SARATH KUMARA PERERA,
v.
WINIFRED KEERTHIWANSA AND OTHERS

SUPREME COURT.
G. P. S. DE SILVA, C.J.,
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. APPEAL NO. 66/92.
C.A. NO. 37/82 (F).
D.C. GAMPAHA NO. 21936/M.

Negligence – Death of passenger – Vicarious liability of master for negligence of servant.

The defendant had hired his car and driver Sally to Baur & Co. Ltd., through a company called Cosmos Travels & Tours to transport some tourists from the Katunayake Air Port to Trincomalee. It was Sally's duty to bring back the defendant's car to Colombo. Having dropped the tourists at Trincomalee, Sally came alone in the car up to Kurunegala. At Polwatte close to Kurunegala he picked up one Hettiarachchi and he next drove up to the Kurunegala bus stand when he picked up the deceased Keerthiwansa and another passenger, a woman. Neither Hettiarachchi nor the other passengers knew Sally. The car had a red number plate and was driven at a very high speed when at Kalagedihena the car struck a post. Keerthiwansa was seriously injured and later succumbed to his injuries. Sally had been orally instructed by his master, the defendant not to give lifts to passengers. Keerthiwansa's widow and children sued the defendant.

Held : (Ramanathan J. dissenting)

1. In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is 'Yes', the second question is to see whether the employer must shoulder the servant's liability.

2. The liability of the servant, Sally was not challenged. The question then was whether the defendant was *vicariously liable* for the act of Sally in giving a "lift" to the deceased.

3. The question whether the servant was acting within the scope of his authority is in every case a question of fact. The dividing line which separates the acts which fall within the scope of the servant's authority from those which fall outside is never rigid ; it is flexible and has to be decided having regard to all the facts and circumstances of each case.

4. The fact that the car carried a red number plate is a crucial undisputed fact. It is a representation that it was a car authorised to carry passengers for a fee. The secret instructions given by the defendant to Sally were unknown to the public.

5. There is a difference between implied authority and ostensible authority. The Servant's act may be an authorised act for the purposes of vicarious liability even if it is done solely for his own purposes if in the circumstances the permission of the master can be implied. Ostensible authority is different ; it may be held to exist if, whatever the true state of affairs, the stranger has been misled by appearances.

6. Sally was returning to Colombo on an authorised journey and there was no deviation from the authorised route. He had not abandoned his master's work. The vehicle had a red number plate and at the time of the accident there were 3 passengers in the car none known personally to Sally. Sally was not giving a lift to a friend. The passengers, it may be reasonably be informed, were willing to pay for the journey and they travelled in the car with the permission and consent of Sally. The defendant had known Sally for only a year and used to employ him whenever the need arose. The act of taking Keerthiwansa in the car was within the ostensible authority of Sally and was not an unauthorised act. Therefore Sally was acting within the scope of his employment in taking the deceased as a passenger and the defendant is thus vicariously liable.

Cases referred to :

1. *Young v. Edward Box & Co. Ltd.*, (1951) 1 TLR 789, 793.
2. *Limpus v. London General Omnibus Co.* 1 H & C 526, 539.
3. *Marsh v. Moores* (1949) 2 KB 208, 215.
4. *Priestly v. Dumeyer* (1898) 15 SC 393.
5. *Beard v. London General Omnibus Co.* (1900) 2 QB 530.
6. *Ilkiw v. Samuels* (1963) 1 WLR 991.
7. *Estate Van Der Byl v. Swanepoel* (1927) AD 141, 151.
8. *Rossouw v. Central News Agency Ltd.*, (1948) 2 SA (WLD) 267.
9. *Twine v. Beans Express Ltd.*, (1946) 1 All RE 202, (1946) 175 LT 131 CA.
10. *South African Railways and Harbours v. Marais* (1950) 4 SA (A.D) 610.
11. *Conway v. Wimpey Co. Ltd.*, (1951) 2 KB 266.
12. *Rose v. Plenty* (1976) 1 WLR 141.

APPEAL from Judgement of the Court of Appeal.

