DE MEL AND ANOTHER
v.
REV. SOMALOKA

COURT OF APPEAL
WEERASURIYA, J. AND
DISSANAYAKE, J.
CA NO. 664/84 (F)
DC NEGOMBO NO. 4734/M
FEBRUARY 15 AND 26, 2001
MAY 11, 2001

Damages – Accident – Motor Traffic Act s. 149 (1), s. 151 (3) – Plea of guilt in the Magistrate's Court – Does it amount to an admission – Negligent driving – Evidence.

The plaintiff-appellant claimed damages for causing the death of one N resulting from an accident in which he suffered injuries by being knocked down by the van driven negligently by the 2nd defendant-respondent. The 1st defendant-respondent was the registered owner of the vehicle. District Court dismissed the action.

Held:

(1) The plaintiff-appellants failed to lead evidence in respect of the manner of the occurrence of the accident.

(2) The charge (in the Magistrate's Court) had been reduced to s. 151 (3) and s. 149 (1) of the Motor Traffic Act. One cannot ascertain with certainity as to items which formed the charge if it was reduced to s. 149 (1).

(3) The charge, 'failure to avoid an accident is *prima facie* different in form and substance from 'rash and negligent driving'. There is no reference to the items which formed the basis for negligent driving in terms of s. 151 (3).

(4) In the circumstances it cannot be said that the plea of guilt to charge under s. 149 (1) and s. 151 (3) in the Magistrate's Court can be considered as an admission. Admissions must specifically relate to the items of negligent driving as set out in the plaint.

APPEAL from the judgment of the District Court of Negombo.

Cases referred to:

1. *Sinnaiah Nadarajah v. Ceylon Transport Board* – 79 NLR (2) 48.
2. *Hollington v. Hewthorn & Co., Ltd.* – 1943 2 All ER 35.

P. Nanayakkara with *T. Alahakone* for plaintiff-appellant.
W. Dayaratne for substituted 1st defendant-respondent.

Cur. adv. vult.

August 21, 2001

WEERASURIYA, J.

In this action the plaintiff-appellants claimed damages in a sum of Rs. 150,000 for causing the death of Gamage Nandasena, resulting from an accident in which he suffered injuries by being knocked down by the van driven by the 2nd defendant-respondent (hereinafter referred to as the 2nd defendant). The deceased 1st defendant was sued on the basis of being the registered owner of the vehicle which was driven by the 2nd defendant in the course of his employment under the 1st defendant. The defendants in their joint answer whilst admitting that the 2nd defendant drove the vehicle, denied negligence on his part for the occurrence of the accident.

This case proceeded to trial on 7 issues and at the conclusion of this case, learned District Judge by his judgment dated 22.11.1984, dismissed the action. It is from the aforesaid judgment that this appeal has been preferred.

At the hearing of this appeal, learned Counsel for the plaintiff-appellants submitted that District Judge has misdirected himself in holding that plaintiff-appellants had failed to lead evidence in respect of the following matters, namely:

(*a*) occurrence of the accident;

(b) driving the vehicle by the 2nd defendant; and
(c) the manner of driving the vehicle.

At the commencement of the trial the following admissions were recorded:

(a) That the registered owner of the vehicle bearing No. 34 Sri 765 was the 1st defendant.
(b) That the accident occurred on 21. 06. 1986 while the 2nd defendant was in the employment of the 1st defendant; and
(c) That at the time of the accident the vehicle was driven by the 2nd defendant.

In the light of the above admissions, it was wrong for the District Judge to state that there was no evidence in respect of the occurrence of the accident and that the 2nd defendant drove the vehicle. Therefore, it is manifest that District Judge was in grave error in arriving at the aforesaid findings.

