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CHANDAR BALI

v.

YUSUF KHAN AND ANOTHER

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[SUPREME COURT, 1970 (Moti Tikaram P.J.), 31st July, 10th November]

Appellate Jurisdiction

Tort—negligence—collision between motor vehicles—different versions of accident given by the driver of the plaintiff's vehicle, a passenger in that vehicle, and the defendant's driver—finding that negligence on defendants' part not affirmatively proved—whether abdication of jurisdiction by magistrate.

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The appellant brought an action against the respondents in the Magistrate's Court for damages arising out of a collision between the appellant's van and the first respondent's lorry. The collision took place on a bridge and the Magistrate said that he had been given three different versions of what happened. The appellant's driver gave one version; a passenger in his van, who was called by the appellant, gave another which differed in material particulars. The second respondent, who drove the lorry, gave a different version again and said (*inter alia*) that his brakes failed. He was supported in this by a mechanic who gave evidence of a leaking washer in the braking system which would only be apparent if the brakes were applied in an emergency. In his judgment the Magistrate made no findings on credibility but held that it was clear that the appellant had not proved affirmatively that the accident was caused by the negligence of the respondent driver.

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Held : 1. It was a case where evidence of eye-witnesses was led by both sides and the Magistrate dismissed the action, after considering the nature of the evidence, because the appellant had failed affirmatively to prove negligence.

2. There was no abdication of jurisdiction or denial of justice, and it would be unfair to afford the appellant a second opportunity by remitting the case for retrial, when the failure to establish the case to the Magistrate's satisfaction on the balance of probabilities could be laid at least partly at the appellant's own door.

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Cases referred to:

Bray v. Palmer [1953] 2 All E.R. 1449; 97 Sol. Jo. 830.

Ram Karan v. Shiu Shankar Civ. App. No. 1/1956 (S.C.)—unreported.

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Baker v. Market Harborough Industrial Co-operative Society Ltd.: *Wallace v. Richards* [1953] 1 W.L.R. 1472; 97 Sol. Jo. 861.

Davison v. Leggett (1969) 133 J.P. 552; 113 Sol. Jo. 409.

Briginshaw v. Briginshaw (1938) 60 C.L.R. 336.

Welch v. Standard Bank Ltd. [1970] E.A. 115.

Nesterczuk v. Mortimore (1965) 39 A.L.J.R. 288.

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Barkway v. South Wales Transport Co. Ltd. [1950] A.C. 185; [1950] 1 All E.R. 392

Appeal from the dismissal of a civil action for damages in the Magistrate's Court.

K. P. Mishra for the appellant.

A *M. S. Sahu Khan* for the respondents.

The facts sufficiently appear from the judgment.

MOTI TIKARAM P.J.: [10th November, 1970]—

This is an appeal against the decision of a first class Magistrate sitting at Ba in civil action No. 324 of 1968 delivered on 19th of December, 1968. The learned trial Magistrate had dismissed the appellant/plaintiff's claim for damages arising B out of a motor collision on the ground that the plaintiff had failed to prove affirmatively that the accident was caused by the negligence of the defendants' driver. The full text of his judgment reads as follows:—

" Before considering the material issues in this claim for damages grounded on alleged negligence on the part of the Defendant I think that it is as well to re-state the general rule governing such claims, as formulated by the jurist Salmond " when accidental harm is done . . . it is not for the doer to excuse him- C self by proving that the accident was inevitable and due to no negligence on his part; it is for the person who suffers the harm to prove affirmatively that it was due to the negligence of him who caused it ".

In this case there is no doubt that the lorry driven by the 2nd defendant collided with the vehicle being driven by the plaintiff. The area of doubt concerns the way in which that accident happened, and in order to succeed, the D plaintiff must prove that it was caused by the defendant's negligence.

I have been given three different versions of what happened:—the plaintiff's driver, Brij Raj stated that when his van entered the bridge the defendant's lorry was more than a chain away from the other side of the bridge. He said that the lorry sounded its horn and did not stop. Brij Raj went on to say that when he was $\frac{3}{4}$ way across the bridge he realised that the lorry was still coming on so he stopped his van completely—and he was quite certain about this—the E lorry then collided with the van which was pushed back to the final position indicated on the plan. The second version of how the accident occurred is that given by Jai Singh who was the passenger in the plaintiff's van No. K369. He said that when the van entered the bridge the lorry was just about to come on to the bridge and was only a few yards from the far side; he was also quite certain that the van did not stop and was in fact travelling at 15–20 miles per hour, when the collision occurred. Clearly, either the driver of the F van or the passenger is mistaken on a most material point in connection with this case.

