IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 47 of 1978

Between:

1. GANESH s/o Ram Asre
2. RAM ASRE s/o Balai — Appellants

and

1. MAHMOOD ALI)
2. ANWAR ALI) all sons of
3. AMJAD ALI) Habib Ali — Respondents

Mr. M.S. Sahu Khan for the Appellants.
Mr. F.M.K. Sherani for the Respondents.

Date of Hearing: 8th November 1978
Delivery of Judgment: 30/11/78

JUDGMENT OF THE COURT

Spring J.A.

The Supreme Court sitting at Lautoka in its appellate jurisdiction upheld an award of damages made by the Magistrate's Court sitting at Ba against the abovenamed appellant Ganesh. The appeal to this Court is limited to questions of law pursuant to the provisions of section 12(i)(d) of the Court of Appeal Ordinance (Cap. 8).

The facts briefly are as follows: On the night of 15th May 1977 on the road between Tavua and Ba a Toyota motor van owned by Ganesh, the appellant, and driven by his father one Ram Asre collided with a stationary motor vehicle - a taxi - owned by the respondents and driven by one of their employees. Negligence on the part of Ram Asre the driver of the appellant's van was admitted. Ganesh owns and operates a thriving retail shop in the township of Tavua; he employs several assistants and owns the Toyota van involved in the accident. His father, Ram Asre assists in and about the shop; also he drives the van both in connection with his

son's business and on his own account. Ram Asre has a general permission to use the van whenever he wished provided the appellant did not require it himself. On the morning of Sunday, 15th May 1977 Ram Asre drove his wife, his daughters and other members of his family in the van to a wedding celebration held at Lautoka at the home of an uncle of the appellant.

On the return trip in the evening of 15th May 1977, the accident occurred. The learned Magistrate found and the learned Judge upheld the finding that Ram Asre had a general permission to use the van when he wished and that Ganesh his son knew that the celebrations were to take place on Sunday 15th May 1977. Proceedings were issued out of the Magistrate's Court against the appellant alleging that Ram Asre when he negligently drove into the respondents' vehicle was driving as his servant and/or agent. The learned Magistrate found that the appellant was vicariously liable for his father's negligent driving and awarded damages against him. The appellant appealed to the Supreme Court which upheld the award of damages against Ganesh and dismissed the appeal. It is against the judgment of the Supreme Court that this present appeal is brought.

The first ground of appeal only, was argued before this Court. Counsel for appellant abandoned ground 2.

Ground 1 reads :

> 1. That the learned trial Magistrate erred in law and in fact in holding that the 2nd Defendant was the servant and/or agent of the First Defendant at the relevant time.

It should be mentioned that the present appeal is incorrectly intituled in that it shows Ram Asre as second appellant. On 28th May 1977 before any evidence was called Ram Asre, who was sued as a 2nd defendant was dismissed from the suit upon application being made by the plaintiffs' counsel. The application was made upon the grounds that Ram Asre had been adjudged bankrupt in 1958 and had remained undischarged ever since. References to "the appellant" hereinafter will indicate Ganesh.

This Court cannot on this appeal overrule the findings of fact made by the learned Magistrate, but as was stated in

Hemns v. Wheeler /1948/ 2 K.B. 61 at page 65 -

> "Whether there is any evidence to support the county court judge's findings of fact is always a question of law.....it is for the county court judge to find the facts and to draw the inferences from those facts, but that it is always a question of law, which will warrant the interference of this court, whether there was any evidence to support his findings of fact and whether the inferences he has drawn are possible inferences from the facts as found. "

Mr. Sahu Khan for the appellant submitted that the award of damages should be set aside as the learned Judge erred in law in finding that Ram Asre was the agent of the appellant. Further, notwithstanding that Ram Asre had appellant's permission to use the van when he wished and that the learned Magistrate had found as a fact the appellant knew about the wedding celebrations this was insufficient in law to constitute Ram Asre the agent of the appellant; he submitted also that the respondents had failed to discharge the onus of proof, proving that Ram Asre had at the time of the accident been acting as the agent of his son, the appellant.

Mr. Sherani on behalf of the respondents supported the judgment of the learned Judge and submitted that the question whether Ram Asre was acting as agent for the appellant was one of fact; that the appellant was a single man who lived together with his mother and father and the other members of the family. That the learned Magistrate had found that the appellant "knew and approved of" the use of the van by the father for the purpose of conveying the members of appellant's family to the wedding celebrations; that in so doing it was a matter of interest and concern to the appellant. The learned Magistrate said :

> "I do not think it is stretching the precedent too far to conclude that the father was using the son's vehicle for a purpose of interest and concern to the son. As I have said, I have no doubt that the son knew and approved of the vehicles use for the purpose of conveying members of his family to the wedding ceremony at his uncle's house. "

It is necessary to consider firstly the legal principles which renders an owner vicariously liable for the negligent driving of his vehicle by another. In Morgans v. Launchbury /1972/ 2 All E.R. 606 at p. 620 Lord Salmon says :-