However, the question to be examined is whether there was evidence relating to the negligent driving of this vehicle by the 2nd defendant. The meaning of the words "manner of driving" used by the District Judge could be gathered on further examination of the judgment as pointing to the items of negligent driving as set out in the plaint. The items referred to in the plaint are as follows:

(a) Failure to take a proper look out of the road;
(b) Using the road without consideration of other users of the road;
(c) Failure to have a proper control of the vehicle; and
(d) Driving at an excessive speed and recklessly.

Learned District Judge has come to a finding that admission of guilt in a case filed against the 2nd defendant in the Magistrate's Court is not sufficient to establish negligence as itemised in the plaint.

The main contention of learned Counsel for the plaintiff-appellant was that admission of guilt in case bearing No. 30929 had been disregarded by the District Judge as evidence on the issue of negligence. He cited the case of *Sinnaiah Nadarajah v. Ceylon Transport Board*[1] in support of his contention.

This case laid down that where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver when charged in the Magistrate's Court in respect of the same accident is relevant as an admission made by him and ought to be taken into consideration by the trial Judge in the civil suit.

In that case in addition to the evidence of the plaintiff who was an eyewitness to the accident the circumstances relating to the accident were elicited through the officer who had visited the scene.

Further to the above material, the defendant's plea of guilt to the charge against him in terms of section 149 (1) of the Motor Traffic Act was held as amounting to an admission of the matters itemised in the charge, namely:

(*a*) failing to stop or reduce the speed;
(*b*) failing to keep a proper look out of the road; and
(*c*) failing to keep to the left or near side of the highway.

At page 52, reference had been made to a passage from the case of *Hollington v. Hewthorn & Co., Ltd.*[2]. This passage reads as follows:

> "In *Hollington v. Hewthorn & Co., Ltd.*, a conviction of one of the defendants for careless driving was held to be inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But, "had the defendant

before the Magistrate pleaded guilt" or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial."

In the instant case, the plaintiff-appellants failed to lead evidence in respect of the manner of the occurrence of the accident. The police officer who testified at the trial merely produced the sketch of the scene drawn by the officer, who proceeded to the scene of the accident, for inquiry. The reference in this sketch to two points of collisions with two other vehicles, has resulted in a state of confusion relating to manner of sustaining injuries by the deceased.

The proceedings of the case relating to the tendering of the plea by the 2nd defendant was produced marked P6.

This revealed that the charge had been reduced to sections 151 (3) and 149 (1) of the Motor Traffic Act. It is relevant to note that the original charge against the accused was for causing death by a rash and negligent act not amounting to murder in terms of section 298 of the Penal Code.

It is vital to note that the accused (2nd defendant) was explained the charge from the charge-sheet. But, the charge had been reduced to sections 149 (1) and 151 (3) of the Motor Traffic Act. Therefore, one cannot ascertain with certainty as to items which formed the charge if it was reduced to 149 (1). It is to be noted that charge for failure to avoid an accident is *prima facie* different in form and substance from rash and negligent driving. There was no reference to the items which formed the basis for negligent driving in terms of section 151 (3) of the Motor Traffic Act. Therefore, it is not possible to apply the principles laid down in the case of *Sinnaiah Nadarajah v. Ceylon Transport Board* (*supra*) as having relevance to negligent driving in the instant case. It has to be emphasised that admissions must specifically relate to the items of negligent driving as set out in the plaint.

Learned Counsel for the substituted 1st defendant-respondent submitted that, substituted 1st defendant-respondent as *Viharadhipathy* is responsible only for the property of the temple and not in respect 110
of *Pudgalika* property of an individual Bhikku in terms of section 20 of the Buddhist Temporalities Ordinance and therefore 1st defendant-respondent cannot be substituted in this case.

In view of the above finding in respect of the failure to establish negligence imputable to the 2nd defendant as itemised in the plaint, it is unnecessary to consider the above contention.

For the foregoing reasons, it seems to me that there is no merit in this appeal, and I make order to dismiss it.

The parties must bear their costs of the appeal.

DISSANAYAKE, J. – I agree.

Appeal dismissed.