A

MUNESHWAR PRASAD

v.

RAMZAN KHAN

[COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 3rd, 18th October] B

Civil Jurisdiction

Appeal—findings of fact by trial judge—open to appeal court to draw own inferences from facts found—negligent driving.

Negligence—motor vehicle—negligence of driver—open to appeal court to draw inferences based on facts as found by trial judge. C

The appellant was driving a motor vehicle on a main highway and approaching two feeder roads when a child of 4½ years ran onto the road from the vicinity of a group of people standing on the verge. She was struck by the vehicle and killed. In the Supreme Court the appellant was held to have been negligent, and the child guilty of contributory negligence the degree of which was fixed at 50%. On appeal — D

Held: 1. While the findings of fact of the trial judge were not open to question an appeal court could draw from those facts inferences which differed from those drawn by the trial judge.

2. Though in the circumstances the appellant's failure to sound his horn was not a matter for criticism, nor did his swerving to the left instead of the right amount to an error of judgment ,the appellant was negligent (*per* Marsack J.A. and Gould V.P. — Hutchison J.A. dissenting) either in failing to keep a proper lookout or in travelling at a speed which was, having regard to the circumstances, excessive. E

3. The allocation of 50% in respect of the contributory negligence of the deceased child would not be disturbed. F

Cases referred to: *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326: *Bracegirdle v. Oxley* [1947] K.B. 349; [1947] 1 All E.R. 126.

Appeal from a judgment of the Supreme Court. G

R. G. Q. Kermode for the appellant.

S. M. Koya for the respondent.

The facts sufficiently appear from the judgments of *Marsack* and *Hutchison JJ.A.* H

The following judgments were read:-

MARSACK J.A.: [18th October, 1968]—

This is an appeal against a judgment of the Supreme Court sitting at Lautoka on the 11th April, 1968, awarding to the respondent, as administrator of the estate of his daughter, a sum of £200 by way of damages under the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance, together with a further sum of £12.10.0d. as funeral expenses. The damages assessed by the learned trial Judge amounted to £400 in respect of the claim under the Ordinance, and £25 for funeral expenses; but this total was reduced by 50 per cent on account of the contributory negligence of the deceased.

The facts giving rise to the action may be briefly stated as follows. On the 11th August, 1965, a girl named Farida Nasrin Begam, 4½ years of age, was killed on the main Lautoka-Ba road when she was struck by a motor car driven by the appellant. This road forms part of the King's Road highway, and is a straight well constructed road with some 23 feet of tar-seal and a narrow grass verge on each side. Visibility is good. Two feeder roads run into the main highway, one on each side of the road, at a short distance on the Ba side of the spot where the girl was struck. The girl with her mother alighted from a car driven by one Abdul Majid a little to the Lautoka side of the feeder road. After the car had driven off the little girl ran across the road and was struck by an oncoming car driven by the appellant when she had crossed to within a short distance of the far side of the road. Her body was picked up from a drain which is separated from the edge of the bitumen by a narrow grass verge. This was on the left-hand side of the road for the the oncoming car. Brake marks on the road itself showed that the appellant's car had travelled a distance of 82 feet after the brakes had been applied before the car came to rest.

The learned trial Judge found certain facts which were based upon evidence accepted by the Court and which, in my view, are not open to challenge in this Court. As far as this appeal is concerned the relevant facts so found are that, at material times, the appellant was travelling at a speed in excess of 45 m.p.h.; that visibility was good and there was no obstruction to the view of the girl from the time she started to cross the road; that she had almost crossed the road when the impact took place; and that very shortly before the impact the driver of the car had swerved to his left. Upon these findings the Judge held that the appellant had been negligent in several respects, which are set out in detail later in this judgment, and that his negligence had contributed materially to the collision which resulted in the death of the child.

Four grounds are set out in the notice of appeal. These read —

"1. That the learned trial Judge erred in holding that there was any negligence on the part of the appellant.

2. That the learned trial Judge misdirected himself in considering the standard of care to be exercised by a reasonably prudent driver.

3. That the learned trial Judge erred in finding that the appellant committed an error of judgment in not swerving towards the centre or right of the road.