R. C. Gooneratne for defendant Appellant.

S. Sivarasa, P. C. with *Shammi Perera and Sampath Walgampaya* for plaintiff-respondents.

Cur. adv. vult.

November 24, 1993.

G. P. S. DE SILVA, C.J.,

The plaintiffs filed this action against the defendant claiming damages in a sum of Rs. 283,000. Admittedly, the defendant was the owner of the motor car bearing distinctive No. 6 Sri 5728. It was not disputed that A. M. Sally was the driver employed by him on the date when the car met with an accident, namely on 21st July 1975, at Kalagedihena on the Colombo–Kandy Road. It was the case for the plaintiffs that G. W. Keerthiwansa who was a passenger in the car at the time of the accident died as a result of the negligent driving of Sally. The first plaintiff is the widow of G. W. Keerthiwansa and the 2nd, 3rd, 4th and 5th plaintiffs were the dependent children of the deceased. The accident was admitted by the defendant but it was the defendant's case that his servant Sally was acting outside the scope of his employment at the time of the accident and therefore he was not liable in damages. After trial, the District Judge held with the plaintiffs and awarded a sum of Rs. 150,000 as damages to the plaintiffs and a further sum of Rs. 33,123 as expenditure incurred by the 1st plaintiff. The defendant unsuccessfully appealed against the judgment of the District Court to the Court of Appeal. The defendant has now preferred an appeal to this court.

The defendant has hired his car and the driver to Baur & Co. Ltd., through a company known as Cosmos Travels & Tours to transport some tourists from the Katunayake Air Port to Trincomalee. It was Sally's duty to bring back the defendant's car to Colombo. Having dropped the tourists at Trincomalee, Sally came back alone in the car up to Kurunegala. At the Polwatte junction close to the Kurunegala town, he stopped the car at the point where witness Hettiarachchi was, and offered him a lift. Hettiarachchi got into the car and Sally drove the car and stopped it in front of the bus stand at the Kurunegala town. At the bus stand the deceased Keerthiwansa and another woman were picked up. According to Hettiarachchi, he had not known Sally previously. Hettiarachchi knew the deceased and with the permission and consent of Sally the deceased also got into the car. At that stage, a women also got into the car. Sally continued on his journey to Colombo. At Kalagedihena he met with this accident at about 5.30 a.m. According to Hettiarachchi, the car was driven very fast (60 M.P.H). The car moved in a zig zag manner and struck against a post by the side of the road ; the car overturned.

G. W. Keerthiwansa had to be lifted out of the car. The medical evidence revealed that he had sustained serious injuries which had resulted in paralysing him below his neck. He was hospitalised and he ultimately succumbed to his injuries on 14th October 1977.

Mr. Gooneratne for the defendant appellant strenuously contended that Sally had no authority to give a lift to the deceased Keerthiwansa. The principal defence was set out in issue (10) which reads as follows :

> " Did Abdul Majeed Sally have any *authority* to carry persons other than foreigners for hire at the time of this accident." (The answer to this issue by the District Judge was " Not proved ").

As stated by Lord Denning MR in *Young v. Edward Box & Co. Ltd.,* [1], " In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is 'Yes', the second question is to see whether the employer must shoulder the servant's liability."

At the hearing before us, the liability of the servant Sally was not challenged. The question then is whether the defendant is *vicariously liable* for the act of Sally in giving a " lift " to the deceased in the defendant's car on the return journey from Trincomalee to Colombo. At this point it is relevant to state that the finding of the Court of Appeal is that the defendant had verbally instructed Sally not to take any passengers in the car on his return trip to Colombo from Trincomalee. Althogh this finding is contrary to the finding of the District Judge, I will proceed on the basis that Sally had been orally instructed not to take any passengers on his return trip. However as observed by Willes J., " The law is not so futile as to allow a master, by giving secret instructions to his servant, to discharge himself from liability." (per Willes J., in *Limpus v. London General Omnibus Co.*[2].

In this connection the Court of Appeal has rightly stated ; " In the instant case there were no written instructions. There was no way how a third party would have known that the driver had been given instructions not to carry passengers on his return trip. On the other hand, the driver had conducted himself in such a way as if he ostensibly had such authority."

