RAFINA AND ANOTHER v. THE PORT (CARGO) CORPORATION AND ANOTHER

COURT OF APPEAL
WIMALARATNE, J. (PRESIDENT) & RODRIGO, J.
C.A. (S.C.) 29/73 (F); D.C. PANADURA 12759/M
JULY 21, 1980

Delict – Vicarious Liability – Port (Cargo) Corporation Act No. 13 of 1958 – Scope of employment – Agency.

Action was instituted by the widow and children of S claiming damages from the Port (Cargo) Corporation and its driver. S died from injuries he sustained in a collision between the van of which he was a passenger with a lorry that was travelling in front. The van belonging to the Corporation was returning having taken S and some other employees of the Corporation to attend a funeral of a co-employee. The Corporation at the request of the United Port Workers' Union had provided the van. Petrol for the journey and the driver's expenses were provided by the Corporation. The plaintiff's action was dismissed by the trial judge on the ground that the Corporation had no interest in the journey and the journey itself was not for the purposes of the Corporation as set out in the statute creating the Corporation. The trial judge has held that it had been the policy of the

Corporation to provide vehicles to the employees on that kind of occasion and that the driver drove the van as a servant of the Corporation.

Held:

Though the statute creating the Corporation does not expressly provide for provision of welfare facilities to its employees, it is taking too narrow a view of the duties enjoined by the statute on the Corporation that the provision of welfare facilities to its employees is *ultra vires* the Corporation. The maintenance of proper relations between employer and employee is a *sine qua non* of the efficient working of the Corporation and for the efficient discharge of its duties. The driver was on that journey for the purpose of the Corporation. In the alternative, notwithstanding that the driver was a servant of the Corporation he was clearly acting as its agent when he undertook the journey. For the purpose of liability it is sufficient that there was an instruction given by the Corporation to the driver and the driver having undertaken to comply with that instruction and discharging the duty entrusted to him.

Cases referred to:

1. *Ellis* v. *Paranavitana* 58 NLR 373.
2. *Ormrod* v. *Crossville Motor Services Ltd.* (1953) 2 AER 755.
3. *Morgans* v. *Launchbury* (1972) 2 AER 606.

APPEAL from the Order of the District Court of Panadura.

H. W. Jayewardene Q.C. with *A. J. Handy* and *Laksman Perera* for the plaintiff-appellants.

Nimal Senanayake with *Kithsiri Gunaratne* and *Miss S. M. Senaratne* for the 1st defendant-respondents.

Cur adv vult.

8th August, 1980.

RODRIGO, J.

This appeal arises from an action instituted by the widow and children of a passenger in a van belonging to the defendant-Corporation who had died from injuries sustained in a collision between the van in which he was going with a motor lorry that was travelling in front of the van at the time of the accident.

The deceased carried the name of Udumalebbe Abdul Salam and was an employee at the material time of the Port (Cargo) Corporation. He was also the President of the United Port Workers' Union. On the 4th of October 1969, was the funeral of one Somapala

who was also an employee of the defendant-corporation. He had died about two days earlier from a fatal accident while working as an employee of the defendant-corporation within the harbour premises.

A number of employees had attended the funeral in two or three vehicles, belonging to the defendant. The van in which the deceased had travelled was one of the vehicles. The van in which the deceased was seated in the front seat was on its way back after the funeral when on the Moratuwa bridge the van had tried to overtake a lorry going in front of it. On seeing a car coming in the opposite direction the van had breaked and had attempted to fall back behind the lorry. The driver of the van, however, in the course of doing that struck some part of the moving lorry from the rear and lost control of the vehicle. In the process the van had struck the iron raillings of the bridge in addition and caused not only serious damage to the van but also brought about the death of Abdul Salam who was in the front seat.

Abdul Salam's is widow and children have sued the defendant-corporation for the recovery of a sum of Rs. 50,000/- as damages sustained by them from the death of Abdul Salam in the said collision.

The action was resisted by the defendant-corporation on the ground that the accident occurred when Abdul Salam was on a journey on which he, like the other employees, had gone to meet their own obligations to the deceased Somapala and that the defendant-corporation had no concern or interest in that journey and/ or that the journey had not been undertaken for the purposes of the defendant-corporation though the corporation admittedly had made available to Abdul Salam and other employees of the corporation its vehicles for the said journey. It is the finding of the learned trial Judge and it is a finding of fact that the corporation as a matter of practice and policy made available its vehicles to its employees and in particular to the office bearers of the Union to attend funerals of its employees. It was in pursuance of such policy that the defendant-corporation had made available the particular vehicle that was involved in the collision together with other vehicles to the President of the Union on this occasion, to attend the funeral of Somapala. So the learned trial Judge has held. He has also found as a matter of fact that the driver of the van in question was instructed by the authorities to take the deceased and other employees to the funeral of Somapala at Weligama and presumably to bring them back. Petrol had been put into the van by the Corporation and the driver's batta and other expenses also in fact had been paid by the Corporation. There is a no dispute on that. The Union, of course, had made a

request to the Corporation to make available the vehicle for this journey and the Corporation had obliged.