231

"As I understand the authorities the law at present makes the owner or bailee of a car vicariously responsible for the negligence of the person driving it, if, but only if, that person is (a) his servant and driving the car in the course of his employment or (b) his authorised agent driving the car for and on his behalf.....Thus, mere permission to drive is not enough to create vicarious responsibility for negligence.....So far as I know, until the present case, du Parcq LJ's statement of the law in Hewitt v. Bonvin /1940/ 1 KB at 194, 195, has never been questioned:

> 'The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.' "

Lord Wilberforce in Morgans' case (supra) at p. 609 says :-

> "It is said, against this, that there are authorities which warrant a wider and vaguer test of vicarious liability for the negligence of another; a test of 'interest or concern'.....
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> On the general law, no authority was cited to us which would test vicarious liability on so vague a test, but it was said that special principles applied to motor cars. I should be surprised if this were so, and I should wish to be convinced of the reason for a special rule. But in fact there is no authority for it. The decisions will be examined by others of your Lordships and I do not find it necessary to make my own review. For I regard it as clear that in order to fix vicarious liability on the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability. "

We respectfully agree with the statement made by Lord Donovan in Rambarran v. Gurrucharran /1970/ 1 All E.R. 749 at 751 when he said :-

> "Where no more is known of the facts, therefore, than that at the time of an accident the car was owned but not driven by A it can be said that A's ownership

affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence. "

However, once the facts are known such an inference and presumption may be rebutted. In Rambarran's case (supra) Lord Donovan said further -

"A case raising an issue similar to that in the instant case arose in New Zealand in 1955 - Manawatu County v. Rowe /1956/ NZLR 78. There the wife of Mr. Rowe, while driving her husband's car with his consent, was in collision with a vehicle driven by one of the appellant county's servants. Mr. Rowe brought an action against the county claiming damages. The trial judge held that both drivers were guilty of negligence, Mr. Rowe's wife being 75 per cent to blame. The question then arose whether her negligence could operate to reduce the damages otherwise recoverable by her husband; and this depended on whether at the time of the accident the wife was driving as the servant or agent of her husband. It was held both by the trial judge and a majority of the New Zealand Court of Appeal that she was not; and that Mr. Rowe was entitled therefore to recover the damages awarded against the county in full.

After considering the English cases of Barnard v. Sully (1931) 47 TLR 557 and Hewitt v. Bonvin /1940/ 1 K.B. 188 and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus: 1 The onus of proof of agency rests on the party who alleges it. 2 An inference can be drawn from the ownership that the driver was the servant or agent of the owner, or in other words, that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue, or if such other evidence as there is fails to counterbalance it. 3 It must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns. It is also interesting to observe that Hutchinson J, one of the majority who gave judgment for Mr. Rowe, remarked in the course of his judgment that the fact that his wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part. "

We turn now to consider the judgment under appeal.

In order to fix liability upon the appellant for the negligent driving of his father Ram Asre it is necessary to show

either that Ram Asre was the servant of the appellant or that at the material time Ram Asre was acting on his son's behalf as his agent.

It is clear from the evidence that it was not contended that at the material time Ram Asre was acting as a servant of appellant. It was a Sunday and the motor van was left at the family home; it was not at the shop.

To establish the existence of agency it was necessary to show that Ram Asre was using the van at appellant's request, express or implied, or on appellant's instructions and was doing so in performance of the task or duty thereby delegated to him by the owner. Appellant in evidence said "I had not asked him to do anything" and in cross-examination he said "He did not ask me for the van that day".

It is clear from the evidence that Ram Asre was using the van with appellant's permission and that the purpose for which the van was being used was one in which the owner had an interest or concern; was this sufficient to establish vicarious liability on the part of appellant? The learned Magistrate concluded that the appellant had an interest or concern in the journey undertaken by his father Ram Asre when he said -

> "As a major if not the only breadwinner his family must be of great concern to him. He lives with them. He is a single man. I ask myself whether it was in his interest that they should go to the wedding at his uncle's house and I answer without hesitation that of course it was. "

Again later in the same judgment he said -

> "I do not think it is stretching the precedent too far to conclude that the father was using the son's vehicle for a purpose of interest and concern to the son. As I have said, I have no doubt that the son knew and approved of the vehicles use for the purpose of conveying members of his family to the wedding ceremony at his uncle's house. "

The learned Magistrate concluded that the action of Ram Asre driving appellant's mother and other members of the family to the wedding celebrations was a matter of interest and concern to him. Having so concluded the learned Magistrate went on and drew the inference

that the appellant "approved" of the journey. This finding by the learned Magistrate means in our view no more than that the appellant did not disapprove of the journey being undertaken; in other words can it be said that the drawing of this inference means any more than the appellant merely consented to, or permitted, the use of the van. The learned Magistrate appears to have interpreted the statement made by Lord Denning in Ormrod v. Crossville Motor Services Ltd. /1953/ 2 All E.R. 753 at page 755 -

> " The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: "

as giving a warrant to transform the use of these words "interest" or "concern" in a negative form into a positive test of agency.