4. That the learned trial Judge erred in any event in his assessment of the liability of the respective parties for the accident."

Although, in my view, the findings of fact by the learned trial Judge in this case are not open to question, it still lies with this Court, in accordance with the principles laid down in *Benmax v. Austin Motor Co. Ltd.* [1955] 1 All E.R. 326, to draw from those facts inferences which differ from those drawn by the trial Judge if the evaluation by this Court of the facts specifically found does not accord with what appears in his judgment. That is, in effect, what we are being invited to do.

The inferences to which exception is taken are shortly these: that the speed of over 45 m.p.h. was, in the circumstances of the case, excessive and unsafe; that if the driver did not see the girl when approaching the feeder roads, he was not keeping a proper look-out; that he was negligent in not reducing speed when approaching the feeder roads, and as soon as he saw the group of people near the mouth of the feeder roads; and that he committed an error of judgment in turning at the last minute to the left, when a turn to the right would have avoided the child altogether.

At the outset I should like to say that on one or two of these points I agree with the views expressed by my brother Hutchison whose judgment I have had the advantage of reading. In my view it was not an error of judgment on the part of the appellant to swerve to his left instead of to his right. Not only did the driver act in what my brother refers to as the "agony of collision," but in any event it is impossible to predict what a child will do at the last moment on perceiving a fast-approaching car. I also agree that the appellant is not to be blamed for not sounding his horn. In my opinion, however, the evidence clearly establishes that the appellant was negligent in two respects —

(i) in failing to keep a proper look-out, and

(ii) in travelling at a speed which was in all the circumstances excessive.

The evidence with regard to the keeping of a proper look-out by the appellant is conflicting and difficult to assess. On the one hand, we have the testimony of the appellant himself that the road ahead of him, prior to the accident, was clear except for a parked truck which appellant says was standing on the other side of the road and from behind which the little girl emerged. He states, however, that he did not see the girl until she was about 5 feet from his front bumper; she was, in any event, across what he described as the half-way line of the road. Mohammed Aiyaz, held by the learned trial Judge to be a straightforward and reliable witness, stated that when the girl commenced to cross the road the appellant's car was, at an estimate, about 5 chains away; and although it was coming at speed he thought the girl would manage to cross the road before the car reached her.

The appellant was unable to say which part of the car first struck the girl;

> "whether it was the centre of my car or either side of my car . . . . . she came and landed on the bonnet on the left-hand side and was flung off. This is sheer guess."

A photograph produced in Court shows considerable denting on the left-hand side of the bonnet, but none on the right-hand side. The appellant further stated that he did not see Abdul Majid's taxi at all, though the car crossed the taxi shortly before the collision, and the taxi backed to the scene when the noise of impact was heard.

Standing by itself this evidence would be sufficient to justify a finding that the appellant had not been keeping a proper look-out; particularly when the evidence satisfied the trial Judge that there was no truck standing on the other side of the road and the appellant should have had a clear view of the child from the time she started to move across the road. But it is difficult to reconcile this evidence with the undoubted fact that the brake marks on the road showed clearly that the car had travelled 82 feet after the application of the brakes before it came to rest. It is not possible, in my view, to draw from the evidence the inference that the child was struck at approximately the same time as the appellant applied his brakes, and was carried a distance of some 80 feet before being thrown clear. Moreover, there must have been some reaction period after the appellant saw the girl and before he applied his brakes; counsel agreed that one second would be reasonable to allow for this, though possibly the reaction period may in fact have been shorter. In any event, this evidence indicated that, from the time the appellant first saw the girl starting to cross the road, the car may well have travelled, as my brother Hutchison suggests, some 120 feet before coming to rest. There is, unfortunately, no evidence establishing how far the girl was carried forward after being struck, if she were in fact carried forward at all. The evidence of Mohammed Aiyaz, uncle of the deceased girl, was accepted by the trial Judge as substantially correct. This witness stated that after the impact the car travelled a little further on and then turned sideways; the car had travelled beyond the point where he picked up the girl. He also deposed that he heard the brakes of the car being applied before the girl was struck; and she was then still on the main road but had crossed the centre line.