The question whether a servant was acting within the scope of his authority is in every case a question of fact (*Marsh v. Moores* [3]. In *Priestly v. Dumeyer* [4] the defendant's servant who was employed to drive a cab plying for hire allowed a friend to drive it. The court held that the defendant was liable in respect of an accident caused by the negligence of his servant's friend. On the other hand, in the case of *Beard v. London General Omnibus Co.,* [5] the defendant Company was held to be not liable for the accident caused by the negligence of the conductor of the omnibus who drove the bus in the temporary absence of the driver. In *Ilkiw v. Samuels* [6], it was held that a servant who is authorised to drive a motor vehicle and who permits an unauthorised person to drive in his place may yet be acting within the scope of his employment. The dividing line which separates the acts which fall within the scope of the servant's authority from those which fall outside is never rigid ; it is flexible and has to be decided having regard to all the facts and circumstances of each case.

What then are the facts which are relevant to the issue whether Sally was acting within the scope of his authority in taking Keerthiwansa as a passenger in the car?. On the evidence on record the facts and circumstances established may conveniently be enumerated as follows :

i) Sally was returning to Colombo having dropped the tourists at Trincomalee. He was on an authorised journey.

ii) There was no deviation whatever from the authorised route.

iii) It cannot be said that he had abandoned his master's work for he had at all times material retained the custody and control of his master's vehicle.

iv) The vehicle had a red number plate. This was a clear representation to the public that the vehicle was authorised to carry passengers for a fee, whatever may have been the secret instructions, unknown to others, that were given by the master to his servant.

v) At the time of the accident there were no less than 3 passengers in the car including the deceased. None of the passengers were personally known to Sally. This certainly was not a case of a servant giving a lift in his master's car to a *friend.*

vi) It is not unreasonable to infer, having regard to the normal course of conduct, that a person who travels as a passenger in a car, with a red number plate, is ready and willing to pay for his journey.

vii) The 3 persons who travelled in the car (including the deceased) did so with the permission and consent of Sally.

viii) The defendant had known Sally only for about a year prior to the accident. Sally was only a casual employee called on to drive the car whenever the need arises. The defendant knew nothing of Sally's antecedents. The defendant had failed to exercise the degree of care expected of a prudent employer in selecting the person whom he employs. The defendant was content to give mere oral instructions to such an employee.

The prohibition against taking passengers on the return journey, very strongly relied on by Mr. Gooneratne, has to be considered in the context of the facts set out above and in the light of the legal position succinctly stated by Wessels J., in *Estate Van Der Byl v. Swanepoel* [7].

"It is within the master's power to *select trustworthy servants who will exercise due care towards the public and carry out his instructions.* The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant then it is the master who must suffer rather than the third party. The master ought not to be allowed to set up as a defence secret instructions given to the servant where the latter is left, as far as the public is concerned, *with all the insignia of a general authority to carry on the kind of business for which he is employed* " (The emphasis is mine).

The fact that the car carried a red number plate is a crucial, undisputed fact in this case. The red number plate constituted a representation that it was a car authorised to carry passengers for a fee. The secret instructions given by the defendant to Sally were unknown to the public. There was no notice inside the car prohibiting the presence of unauthorised passengers. It is significant that Sally stopped the car in front of the bus stand at Kurunegala and it was there that the deceased got into the car with the consent of Sally. He was carrying 3 passengers picked up at different places. Referring to the distinction between implied and ostensible authority Salmond States :-

" There is a difference between implied authority and ostensible authority. The servant's act may be an authorised act for the purposes of vicarious liability even if it is done solely for his own purposes if in the circumstances the permission of the master can be implied. Ostensible authority is different ; it may be held to exist if, whatever the true state of affairs, the stranger had been misled by appearances." (Salmond Law of Torts 19th Edition page 524).

Having regard to the facts and circumstances relevant to the instant case enumerated above, in particular the matters set out as (iv), (v), (vi) and (vii), I am of the view that the act of taking Keerthiwansa in the car was within the ostensible authority of Sally and was not an unauthorised act. I accordingly hold that Sally was acting within the scope of his employment in taking the deceased as a passenger in the car and that the defendant is thus vicariously liable.

