IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction
Civil Appeal No. 2 of 1980

Between:

TEBARA TRANSPORT LIMITED Appellant

and

THE ATTORNEY-GENERAL OF FIJI Respondent

Mr. H.K. Nagin for the Appellant
Mr. G. Grimmett for the Respondent

JUDGMENT

This is an appeal against the decision of the Magistrates Court Suva dismissing the appellant's claim for damages caused to his bus in a collision with the respondent's truck and allowing the respondent's counter-claim.

The incident took place on Nabukaluka Road some distance out of Nausori. The respondent's driver was driving an Agricultural Department truck laden with cattle when a collision occurred between it and the appellant's bus travelling downhill with a load of passengers.

The respondent's driver, one Nazir Mohammed, was later charged with driving without due care and attention and, after a trial, found guilty and convicted by the Magistrate's Court, Nausori. In this action the conviction is admitted both in the pleadings and in evidence. Where such a conviction is proved, section 9(2)(a) of the Evidence Act (see section 2 of the Evidence (Amendment) Act, No. 6 of 1975) provides that the person convicted

"shall be taken to have committed that offence unless the contrary is proved". The learned Magistrate quite correctly held that the onus of proof had, by virtue of the conviction, shifted to the driver and it was for him to establish that he had not been guilty of carelessness.

Counsel for the appellant sought at the hearing of the civil action to produce the record of the Nausori Traffic prosecution presumably to identify the facts on which the conviction was based, but this was resisted by the respondent's counsel whereupon the appellant's counsel would appear to have abandoned all effort to have it admitted in evidence. The learned Magistrate, therefore, had nothing before him relating to the earlier traffic proceedings except the bare admission of conviction. The exclusion of this evidence, however, does not form a ground of appeal and does not call for consideration.

On the evidence before him the learned Magistrate found that it had been raining that day and the road, a gravel and dirt road, was wet and slippery. He accepted Nasir Mohammed's evidence, supported by one Peni Ravai a stockman, who was sitting next to the driver, that, before the collision, he had driven completely to his correct side and stopped. Peni Ravai had not given evidence at the earlier traffic proceedings.

The driver of the appellant's bus admitted that the road was slippery and that, when he had tried to brake the bus had skidded. The learned Magistrate said in his judgment:

> " It is quite clear to me that the plaintiff did not have proper control of his bus to such an extent as to be able to stop it when confronted with this emergency. He skidded, went on to the grass and then veered back on to the road. The force of the collision pushed the truck back some seven feet. The position of the bus after the accident shows that the plaintiff could not control it and his rear wheels ended in the ditch. "

There is nothing to suggest that he had at any time lost sight of the shift in the onus of proof. Towards the end of his judgment he said:

> " On the balance of probabilities I am satisfied that the truck driver was not negligent and that he had stopped on the left hand side of the road before impact."

And again -

> " I am therefore satisfied that the conviction has been overthrown ..... "

The main argument at the hearing of the appeal was directed to ground 2 which reads:

> "(2) The learned trial Magistrate erred in law and in fact in not properly directing himself in respect of the conviction of the Defendant's driver."

It was decided in Wauchope v. Mordecai: 1970 1 W.L.R. 317 that the proof of a criminal conviction established liability in a subsequent civil action "unless the defendant discharged the burden on him of proving the contrary". The questions of standard of proof and the weight to be attached to the conviction were not discussed at any length.

In Taylor v. Taylor: 1970 1 W.L.R. 1148, a divorce case, it was held by the Court of Appeal, that the Commissioner had not given sufficient weight to the verdict of the jury which had earlier found the husband guilty of incest and that "the Commissioner's finding that the husband had not been guilty of incest was contrary to the evidence". What evidence? At the hearing of the appeal the whole transcript of the criminal trial had been made available to the Court. Fenton Atkinson L.J. said:

> " We have seen a transcript of the evidence. Nobody reading the transcript of the husband's cross-examination at the trial and his attempts to deal with and explain away Police Sergeant Gulliver's evidence could doubt that his conviction was fully justified, and I agree with my Lord that he wholly failed to prove at this trial by the civil standard of proof, or indeed any standard of proof, that he did not commit the crimes of which he was convicted. " (P.1155)

In the present case there is nothing to show the kind of evidence on which the defendant was convicted in the traffic prosecution. It was not put in at the trial of this action, and was not referred to at all on appeal.