Despite the conflict between the evidence of the appellant himself and the facts disclosed by the brake marks on the road, the whole of the evidence, in my view, leads to the conclusion drawn by the learned trial Judge, namely that the appellant did not see the child as soon as he should have done if he were keeping a proper look-out. The fact that he himself says that the girl emerged from the back of a truck, when the trial Judge has found that there was no such vehicle there, would indicate that he did not have in his mind the clear picture that he should have had, the picture of a little girl starting across the road ahead of him. If he had so seen her, and if he had been travelling at a speed which in all the circumstances was reasonable, then it is difficult to hold that the driver could not, by the exercise of reasonable care, have avoided the accident.

This brings me to the next point requiring consideration, that of the speed of the car. It is to be noted that the trial Judge's finding sets a lower limit only of 45 m.p.h. Here again it is very difficult to make a definite finding as to speed from the evidence tendered at the trial. Mohammed Aiyaz says —

> "as far as I know the car was travelling at a great speed and had come there very soon — sooner than expected."

Taxi-driver Abdul Majid, also accepted by the learned trial Judge as a reliable witness, estimated the appellant's speed shortly before the accident at 45-50 m.p.h. The evidence of the brake marks indicates very clearly that the appellant was travelling at a high speed. I do not think that the Court must necessarily draw the conclusion suggested by counsel for the appellant, based upon the table quoted in *Bingham's Motor Claims Cases*, 3rd Edn. p.42, to the effect that a car travelling upon an asphalt road at 40 m.p.h. should be able to come to a stop in 76 feet. These particulars are stated to be 'extracted from the tables issued by Ferodo Ltd. in 1940'. It is, I suggest, a reasonable presumption that braking systems have improved in efficiency since 1940, and if this is so it cannot be assumed that a vehicle in 1965 would require as great a distance to pull up as in 1940. This would mean that a car which took 82 feet — of obviously full braking power — to come to rest may well have been travelling at a speed substantially in excess of the 40-45 m.p.h. which is counsel's estimate based on the tables quoted. Moreover, we have no evidence before us as to the efficiency of the brakes of the Volkswagen concerned in this case. On full consideration of the whole of the evidence I do not think that this Court can draw any inference other than that drawn by the learned trial Judge, namely that the car was travelling at a speed which in the circumstances was excessive and unsafe.

The circumstances were that the appellant was approaching two feeder roads, one on each side; and that a small group of people, including a young child, was standing on the edge of the road ahead of him to his right. There was also certain amount of other traffic on the road; and that was only to be expected on the main highway such as the King's Road.

In my view, there must be a very close relation betwen the speed at which a car is travelling and the look-out which the driver is keeping at the time. The learned author of *Mazengarb's Negligence on the Highway*, 4th Edn. at p.311, expresses the view that speed, reckoned in miles per hour, is seldom a test by which to determine whether a driver was negligent. In determining whether the speed of a vehicle in any particular circumstances is excessive regard must be had to the general conditions under which the vehicle is being driven; and among these conditions may be the presence of other vehicles or pedestrians along the intended route or the fact that the driver was inattentive. The learned author goes on to say —

> "There are certainly cases in which the speed is in itself dangerous, but most frequently it it pace combined with failure to keep a proper look-out or some other factor of which the driver should have been aware, that causes the accident."

As was stated by Denning J. in *Bracegirdle v. Oxley* [1947] 1 All E.R. 126 at p.130 —

> "the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts."

In the present case, if the appellant, contrary to his own sworn evidence, saw the child start to cross the road when he was at a distance of 120 feet or more from her and was unable to stop or to control his

vehicle so as to avoid running down the girl, then he was travelling too fast in the circumstances. If, on the other hand, he did not see the girl until it was too late for him to avoid the accident then he was failing to keep a proper look-out or, to use Mazengarb's phrase, he was inattentive. In either case, this Court could not, in my view, interfere with the finding of the learned trial Judge that the appellant had been negligent in failing to keep a proper look-out and in travelling at a speed which, having regard to the circumstances, was excessive. He was also right, in my view, in holding that the negligence of the appellant was a material factor in bringing about the collision which resulted in the death of the little girl.