Bearing in mind that the answer to the question whether the master is vicariously liable for the act of his servant depends on the facts and circumstances of each case, I now pass on to consider some of the decisions on which strong reliance was placed by Mr. Gooneratne for the defendant-appellant.

a) *Rossouw v. Central News Agency Ltd.,* [8] This was a case where Ashburner (the servant) while driving his employer's car gave a lift to a person whom he saw walking along the road. The car met with an accident and the passenger was seriously injured. Admittedly, at the time of the accident Ashburner was on " the business of his employers ". The question before the court was whether in picking up the passenger, Ashburner was acting within

the scope of his employment. The court answered this question in the negative. It is to be noted that there are significant facts which distinguish this case from the case in appeal before us :–

i) the car " was an ordinary private car indistinguishable in its outward appearance from any other car on the road ". (at page 269).

ii) the conveyance of passengers was no part of the business of the employers ;

iii) ".....the giving of a lift to a stranger was something completely foreign to the scope of Ashburner's duties, it was neither necesary " nor incidental to them ". (at p. 271).

b) *Twine v. Beans Express Ltd.,* [9]. Here the driver of the defendant's van was authorised to carry certain classes of passengers but strictly forbidden to carry any other class of passengers. The plaintiff's husband who was not in the permitted category accepted a lift in the van. An accident occurred and he was killed. The court held that the defendants were not liable. An important fact in this case was that there was a notice on the dash board of the van which read as follows :- " No unauthorised person is allowed on this vehicle. By Order Beans Express Ltd., " Thus the passenger in the van had been clearly informed that he was in the position of a trespasser. There is no question here of secret oral instructions being given by the master to his servant.

c) *South African Railways and Harbours v. Marais* [10], this was a case where the respondent's husband Marais was killed while travelling on the engine of a train as a result of the derailment of the train. It was not disputed that Marais was issued with a ticket which entitled him to travel in a compartment in the guard's coach at the tail end of the train. The evidence was that had he remained in that compartment he would not have been killed ; but what he did was that sometime before the derailment he left the compartment and boarded the engine. Watermeyer C.J.,
stated :-

" It was not the work of the administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment. It cannot be said that transporting a passenger on the engine was a negligent

manner of driving the engine ; it had nothing to do with engine was in my opinion entirely the driver's own act."

Thus it is clear that the decision turned on the proved facts and circumstances in each case.

For these reasons, I affirm the award of the sum of Rs. 183,123 to the plaintiffs by the District Court and I further order that the defendant must pay legal interest on the aforesaid sum from the date of the decree in the District Court till payment in full. Subject to this variation, namely the payment of interest, the appeal is dismissed with costs fixed at Rs. 2000.

Kulatunga, J.

I have perused in draft, the judgments of my Lord The Chief Justice and my brother Ramanathan. I agree with the judgment of my Lord The Chief Justice. My brother Ramanathan has relied on the decision in *Conway v. Wimpey Co. Ltd.* [11]. With great respect, the facts of that case are different from those in the case before us.

RAMANATHAN, J.

This is an appeal from the judgment of the Court of Appeal which has affirmed the award of damages made by the District Court for causing the death of the deceased by one Abdul Majeed Sally the servant of the defendant-appellant-appellant by his negligent act. The deceased was the husband of the 1st plaintiff and the father of the 2nd to the 6th plaintiffs-respondents-respondents.

The defendant-appellant-appellant was the owner of the vehicle and master of the driver Abdul Majeed Sally his servant. The vehicle had been hired by Cosmos a travel agency who in turn had hired the vehicle to Baur & Co., to transport specified tourists from Katunayake Airport to Club Oceanic Hotel in Trincomalee.

At the trial the defendant led evidence to establish that the servant was given specific oral instructions not to give lifts to anyone. The driver had acted contrary to these instructions.

The learned District Judge in his judgment has on the question of the prohibition by the master not to carry passengers on the return journey, concluded that no such instructions had been in fact given. He based his conclusions on the presumption that if there had been such instructions they would have been in a written form and the failure to have such written instructions indicates that no such instructions whatever had been given.

