FISHER, C.J. & STUART, P.J. 1922 May 15

[FISHER, C.J. AND STUART, P.J.]

THE HEIRS OF YORGHI HAJI HANNI

v.

ANDREA YORGHI, CAFEDJI, AND 150 OTHER INHABITANTS OF THE VILLAGE OF ORA.

DIYET—UNKNOWN KILLER—LIABILITY OF INHABITANTS.

APPEAL of Plaintiffs from the judgment of the District Court dismissing an action for " diyet."

The facts are as follows:—

Plaintiffs are the widow and children of one Yorghi Haji Hanni who was killed by gunshot wounds whilst sitting in the cafe of the first Defendant on the night of the 15th May, 1916. No person has been charged with the murder and the District Court held such person was unknown.

The evidence generally went to show deceased was a bad character and of no value to Plaintiffs as a breadwinner.

The judgment of the District Court is as follows:—

The facts in this case are clear and mainly undisputed. On 15th May, 1916, at 9 p.m. one Yorghi Haji Hanni of Kythrea was shot dead while sitting in a cafe at Ora, owned by the first Defendant, and leased by the second Defendant. The cafe at the time was full of customers and a zaptieh was also present when the incident occurred. The murderer is unknown.

All that is known by those present, is that a gun-shot was heard—that the gun or weapon was fired outside the cafe, which has three doors all of which were open at the time—that Yorghi Haji Hanni had been shot in the head, and that he died immediately without uttering a sound.

The action is brought by the heirs of the deceased Yorghi Haji Hanni to recover £222 as compensation, or blood money, from (1) the owner of the cafe, Andrea Yorghi, cafedji; (2) the lessee of the cafe Michail Nikola and 149 other Christian inhabitants of the village of Ora.

The issues are four in number:—

1. Is the person who killed the deceased known or not ?

We find as a fact that the murderer is unknown.

2. Was the act a premeditated murder, or was it an accidental death ?

There is no evidence before us to show whether the death of the deceased was caused by a premeditated act or an accidental act. But we find as a fact that the deceased died from the effects of a gunshot wound.

3. Of what age was the deceased at the time of his death ?

We find as a fact that the deceased was 32 years of age and it was admitted at the hearing by both parties.

4. To what amount of damages are all or any of the Defendants liable, if any ?

To decide upon this issue it is necessary to closely examine the law relating to diyet, or blood money.

The Plaintiffs' claim is based upon the principle that the inhabitants of a village are responsible for the protection of life and the detection of crime within that village, and in the event of death by violent causes that the said inhabitants are liable to pay diyet to the heirs of the deceased person.

Our attention has been called to the case of *Christodoulo Haji Loizou and others v. Naoum Cababe*, Administrator of the estate of Demetri Towli—C.L.R., Vol. X., p. 85.

In this case the circumstances were different in all respects from the case under consideration. The murderer was known and had been convicted and sentenced to death. The sentence was commuted to one of imprisonment for life. The issues before the Court of Appeal turned upon the question whether the District Court had jurisdiction and whether a claim for diyet could be the subject of a civil action.

Chief Justice Tyser, however, in his judgment stated " some pro- " positions of the law to show what is the nature of a claim for diyet " and how it arises," and it is on certain of these propositions that the Plaintiffs in this case rely and especially on the doctrines of Imam Ebu-Hanife and Imam Youssuf.

According to the former, where a person who had caused the death is unknown, " the owner of a house where a killed man had been found " is always liable for diyet, because he is bound to control and keep " his house; otherwise it is attributable to his fault or neglect."

According to the latter, " if the owner of a house is absent, the occu- " pants of it are always responsible because the controllers of a house " are the occupants of it. The killed man has naturally cried out and " asked for help at the time of the act of murder, and as the said occu- " pants failed to give their assistance, they are liable to pay diyet."

In the notes on p. 3 of Sir John Bucknill's translation of the Ottoman Penal Code, it is stated that in the case of homicide, the author of which was unknown, the payment was exigible from the people in whose vicinity the body was discovered, such as for example the inhabitants of a village or quarter, the crew and passengers of a vessel, or the proprietor of an hotel.

Mr. Stavrinakis for the Plaintiffs in his arguments addressed to the Court states that he does not press his claim against the first or second Defendants personally, but he insists upon the liability of the inhabitants of the village for the payment of diyet for the death of the deceased man, who was sitting in this public cafe to which the public had access by three doors, from the street, on the basis that it was their duty to protect life and detect crime.

Mr. Nicolaides for the Defendants disputes the claim and argues that the circumstances of this case do not fit the principles laid down in *Loizou and others v. Cababe* and that the remarks of the Judges of the Supreme Court in that judgment are merely *obiter dicta* and not decisions upon the material points raised in the present case. He argues that the general principles laid down only apply where a dead body is found in a man's house in suspicious circumstances, where no one knows exactly what happened at the time.

