JANAK PRASAD v MANO LATA (as administratrix of the estate of RAMENDRA PRASAD (dec'd)) (ABU0026 of 2004)

COURT OF APPEAL — CIVIL JURISDICTION

BARKER, KAPI JJA and SCOTT RJA

1, 4 March 2005

Negligence — contributory negligence — causation — causing death and injuries by dangerous driving — dangerously late and sudden turn — Civil Evidence Act 2002 s 17 — Court of Appeal Act s 22(1) — High Court Rules O 18 r 18.

The truck driven by the first Appellant collided with the car driven by the deceased. The deceased and his brother were killed and the Respondent and another passenger were injured. The first Appellant was charged, convicted and sentenced with two counts of causing death by dangerous driving. The first Appellant's appeal to the High Court was dismissed. The High Court said it was the first Appellant's dangerously late and sudden turn across the deceased's path that caused the collision. The Respondent then sought damages in the High Court. The Respondent contended that the first Appellant was negligent. The first Appellant pleaded that the sole cause of the accident was the deceased's negligent and careless driving.

Held — Section 17 of the Evidence Act 27/2002 applies: "In any civil proceedings in which … a person is proved to have been convicted of an offence" then "the person is taken to have committed that offence unless the contrary is proved". There was a shift in the burden of proof after the first Appellant had been convicted of two counts of dangerous driving. The Appellant must be able to show that he was not negligent. The first Appellant failed to overcome the statutory presumption after all the evidence was considered and without any claim for contributory negligence. Evidence established that the appeal had no merit except to further delay the payment of damages to the Respondent.

Appeal dismissed.

Cases referred to

Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 All ER 727; *Pratt v Bloom* (The Times, 21 October 1958), cited.

Chandar Pal v Reginam [1974] 20 FLR 1; *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50, considered.

S. Tabaiwalu for the Appellants

R. Chaudhary for the Respondent

[1] Barker, Kapi JJA and Scott RJA. On 10 April 1997 a road accident took place on the Queens Road near Nawaibale. The first Appellant (A1) was driving a PWD truck down the hill while a car driven by Ramendra Prasad was coming in the opposite direction. The two vehicles came into collision. Ramendra Prasad and his brother were killed and the Respondent and another passenger in the car were injured.

[2] The A1 was charged with two counts of causing death by dangerous driving. On 27 October 1998 he was tried in the Suva Magistrates Court. The prosecution called ten witnesses. The A1 gave an unsworn statement but called no evidence. The court found itself satisfied that the A1 had driven his lorry into the path of the oncoming car and had thereby caused the accident. He was convicted and sentenced.

[3] The A1 appealed to the High Court at Suva. The High Court (Townsley J) dismissed the appeal. After reconsidering the evidence the court found itself satisfied that it was the A1's "dangerously late and sudden turn across the deceased's path that caused the collision". It pointed out that the Appellant's claim that before he turned he looked and saw the road ahead was clear right up to the next bend was obviously unsustainable since had the road indeed been clear then the deceased's vehicle would not have come into collision with him.

[4] A second appeal was lodged in this court subject to the provisions of s 22(1) of the Court of Appeal Act. The point of law was an alleged reversal of the onus of proof. The court found no error and the appeal was dismissed.

[5] On 20 November 1997 the Respondent commenced proceedings in negligence in the High Court at Lautoka. She sought damages on behalf of her husband's estate and in respect of her own injuries. The fact of the A1's conviction was not pleaded since at that time he was yet to be convicted.

[6] In January 1998 a defence was filed. Apart from accepting that an accident had occurred the Plaintiff's claim was denied. Paragraph 5 of the defence pleaded that the *sole* cause of the accident was the deceased's negligent and reckless driving. However there was no counter-claim as such.

[7] On 25 January 2001 the Respondent filed a motion to strike out the A1's defence under the provisions of RHC O 18 r 18. In her supporting affidavit the Respondent referred to the A1's convictions and she exhibited copies of the three judgments.

[8] On 5 February 2001 the A1 filed an affidavit in answer. He admitted the convictions but denied their relevance to the civil proceedings.

[9] On 19 October 2001 the motion to strike out the defence was dismissed. On 25 October an amended statement of claim was filed. Paragraphs 10–13 pleaded and relied upon the A1's convictions and the dismissal of his appeals.

[10] An amended defence was filed on 28 January 2003. Notwithstanding limited agreement reached at a pre-trial conference, the A1 again chose not to admit even the threshold matters pleaded in the introductory paragraphs of the claim. The allegation that the sole cause of the accident was the deceased's driving was repeated. Although the conviction and appeals were admitted their relevance to the action was denied.

[11] The trial took place at the Lautoka High Court (Connors J) on 22 and 23 March 2004. The Respondent herself gave evidence and called three witnesses. The A1 also gave evidence and called a number of witnesses. As may be seen from the record the central question was whether the accident was caused by the A1 turning the PWD Lorry into the path of the deceased's oncoming vehicle. Once again, the A1 stated that before turning he had established that the road ahead was clear. He told the court that the bend was about three chains away and that he saw that the road right up to the bend was clear as he began to turn. The turning took about two seconds to complete.