The House of Lords in Morgans' case (supra) did not agree, and at p. 609 Lord Wilberforce said :-

> "And the appearance of the words in certain judgments (Ormrod v. Crossville Motor Services Ltd. /1953/ 1 All E.R. 711 per Devlin J and per Denning LJ /1953/ 2 All E.R. 753) in a negative context (no interest or concern, therefore no agency) is no warrant whatever for transferring them into a positive test. "

We are satisfied that the above authorities clearly establish that permission by the owner to drive his vehicle coupled only with a mere interest or concern on the owner's part in the object of the journey does not create the driver of the vehicle the agent of the owner. The learned Judge in the Court below in his judgment said -

> "In my view, the Magistrate was fully justified in concluding that Ganesh, as financial head of the family had an interest in the conveyance of his mother, sisters, nephews and father on the journey of 30 or more miles from Tavua to Lautoka. "

Further the learned Judge relying on a statement of the Court of Appeal in Launchbury v. Morgans 1971 2 W.L.R. 601 said -

> "His Lordship gave illustrations of that proposition by reference to husband and wife and a car in the husband's name which the wife had permission to use at any time, similar to the father, Ram Asre, in the instant case. He stated at p. 608 that the wife in

> using the car to take the husband to work, children to school, and going shopping was clearly the agent of her husband. In all those matters the husband had some interest in the use to which the car was put. "

This latter statement of the law was, however, disapproved when the case was heard on appeal; the House of Lords in Morgans v. Launchbury (supra) at p. 610 said :-

> "The respondents submitted that we should depart from accepted principle and introduce a new rule, or set of rules, applicable to the use of motor vehicles, which would make the appellant liable as owner. Lord Denning MR in the Court of Appeal [1971] 1 All E.R. at 648, [1971] 2 Q.B. at 256 formulated one such rule, based on the conception of a matrimonial car, a car used in common by husband and wife for the daily purposes of both. All purposes, or at least the great majority of purposes, he would say are matrimonial purposes: shopping, going to work, transporting children, all are purposes of the owner, the car was bought and owned for them to be carried out. And, consequently (this is the critical step) the owner is ipso jure liable whatever the other spouse is using the car for, unless, it seems, although the scope of the exception is not defined, the latter is 'on a frolic of his own'. Indeed Lord Denning MR seems to be willing to go even further and to hold the owner liable on the basis merely of permission to drive, actual or assumed.....
> But I have come to the clear conclusion that we cannot in this House embark on the suggested innovation. "

In applying the legal principles which we have endeavoured to state above, it follows that the learned Judge's decision can be supported if, and only if, the evidence and the inferences drawn from that evidence establishes that Ram Asre in driving the van to Lautoka was acting for and on behalf of the appellant.

The findings of fact and the inferences drawn in the court below do not take the matter as far as that. In the light of the views expressed in the House of Lords in Morgans' case a simple finding of interest and concern is inadequate: unless such a finding amounts to or can be augmented by a finding that the particular use and concern involves a use of the vehicle for the owner's own purposes, under delegation of a task or duty. There is no such finding in the present case - there was really nothing

23

beyond permission, coupled with knowledge, and approval in the nature of consent. There was no evidence given by the other members of the family or by Ram Asre himself as might have been expected.

In the result there was no evidence that could possibly have supported a finding, direct or by inference, that the family by going to the wedding were carrying out, even incidently, some purpose or personal concern of the appellant. A finding that there is no evidence of any particular fact is, as we have already pointed out, a matter of law and therefore one open to us to decide. It is abundantly plain that the courts below went as far as they possibly could in drawing the inferences they did. They were in our view, inadequate to make the appellant vicariously liable as claimed.

In the Supreme Court the learned Judge, in case he should be found wrong in his assessment of the result of the evidence, said that a similar result would follow if the appellant's statement as to the purpose for which Ram Asre used the van, was excluded from consideration as hearsay evidence. There would then, in his opinion, be nothing left but a presumption of agency arising from the son's ownership. With respect we do not think it was open to the learned Judge to rely upon such a foundation for a finding when the whole case had been presented without challenge in any of the courts to the admissibility of the evidence, upon the premise that Ram Asre had used the appellant's van for the purpose of taking the family members to the wedding in Lautoka. We do not therefore need to consider the matter from the point of view of what might have been the position if the evidence had not been received.

Accordingly for the reasons we have given we are of the opinion that the appeal must be allowed and the judgment against the appellant set aside. The appellant's costs in all courts are to be paid by the respondents and if not agreed to be taxed.

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VICE PRESIDENT

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JUDGE OF APPEAL

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JUDGE OF APPEAL

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