The third version is that given by the defendant driver of the lorry. He says that his vehicle entered the bridge first, that the van came on towards him at about 20 m.p.h. and that the collision occurred about $\frac{3}{4}$ way across the bridge on the van's side. He also said that he applied the brakes but they failed and he was unable to stop his vehicle.

H The police constable who attended the scene of the accident, and who was the first witness called by the plaintiff, prepared a plan on which he marked, *inter alia*, the point of impact which, he said, was agreed by both parties. This point, marked " A " on the plan, is almost exactly in the middle of the bridge although I note that in his evidence the defendant driver gave the impact point as being further on the western, or van's side of the bridge.

G The second defence witness, a mechanic who examined the lorry, gave evidence to the effect that a washer in the braking system was leaking which constituted an inherent failure which would only become apparent if the brakes were applied in an emergency.

From the foregoing it is clear that the plaintiff has not proved affirmatively that the accident was caused by the negligence of the defendant driver and this action must fail." A

The appellant/plaintiff has appealed against the learned Magistrate's decision on the following grounds:—

" 1. With regard to the evidence before the Court it was incumbent on the learned Magistrate to find who was negligent or in what proportion.

2. The learned Magistrate erred in adopting the criminal standard of proof of beyond reasonable doubt rather than that of civil standard of on balance of probability. B

3. Once negligence is established and the balance of probability is evenly balanced the learned Magistrate ought to have held that the parties are equally liable."

The appellant, therefore, contends that judgment should be entered in his favour and the case be sent back for hearing on the issue of quantum of damages or alternatively the case should be sent back for re-hearing as a whole. C

It will be convenient to dispose of the second ground of appeal first. It is with reference to the learned trial Magistrate's use of the term " proved affirmatively " that the appellant is basing his contention contained in the second ground of appeal. The trial Magistrate was a legally qualified person with some years of experience. Furthermore the term " affirmatively " has been used by the jurist Salmond, and also by Mazengarb in his well-known text—*Negligence on the Highway*. Both these learned authors have used the term " proved affirmatively " with regard to standard of proof in civil causes and matters to denote proof on balance of probabilities. There is no doubt in my mind whatsoever that the learned trial Magistrate in this case did not equate standard of proof required in the case before him with the standard of proof required in criminal cases. The second ground of appeal must therefore fail. D E

The first and third grounds of appeal can be conveniently dealt with together. In support of these grounds of appeal the learned Counsel appearing for the appellant cited the following cases:—

(i) *Bray & Anr. v. Palmer* [1953] 2 All. E.R. 1449,

(ii) *Ram Karan v. Shiu Shankar & Ors*, Supreme Court of Fiji, Civil Appeal No. 1 of 1956. F

The Supreme Court's decision in *Ram Karan's* case cited by the learned Counsel for the appellant was based on the *ratio decidendi* of the judgment in *Baker v. Market Harborough Industrial Co-operative Society Limited* and *Wallace v. Richards Limited* (1953) 1 *W.L.R.* 1472 the headnotes whereof read as follows:—

" Where the evidence established that a collision between two motor-vehicles proceeding in opposite directions occurred in the centre of a straight road during the hours of darkness, when both drivers were killed, the inference, in the absence of any other evidence enabling the court to draw a distinction between them, was that each driver was committing almost the same acts of negligence—failing to keep a proper look-out and to drive his vehicle on the correct side of the road—and accordingly both were equally to blame." G

Denning L.J. said—

" Even assuming that one of the vehicles was over the centre line, and thus to blame, the absence of any avoiding action by the other vehicle made that vehicle also to blame. Once both were to blame, and there was no means of distinguishing between them, the blame should be cast equally on each. " H

As recently as 7th May, 1969 (the Times) Sachs L.J. in *Davison v. Leggett*, quoted witl approval the following dictum of Denning L.J. (as he then was) from *Baker's* case (supra)

> " Everyday, proof of collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence the court would unhesitatingly hold that both were to blame. They would not escape simply because the court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must be held both to blame, and equally to blame.".