The effect of section 11 of Civil Evidence Act 1968 of England was more fully discussed by the Court of Appeal in the later case of Stupple v. Royal Insurance Co: 1971 1 Q.B. 50. Stupple had been convicted of robbery and a magistrate had later made an order that the money found on him be returned to the Royal Insurance Company. Stupple sued the Insurance Company claiming that the money found on him was his own money and should be restored to him. His claim was dismissed and he appealed.

The Court of Appeal had before it the evidence of the circumstances leading to Stupple's conviction at the criminal trial. Paull J. who tried the civil action also considered "the evidence before him and the evidence given at the previous criminal trial" as is clear from the headnote to the report of his judgment (Stupple v. Royal Insurance Co: 1970 2 W.L.R. 124 at 125).

The Court of Appeal dismissed Stupple's appeal. Lord Denning M.R. and Buckley L.J., however, disagreed as to how the evidence of conviction ought to be treated by the Court trying the civil action. Lord Denning M.R. said:

" I think that the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself." (1971 1 Q.B. 50 at 72.)

And again -

" In my opinion, therefore, the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction.

If the defendant should succeed in throwing doubt on the conviction, the plaintiff can rely, in answer, on the conviction itself; and he can supplement it, if he thinks it desirable, by producing (under the hearsay sections) the evidence given by the prosecution witnesses in the criminal trial, or, if he wishes, he can call them again." (P. 73)

Buckley L.J. said:

" There remains, however, the problem of what weight, if any, should be accorded to the proved fact of conviction in deciding whether any other evidence adduced is sufficient to discharge the onus resting on B. In my judgment no weight is in this respect to be given to the mere fact of conviction." (P. 75)

He, however, agreed with Lord Denning as to the possible need during the civil proceedings to consider the evidence given at the criminal trial. He said:

" But very much weight may have to be given to such circumstances of the criminal proceedings as are brought out in the evidence in the civil action. Witnesses called in the civil proceedings may give different evidence from that which they gave in the criminal proceedings. Witnesses may be called in the civil proceedings who might have been but were not called in the criminal proceedings, and vice versa."

It seems to me that "the probative force of a conviction", of which Lord Denning speaks, must largely depend on the quality of evidence which the criminal court accepted and upon which the conviction was based. In the present case, the appellant tried unsuccessfully to produce in evidence the record of the criminal proceedings. He had, he said, no authority to cite in support of his application. He was invited to renew his application during the proceedings, if he wished. He did not. As a result, the Magistrate trying the civil action had nothing before him to show the circumstances leading to the conviction of Nazir Mohammed, the driver of the defendant's truck.

It is not known whether the driver was represented by counsel at the traffic prosecution, or how his defence was conducted. It is quite possible that the Attorney-General took little interest in that prosecution, but as the defendant named in the civil action has done all he can to protect the interests of the Crown. There is no way of knowing. All that can be seen from the record in this case is that Peni Ravai, an important witness, who gave evidence for the respondent in this action, did not give evidence on behalf of the driver Nazir Mohammed in the traffic prosecution. He was a passenger in the truck sitting next to the driver.

At the hearing of this action it was the appellant who was relying on the conviction of Nazir Mohammed as part of his case. It was for him to adduce whatever evidence he considered necessary for his case.

As Buckley L.J. said in the Stupple case -

> " Many examples could be suggested of ways in which what occurred or did not occur in the criminal proceedings may have a bearing on the judge's decision in the civil proceedings: but the judge's duty in the civil proceedings is still to decide that

> case on the evidence adduced to him. He is not concerned with the evidence in the criminal proceedings except so far as it is reproduced in the evidence called before him, or is made evidence in the civil proceedings under the Civil Evidence Act, 1968, section 2, or is established before him in cross-examination. " (P. 76)

Provisions of the Fiji Statute are substantially the same as those of the English Act.

The appellant does not complain of wrongful exclusion of any evidence. This Court, therefore, must confine itself to the evidence adduced before the learned Magistrate. On that evidence he made certain findings of fact, to which reference has been made earlier. Those findings clearly indicate that, applying the standard of proof in civil cases, the respondent had discharged the burden of showing that Nazir Mohammed had done all anyone could have, to avoid the accident and was not guilty of careless driving.

The appeal is dismissed with costs to be taxed in default of agreement.

(G. Mishra)
JUDGE

Suva,