[12] The judgment of the High Court was delivered with commendable promptness on 5 April 2004. On p 5 of the judgment the court found that:

> It [was] quite impossible for the driver of the truck … to safely turn when he is completely unaware of traffic that might legitimately appear in his path during the course of the turn being made.

The judge went on:

> I find on the balance of probabilities in the light of the evidence given in the course of this trial and in the light of the admissions made both in the pleadings and by the First Defendant as to his convictions for the offences of dangerous driving causing death, the Defendants are liable to the Plaintiff for the death of her husband and for the injuries she sustained in the motor vehicle accident.

[13] An appeal was filed by the Office of the Solicitor General on 18 May 2004. It contained three grounds.

[14] At the hearing of the appeal, Ms Tabaiwalu withdrew the third ground of appeal and told us that the remaining two grounds were inter-linked. The thrust of these grounds was that the judge had erred in his evaluation of the circumstances in which the accident occurred.

[15] Ms Tabaiwalu pointed out that the judge's calculations of the distance covered by the deceased's vehicle were mathematically incorrect. She suggested that insufficient attention had been given to the position in which the vehicles ended up after the accident. This, she submitted, tended to support the view that the A1's vehicle was well into its manoeuvre when the collision occurred. She referred to evidence which supported the A1's claim to have slowed down and used his indicator before beginning to turn. All this evidence and all these considerations, it was submitted, supported the contention that the judge had wrongly put the blame for the accident on the A1.

[16] Mr Chaudhary conceded that the judge's calculations were incorrect. He told us however that his own calculations, which were not disputed by Ms Tabaiwalu, showed that for the collision to have occurred at all the deceased's vehicle must have been visible to the A1 when he came to the crown of the road and prepared to turn right. While the point of impact, the speed of the A1's truck and whether or not he had indicated before turning where all factors which could legitimately be considered the central question was whether in the light of all the evidence, including the evidence of the only independent witness, Ms Tabaiwalu had shown that the judge had erred in reaching his conclusion. Mr Chaudhary suggested that there was nothing to show that he had.

[17] As has been repeatedly emphasised, an appellate court is slow to interfere with findings of fact reached at first instance. While Ms Tabaiwalu naturally pointed to those aspects of the evidence which tended to favour her case we are not satisfied that she revealed any fundamental error in the judge's approach. If anything, in our view, the approach was somewhat favourable to the A1.

[18] As has been seen, a notable feature of this case was the A1's conviction on two counts of causing death by dangerous driving, such driving being the matter of complaint raised in this case. Section 17 of the Evidence Act 27/2002 applies. The relevant parts of this section are as follows:

> 17(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the Fiji Islands or elsewhere is, subject to subsection (3) admissible in evidence for the purpose of proving where to do so is relevant to any issue in those proceedings, that the person committed the offence, whether the person was so convicted on a plea of guilty or otherwise and whether or not the person is a party to the civil proceedings.
>
> (3) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the Fiji Islands—
>
> (a) the person is taken to have committed that offence unless the contrary is proved;

[19] In *Stupple v Royal Insurance Co Ltd* [1971] 1 QB 50 at 72 Lord Denning explained the effect of the identical English section:

> the Act does not merely shift the evidential burden as it is called. It shifts the legal burden of proof … Take a running down case where a plaintiff claims damages for negligent driving by the defendant. If the defendant has not been convicted the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving the legal burden is shifted. It is on the defendant himself. At the end of the day if the judge is left in doubt the defendant fails because the defendant has not discharged the legal burden which is upon him. The burden is no doubt the civil burden. He must show, on the balance of probability that he was not negligent … otherwise he loses by the very fact of his conviction.

[20] In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 544; [1981] 3 All ER 727 at 735 the House of Lords characterised as "uphill" the task of a Defendant to persuade the court of the contrary of a verdict beyond reasonable doubt.

[21] The manoeuvre which the A1 undertook was clearly one which called for the greatest care. In *Chandar Pal v Reginam* [1974] 20 FLR 1 Grant CJ wrote:

> the driver of a taxi, in turning across the road to enter one of the entrances of the Tradewinds Hotel was doing something unusual, that is to say, instead of proceeding on his correct side of the road he was changing direction and crossing that side of the road on which vehicles approaching from the opposite direction had the right of way and it was his duty first, to signal and secondly to see that no one was incommoded by his change of direction (per Streatfield J in *Pratt v Bloom* (1958) The Times October 21). He owed a very high duty of care to other road users, particularly those entitled to use that portion of the road on which he was encroaching and there can be little doubt that by turning into the path of the Appellant's car he was driving in a negligent manner.

[22] In our view, on the totality of the evidence before the High Court and in the absence of any claim of contributory negligence the statutory presumption provided an obstacle which the Appellant plainly failed to overcome. Indeed, we would go further. In our view, this appeal has no merit whatever. It has only served further to delay payment to the Respondent of those damages to which she is clearly entitled. We are surprised that it was brought.

Result

1. Appeal dismissed.
2. Respondent to have her costs which are assessed at $3000 plus disbursements.

Appeal dismissed.