

## C. W. NYHOLT AND ANOTHER

v.

## BISH LIMITED

[SUPREME COURT, 1971 (Hammett C.J.), 12th February, 12th March]

## Appellate Jurisdiction

*Practice and procedure—failure by magistrate to give counsel an opportunity of addressing the court before giving judgment—fatal defect vitiating the proceedings—Magistrate's Courts Rules (Cap. 10) 0.31 r.4(b).*

The failure of any court of law to allow reasonable opportunity to the parties in a civil case both to call witnesses and give evidence and to address the court is a fatal defect that must vitiate the decision of the court in those proceedings.

Appeal from a judgment in the Magistrate's Court; reported only on one point of procedure.

R. G. Kermode for the appellants.

F. M. K. Sherani for the respondent company.

The facts sufficiently appear from the judgment of the learned Chief Justice.

12th March 1971.

HAMMETT C.J.:

The launch 'Dua Dua' was originally owned by Harold Swansbury. It was insured. It sank in salt water and was salvaged and the Plaintiff/Respondents were instructed to repair it. Whilst the launch was under repair it was sold to the Defendant/Appellants.

Later a dispute arose over who should pay the cost of certain of these repairs. As a result the Plaintiff/Respondents sued the Defendants for \$405.72, part of the total cost of the work done. This sum included the cost of certain materials supplied.

The Defendants denied liability. They contended firstly that the cost of all the work done should be borne by the original owner or his insurers and secondly that the negligence of the Plaintiff/Respondents' workmen resulted in the cost of repairs being unnecessarily high.

In the course of the trial it became clear that the issue of liability depended largely on —

- (a) whether the damage to the gear box which necessitated repairs was caused by the foundering of the launch, and
- (b) whether the Defendants had authorised and (either directly or indirectly) agreed to pay for the work done to the gear box.

A decision on these issues depended largely on the credibility of the witnesses who gave evidence for each party to the action.

A At the end of the hearing no addresses by Counsel were heard and the learned trial Magistrate did not record a formal judgment. He apparently gave oral reasons for his decision and then entered a summary judgment on the record in the following terms :

Judgment for \$405.72 against both Defendants with costs to be agreed or fixed by the Registrar. Leave to apply. Judgment for Plaintiff on Counterclaim.

B The Defendants have appealed on the following grounds :

1. That the hearing of this action was irregular in that the learned Magistrate did not give counsel for the Plaintiff or the Defendants any opportunity of addressing him either on the facts or on law.
- C 2. That the learned Magistrate forthwith on the close of the defence delivered an oral judgment and made no minute or record of his findings on fact or law other than a record of judgment for the Plaintiff with costs.

D At the hearing of the appeal Counsel for the Plaintiff/Respondents conceded that in the Court below although both sides were represented by Counsel the learned trial Magistrate did not give Counsel on either side the opportunity of addressing him before he gave judgment. He does, however, contend that whilst this was a procedural defect it was not necessarily a fatal defect.

The material part of the Magistrates Court Rules Order XXXI Rule 4(b) reads as follows :

E “ . . . . . At the conclusion of the Detendant’s evidence he shall be entitled to sum up his defence and comment upon the evidence generally; and the Plaintiff shall then be entitled to reply generally upon the whole case.”

F It is absolutely fundamental to the trial of a defended civil action that opportunity be given to the contesting parties both to have the evidence of themselves and their witnesses heard and to address the Court either in person or through Counsel before a decision is reached.

G The failure of any Court of Law to allow reasonable opportunity to the parties both to call witnesses and give evidence and to address it, is a fatal defect that must vitiate the decision that is given by that Court in those proceedings.

For these reasons the appeal must be allowed and the decision of the Court below set aside.

H I direct that the case be remitted to the Court below to be heard de novo before another Magistrate.

The costs of this appeal are to be taxed or agreed and will be costs in the cause and will follow the event.

*Appeal allowed.*