As to contributory negligence on the part of the deceased, I think that the learned trial Judge was right in holding that the deceased had been guilty of contributory negligence; and I would not disturb the allocation of 50 per cent which he makes in respect of the contributory negligence.

For these reasons I would dismiss the appeal, with costs to the respondent.

GOULD V.P.

I have had the advantage of reading the judgment of my learned brother Marsack J.A. I agree with his reasoning and his final conclusion that the judgment under appeal should be upheld on the basis that either the speed at which the appellant was driving was excessive in the circumstances of the case, or that he failed to keep a proper look out.

The appeal is dismissed with costs .

HUTCHISON J.A.

I have the misfortune to disagree with my brethren in this case.

The learned trial Judge stated with clarity the facts which he held to be established. He accepted the version of the accident as given by Mohammed Aiyaz, a witness for the plaintiff and the uncle of the little girl who was killed. He rejected the defendant's contention that the girl suddenly emerged from behind a truck, leaving his finding that there was nothing to obscure the view of the defendant as he approached where the group, consisting of the little girl and two or more adults, was standing on the side of the road. He found that, at the material time, the defendant was travelling at a speed of no less than 45 m.p.h, which in the circumstances of the case he held was excessive and unsafe. He held it conclusively established that the girl had almost crossed the road when the impact took place. He referred to the fact that the defendant made an error of judgment in swerving to the left when he saw the little girl running across the road. I accept entirely all the findings of fact of the learned Judge as to what actually happened, but for myself I would draw somewhat different inferences from those which he drew.

With all respect, I do not think that it can properly be said that a speed of rather over 45 m.p.h. was excessive on that piece of road and under the circumstances as they existed. The only group of people on the road side consisted of one little child and two or more adults, and

it would not, in my opinion, be in the contemplation of a reasonable and prudent motor driver that the little girl would get out of the control of the adults and run across the road when the approaching car was as visible to them as they were to the driver of the car. There were two feeder roads, one on each side, but there was nothing to obscure from a driver on the main road what might be on the feeder roads. The weather was fine and clear. There was a reference in the judgment to appellant's not having sounded his horn, but I do not think that this is a point for criticism. I do not think that it was an error of judgment on the part of the appellant in swerving, as he did, slightly to his left when the collision was imminent. It may, and probably did, have an effect, in that, if he had swerved to the right, the little girl would have got across, but how was he to know whether the little girl would go on or stop and try to get back? His swerving, very slight as it was, occurred in the agony of collision and the fact that it did have an effect in the unfortunate result is, in my opinion, not attributable to appellant as act of negligence.

As it appears to me, the only allegation that might properly be made against the appellant is that he failed to keep a proper look out, and that, I think should fail. It is true that, in his statement to the police and in his evidence, he spoke of seeing the little girl only when she was a very short distance away from the car, but, in fact, the real evidence shows that he saw her much further away. His brake and drag marks extended over 82 feet from the point at which the brakes engaged to the point at which the car finished. Before the brakes engaged there would have been a re-action period which might fairly be taken as about 40 feet at the speed of, say, 45 m.p.h. He must then have seen the little girl start across the road when he was roughly 120 feet back from where his car came to rest. The exact point at which the car struck the child is not established, but the finding of the learned Judge, as I have said, is that she had almost crossed the road when the impact took place; nor is it certain how far back it was from the point at which the car came to rest that the impact took place. If, however, it took place, say, 30 feet back from the point at which the car finished — and if this should be thought to be too much of a guess, it is to be remembered that the burden of proof at the trial on this aspect of the case rested not upon appellant but upon respondent — it would still mean that he saw the little girl coming into danger when he was 90 feet back from her. It would, in my opinion, be reasonable to allow that the little girl could be two or three feet on to the 23 feet wide road before he would appreciate the danger. When he then appreciated that, some 90 feet back from the point of impact and took what steps were available to him to avoid striking her, I find it difficult to see that he should be found guilty of failing to keep a proper look out, the only ground, as it seems to me, on which a finding of negligence could be seriously considered.

As to the other point in the appeal, I would, on the view which the majority of the Court take of the facts, not be in favour of varying the apportionment made by the learned trial Judge.

Appeal dismissed.