The learned trial judge also finds that the van had been driven by the drive as a servant of the Corporation and that its control all along was with the Corporation together with the control of the driver. The learned trial Judge has rejected the contention that on this journey the driver and the vehicle were under the control of the deceased. I agree with the learned trial Judge in his findings on this aspect of the case.

The plaintiffs' action, however, had been dismissed by the Court below on the ground that the Corporation had no interest in this journey and that the journey itself was not for a purpose of the Corporation. The purposes of the Corporation, according to him, are set out in the statute creating the Port (Cargo) Corporation and according to the statute the Corporation is under no obligation to provide vehicles to its employees to attend funerals. As I said earlier the learned trial Judge finds as a matter of fact that it had been the policy of the Corporation to provide vehicles to its employees on this kind of occasion. The learned trial Judge relies on the case of *Ellis v. Paranavitana.*[1] In that case a car owned by a lady had been permitted by her to be taken away by the driver to pay a visit to his wife who was ill at the time at the request of the driver. The car had collided on account of the negligence of the driver with another car in which the plaintiff was travelling and the plaintiff was injured in consequence and the plaintiff's car badly damaged. It was held in that case in the circumstances of it that the defendant was not liable as her car was driven on that occasion for a purpose other than her own though with her permission. T. S. Fernando, J. who had written the judgment in that case cited *Ormrod v. Crossville Motor Services Ltd.*[2] in which Denning. L.J. as he then was had stated.

> "The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern".

While the facts and circumstances of Ellis's case come within the ambit of this particular proposition of law, the facts of the present case are very different. In any event, Denning, L.J's judgment has been distinguished in the later case of the House of Lords in *Morgans v. Launchbury.*[3] The case of Ormrod arose when the "owner of the car therein wanted it to be driven for him from Birkenhead to arrive in Monte Carlo to meet him there before a certain date. He arranged it with a friend for the friend to drive the car for him on this journey. The friend's wife was to accompany him

and they were to bring a suit case for the owner with them. The plan was that after the car had arrived in Monte Carlo, the owner, the friend and his wife should all go in the car for a holiday together in Switzerland. The owner agreed that the friend might make a slight detour on the journey through France to visit an acquaintance whilst en route to Monte Carlo. Soon after the car had left Birkenhead on its journey to Monte Carlo it collided with an omnibus through the negligence of the owner's friend. It was held that the car was being driven by the friend for and on behalf of the owner at his request. And so, obviously, it was, in spite of the fact that it was also being driven partly for the purposes of the friend . . . The agreement or arrangement between the owner and his friend was not a legal contract or agency. This, however, was irrelevant for it was more than mere permission by the owner for his friend to drive. It amounted to a request and express authority by the owner to its friend to drive the car to Monte Carlo for and on behalf of the owner. Accordingly, the owner was vicariously liable for the friend's negligent driving." It was in this context that Lord Denning had made the observation quoted earlier. So that case must be read in the light of its essential facts. The aspects of law in which the case of Ormrod was distinguished in Morgan's case are not relevant here.

In Morgan's case the owner of the car involved in the accident was the wife, and the husband was in the habit of using her car to go to is place of work and come back home. He was however, in the habit of "pub crawling" most of the evenings. On the day in question, he had gone with a friend of his to a public house for drinks. He had overdrunk which was not unusual for him and got his friend to drive the car with three other passengers to whom his friend had offered a lift. His friend, however, had driven the car from the public house yet to some other place which was not in the direction of the home of the wife and the husband for a meal at the instance of the friend. On that stretch of the journey the friend had driven it at 90 m.p.h. and the car crashed with a bus and the passengers in the car were injured. A claim for damages was made against the wife as owner of the car. It emerged in evidence in that case that there was in fact an understanding or arrangement between the husband and wife that if he thought that he had overdrunk, then he would not drive the car but would get one of his friends to drive him home. Lord Denning, M.R. took the view in the Court of Appeal that the owner (wife) is *ipso jure* liable whatever the plaintiff's spouse is using the car for unless the latter is 'on a frolic of his own'. Indeed, Lord Denning, M.R. went even further to hold the owner liable merely on permission to drive, actual or assumed. The House of Lords stated the law relating to vicarious liability for damage to person and property in case of collision in the words of Lord Pearson:-

> "... the principle by virtue of which the owner of a car may be held vicariously liable for the negligent driving of the car by another person is the principle, *qui facit per alium, facit per se* . If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the course of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also the fact that the journey is undertaken partly for purposes of the agent as well as for the purposes of the owner does not negative the creation of the agency relationship; I think there has to be an acceptance by the agent of a mandate from the principal though neither the acceptance nor the mandate has to be formally expressed or legally binding."