I find it difficult to accept the reasoning adopted by the learned District Judge which had led him to this conclusion. The mere fact that there were no written instructions is no basis, in my opinion, for saying that there were no instructions whatever written or oral.

The Court of Appeal has taken a different view on this aspect and proceeded on the basis that verbal instructions had been given to the driver not to take passengers on the return journey and given reasons for why they chose to do so. I accept the findings of the Court of Appeal that verbal instructions had been given. However I am not in agreement with the Court of Appeals determination on the law with regard to the vicarious liability of a master for the prohibited acts of his servant.

In the general run of cases, the duty of both master and servant is the same, but this is a coincidence and not a rule of law. For a master to be liable he must owe a duty of care to the injured.

It was decided in *Twine v. Beans Express Ltd.,* [9] for a master to be liable for the negligence of his servant the injured must come within a class of persons to whom a duty to take care was owed by the master. In this case the driver of a vehicle had given a lift to the plaintiff, contrary to the defendants instructions. The plaintiff was injured due to the negligence of the driver. The employer was not liable to the plaintiff as the servants act was wholly outside the course of the servants employment and not an improper means of carrying it out.

This principle of law was followed in *Conway v. Wimpey Co., Ltd.,* [11]. A number of contractors were employed in work at the Heathrow Airport. The defendant company had instituted a bus service for their own employees and the driver was prohibited by the defendant company from giving lifts to anyone other than their own

employees. A non employee of the company had travelled in the bus and due to the negligence of the driver had been injured. Asquith, LJ held that the act of the driver in giving a lift to the plaintiff was outside the scope of his employment. It was not merely a wrongful mode of performing an act of the class which the driver was employed to perform but was the performance of an act which he was not employed to perform.

In *Rose v. Plenty* [12] a milk roundsman had contrary to the instructions of his employer made use of the services of a boy for the purpose of assisting his delivering of milk in the milk float. The boy was injured due to the negligent driving of the vehicle by the roundsman. The Court of Appeal by a majority held that the employer was vicariously liable for the negligence.

Lord Denning, MR in his reasoning has established that the decisive point was that it was *not* done by the servant for his own purpose but for his master's business.

On an analysis of the cases it would appear that the principles on which a master's liability are determined fall into three categories.

A. where the prohibited act relates to the mode of performing an act of the class which the servant *was employed to perform* the employer will be vicariously liable.

B. where the prohibition relates to an act of a class which he was *not employed* to perform at all the employer is not liable. The prohibition mark the limits of the scope of employment. Therefore for any act done outside that scope, the employer will not be liable.

C. where the injury has been caused in the course of performing an act, which the servant was not employed at all to perform, the master will nevertheless be liable where the prohibited act was committed in the *furtherance of the master's business.*

The facts of the present case briefly are as follows :

The defendant-appellant-appellant had hired his car and driver to Baur & Co., through Cosmos Travels to transport specified tourists from Katunayake Airport to Club Oceanic Hotel in Trincomalee. The document V2 shows Baurs had paid for both its outward and the inward journey. There was a prohibition not to take passengers on the return journey.

The driver having dropped the tourists on his return journey via Katunayake had offered a lift to one Hettiarachi who was on the road. From the Kurunegala bus stand the driver picked up the deceased and another passenger. The car was driven fast and due to the negligence of the driver the car over-turned and injured the deceased, who subsequently succumed to his injuries.

The evidence disclosed that the driver was given oral instructions not to carry any person on their return journey. The driver had acted contrary to the prohibition and was performing an act which he was not employed to perform. It cannot be said that the deceased was furthering the master's business or interest as was in the case of *Rose v. Plenty* [12] where the boy was assisting the milk roundsman in his work.

For the reasons stated I hold that the appellant was not vicariously liable for the negligence of his servant. In the circumstances, the plaintiffs' action fails and I set aside the judgments of both Courts below. I allow the appeal. There will be no costs.

I very much regret that I have to dissent from the judgment of my Lord the Chief Justice.

Judgment of the District Judge affirmed.