He insists that in any event according to the assertions of Ebu-Hanife and Imam Youssuf the case can only be founded against the first, and alternatively, the second Defendant. He argues that the cafe is not a public place and that it is under the control of the cafe-keeper. He calls the attention of the Court to the case of *Philippo Gregory and others v. Dervish Arif and others* C.L.R., Vol. X., p. 118 in which it was held that persons convicted of being accomplices in homicide are not liable to pay blood money. He also lays stress upon the presence of the zaptieh at the cafe at the time the deceased man met his death.

In the absence of other authorities we have to confine our attentions to the propositions of the Sheri Law as laid down in the several decisions of the Supreme Court and the notes on the subject in Sir J. Bucknill's translation of the Ottoman Penal Code.

Now what do these propositions amount to ? They are based upon the opinions of certain scribes or priests (Imams) given some 1200 years ago. These opinions appear to us to be merely personal interpretations of the doctrines laid down in the Koran, and the sayings and traditions of the Prophet.

According to the opinions of other Moslem sects, in particular the Shi-i sect, the interpretations of the various Imams may be modified as time passes and conditions of life alter. In this connection *see* Art. 39 of the Mejellé (Greek translation) which is interpreted as follows:—

" It cannot be denied that by the change of time the application of " legal rules is not also changed."

FISHER, C.J. & STUART, P.J.

THE HEIRS OF YORGHI HAJI HANNI v. ANDREA YORGHI, CAFEDJI AND 150 OTHERS

This principle is even more strongly stated in the Turkish text. As an example the principle of " qisas " is no longer applied even in the dominions of the Khalif.

As the application of the principles of qisas have fallen into desuetude, we see no reason why the application of the principles of diyet should not also be discontinued or in any event be limited to cases in which the murderer is known and has been convicted in accordance with the provisions of the Ottoman Penal Code.

No mention is made in the Ottoman Penal Code of the payment of diyet in cases where the murderer is unknown. The Court has had the advantage of hearing the evidence of an expert witness who has practised law in the various Courts of Turkey for some ten years and he tells us that though perhaps in Sheri Law the right to diyet still exists in cases where the murderer is unknown, yet since the Tenzimat, when the Courts of the Turkish Empire were re-organized, such a right cannot be enforced until the murderer is known and has been convicted in the Criminal Courts.

As far as we know there is no similar principle in the laws of any civilized country at the present day, and we see no reason why such a principle should exist. Police forces have been organized to keep order, to protect life and property and to detect crime. And when trained policemen fail to detect the author of a murder how can the ordinary individual be held pecuniarily liable to the heirs of the deceased, on the basis of his failure to protect the dead man's life and to detect his slayer ?

We do not wish this comment to be interpreted to mean that the public have not a duty to assist the police in keeping order and detecting and preventing crime. This important duty attaches to every citizen.

That such a principle did exist is undoubted, but it was created in the days when the knife and the dagger were the chief implements of crime, in days when the murderer must of necessity have been of the same community as the dead man, or be known to the inhabitants of the deceased's neighbourhood. The deadly accuracy and range of the rifle and revolver were then undreamt of. The train, the motor car and the bicycle were not available to assist the escape of the assassin.

It is a principle which, if enforced at the present day, might lead to absurd and unjust consequences. Suppose A. is the occupier of a house in a crowded vicinity and B. his servant is shot in the house by an unknown man from outside by a weapon which unknown, from a direction which is unknown and at a range which is unknown. Can it be said that A. is responsible in damages to the heirs of B. or that A.'s neighbours are responsible on the ground that it was his or their duty to protect B.'s life and detect his murderer ?

For the above reasons we dismiss the action and consequently we award no compensation. We may add that had the circumstances of this case been different, and the murderer had been known, we should only have awarded a nominal amount of diyet, taking into consideration the evidence adduced before the Court as to the deceased man's character and his value as the supporter of his family.

The case is dismissed with costs.

For Appellant *Stavrinakis* and *Aradippiotis.*

For Respondents *M. Nicolaides.*

Judgment: Upholding the District Court and dismissing the appeal with costs.

[FISHER, C.J. AND STUART, P.J.]

CHRISTO ROMANI

v.

EMILIA SKOULLOU.

PRE-EMPTION—CLAIM BY AGENT APPOINTED BY POWER OF ATTORNEY—MEJELLE, ARTS. 1029 AND 1030.

APPEAL of Plaintiff from the judgment of the District Court dismissing the claim.

The facts are as follows:—

Plaintiff heard of the sale of the house in question and being a Shefi and unable to come to Nicosia personally appointed an agent by duly executed Power of Attorney.

The agent in making his formal claim failed, either to mention the immediate claim or to call on the onlookers to bear witness that this was the second claim, and that a first claim had been already made.

Clerides and *Varlaam* for Appellant.

Chrysafinis for Respondent.

HELD: Upholding the judgment of the District Court, that Plaintiff's agent had been duly appointed, but that he had not properly carried out the necessary formalities. Further the Court holds that the second claim to exercise a right of pre-emption under Art. 1030 of the Mejellé must be made in such a way that witnesses know that the first claim under Art. 1029 has been made, and that they were witnesses to the second claim.

Strictness of proof that the formalities have been duly carried out is essential.

Appeal dismissed with costs.