On the other hand we have the dictum of no less a jurist then Dixon J., expressed in the High Court of Australia in *Briginshaw v Briginshaw* (1938) 60 *C.L.R.* 336 *at p.* 361, that the truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. This divergence of opinion was considered by Madan J., in the High Court of Kenya in *Welch v. Standard Bank Limited in* [1970] *E.A.* 115 *at p.* 117, where he expressed his views as follows:—

> " The divergence of opinion between Dixon J.'s active approach and Denning, L.J.'s accommodation approach, for that is what I think it is, is admirably expressed in the words written in the Preface to Robert E Keeton's text-book titled *LEGAL CAUSE IN THE LAW OF TORTS*:
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> > ' Two yearnings influence development of any legal rule. One is the yearning for a precise rule that serves as an unfailing guide to the judge in making decisions and to the lawyer in predicting them. The other is the yearning for a flexible rule that is most conducive to sensitively administered justice—a rule that never compels bad decisions in the interest of symmetry, elegance, or simplicity. The first yearning is an influence toward particularisation of the rule and rigid consistency of application; the second, toward generalisation and discretionary application.'
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> Justice must not be denied because the proceedings before the court fail to conform to conventional rules provided, in its judgment, the court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion."

The facts in *Welch v. Standard Bank Limited* (supra) were similar to those in *Baker's* case. Two vehicles travelling in opposite directions collided on a dry main road. Both drivers were killed. There was no evidence as to which driver was to blame for the accident. Madan J., preferring the accommodation approach, held that " there being nothing to enable the court to draw a distinction between the two drivers, and it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold both were to blame, and equally to blame."

However it appears Dixon J's active approach was given cognizance in *Nesterczuk v. Mortimore* (1965) 39 *A.L.J.L.R.* 288 In this case there was a head-on collision and each party said he was on his correct side of the road and that it was the other who had swerved but the trial Judge was unable to say that one account was more probably correct rather than the other. It was held that in such circumstances both the claim and the counterclaim should be dismissed. As Lord Porter said in *Barkway v South Wales Transport* [1950] 1 *All E.R.* 392, at 395—" if the facts are

sufficiently known the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not.". A

The question that arises in the appeal case before me is whether the learned trial Magistrate abdicated his jurisdiction thus denying justice to the Plaintiff. It is true that he has not assessed credibility and consequently has not arrived at any specific findings of fact. In substance he merely recites the three versions of the accident. However it is equally self-evident that not only the appellant's version of the accident was diametrically opposed to that of the respondent's version, but B additionally there was material conflict in the case as presented by the appellant himself. The trial Magistrate dismissed the action because the plaintiff (appellant) failed to affirmatively prove negligence and this he did after considering the nature of evidence before him. It is important to bear in mind that evidence of eye-witnesses was led by both sides in this case. The question of drawing wrong inference from eye-witnesses does not arise. Furthermore the trial Magistrate appears to have accepted the mechanic's evidence (and presumably although called C by the defence, he was an independent witness), the effect of his evidence in the context of the whole being—

(*a*) that there was latent defect in the brakes;

(*b*) that it failed suddenly in an emergency, and

(*c*) that the defect could not have been discovered by exercise of reasonable prudence. D

Whilst it is probable that had the learned trial Magistrate assessed credibility and arrived at findings of fact, he might have come to a different decision and further had he found that the emergency was the creation of the respondent's own initial negligence, the question of sudden failure of brake would have become irrelevant. However these are matters of conjecture. In my view it would be unfair to allow the appellant to have a second bite at the cherry by remitting the case for retrial when the failure to establish the case to the Magistrate's satisfaction on the balance E of probability can be laid at least partly at his own doors. On the other hand on the evidence as presented this court would not be justified in entering judgment for the appellant. Although the manner in which the trial Magistrate dealt with this case was not entirely satisfactory, I am satisfied that there was no abdication of jurisdiction or denial of justice in this case. This appeal is therefore dismissed. There will, however, be no order as to costs. F

Appeal dismissed.