On the facts of the present case, the driver of the van has been found by the learned trial Judge to have driven the van as a servant of the defendant-corporation. He was, of course, an employee of the corporation as a driver of its vehicles.Though the statute creating the corporation does not expressly provide for the provision of welfare facilities to its employees, it is taking too narrow a view of the duties enjoined by the statute on the Corporation that the provision of welfare facilities to its employees is *ultra vires* the Corporation. The Corporation has in its employment a vast body of workmen and the maintenance of proper relations between employer and employees is a *sine qua non* of the efficient working of the Corporation and for the efficient charge of its duties. Things like that cannot be spelled out in statutes. So that when the Corporation instructed the driver to take out the van on this journey (it is not said that the driver went on an unauthorised journey) the driver was doing so in the course of his employment and in any event he was not "on a frolic of his own". He was also on that journey for a purpose of the Corporation. I cannot agree with the learned trial judge that the driver of the van, as a servant of the Corporation, was not doing the journey for the purpose of the Corporation. The driver in this instance was not taking the van out in the manner and for the purpose like that in Ellis's case to see his own wife or a relative. It was more than permission that the Corporation had granted to the driver of the van. The Corporation had instructed the driver to undertake this journey and, put petrol into

the van and paid his batta. In the alternative, notwithstanding that the driver was a servant of the Corporation he was clearly acting as it agent when he undertook this journey. The journey was a duty or task delegated to him by the Corporation and the driver went in pursuance of an order or instruction or request from the Corporation to undertake the journey for a purpose of the Corporation. It is not necessary as I said that there should be a legal obligation in the strict sense in the Corporation to send the driver on a journey of this nature. For purposes of liability it is sufficient that there was an instruction given by the Corporation to the driver and the driver has undertaken to comply with that instruction and discharge the duty entrusted to him. The fact that the journey undertaken was partly to meet the purposes of the employees themselves to discharge their moral obligations to a fellow workman does not exempt the Corporation from their liability which are so from the creation of the agency relationship on the facts set out. The instruction issued amounted to a mandate from the authorities and such mandate need not be formally expressed or legally binding. (See the passage cited from Lord Pearson's judgment earlier). So that on either view of the legal relations arising on the facts of the present case, it is my view that the Corporation is liable for the negligent driving of the van by the driver and for the damage resulting from the collision. The driver, of course, is himself liable as much as the 1st defendant-corporation.

There remains the question of the adequacy of damages ascertained by the learned trial Judge. The widow and the children had together claimed a sum of Rs. 50,000/-. It is not disputed that the plaintiffs are the widow and minor children of the deceased, who were dependent on the deceased at the time his death. The learned District Judge had taken the view that the retiring age of the deceased was 55 years. It is, however, submitted by Counsel that the retiring age of the deceased was in fact 60 years. The widow in her evidence had testified that her husband could have continued to work in the Corporation till he was 55 years or 60 years of age. The learned trial Judge has stated that generally the retiring age in Government service and in Corporations is 55 years. The legal officer of the Corporation had given evidence and he had not stated to Court the retiring age of the deceased. Neither has he contradicted the evidence of the widow that the deceased would have continued in employment till 60 years of age. I shall, therefore, take the retiring age of the deceased as 60 years. It was conceded by Counsel for the Corporation that on that basis a sum of Rs. 50,000/- was a fair amount to be awarded as compensation in the event of the appeal being allowed. I, therefore, award a sum of Rs. 50,000/- as damages in the aggregate for the plaintiffs and it is apportioned as follows:

one-third of Rs. 50,000/- is awarded to the widow and the balance two-thirds of Rs. 50,000/- is awarded to the children, namely, the 2nd to the 5th plaintiffs, to be divided among them equally. The damages are awarded against the 1st and 2nd defendants jointly and severally.

I accordingly enter judgment for the plaintiffs in a sum of Rs. 50,000/- in the proportion of one-third to the 1st plaintiff and the balance two-thirds to the 2nd to the 5th plaintiffs in equal proportions among themselves, against the 1st and 2nd defendants jointly and severally. I also award the plaintiffs the costs of this appeal.

WIMALARATNE, J. (President) – I agree.

Appeal allowed.