1969
Feb. 27
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SAVVAS ATHANASSIOU
v.
THE ATTORNEY-GENERAL OF THE REPUBLIC

[TRIANTAFYLLIDES, LOIZOU & HADJIANASTASSIOU JJ.]

SAVVAS ATHANASSIOU,

*Appellant - Plaintiff,*

*v.*

THE ATTORNEY-GENERAL OF THE REPUBLIC,

*Respondent - Defendant.*

(*Civil Appeal No.* 4706).

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*Master and Servant—Negligence of master—Duty owed by employer to employee—To take reasonable care for the latter's safety—Not to subject him to 'unnecessary risk'—'Unnecessary risk'—Meaning and effect—Risk that the employer can reasonably foresee and against which he can guard by any precautionary measures, the convenience and expense of which are not entirely disproportionate to the risk involved—See also herebelow.*

*Republic of Cyprus—Civil liability of—Negligence—Master and servant—Workman employed by Government at road works—Injured by a stone flung by the wheel of a passing bus—Reasonably foreseeable by employer that such accident could happen—Obvious precautions to guard against such risk not taken—Precautions such as diversion of traffic at the particular spot neither too costly nor impracticable—Convenience and expense of such precautionary measures not disproportionate to the risk involved—Consequently the respondent employer (Republic of Cyprus) failed in his duty not to subject the appellant - employee to unnecessary risk—See also hereabove.*

*Negligence—Master and Servant—Duty owed by the employed to the employee—See above.*

*Civil Wrongs—Negligence—Master and Servant—See above.*

*Appeal—Court of Appeal—Inferences drawn by trial Courts—Power and duty of the Court of Appeal to substitute therefor its own inferences—Principles applicable.*

*Civil Procedure—Appeal—Fresh evidence on appeal—When admissible—Principles applicable—The Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960) *section* 25(3).

*Fresh Evidence—Fresh evidence on appeal—See above.*

*Evidence—Fresh or further evidence on appeal—See above.*

*Inferences—Inferences of fact—Court of Appeal—Power and duty of the Appellate Court to draw its own inferences—See above under Appeal.*

*Unnecessary risk—Meaning and effect of the phrase—See above under Master and Servant: Republic of Cyprus.*

This is an appeal by the plaintiff against the dismissal of a civil action brought by him against the Republic in respect of injuries he received while being employed as a casual labourer by the Public Works Department of the Government of the Republic in the reconstruction of part of the Nicosia – Myrtou road. His injuries were caused by a stone which was flung at his leg by the wheel of a passing bus; it is not in dispute that at that particular part of the road there were, for the purposes of the road works, heaps of stones along the road, and part of the roadway was at such a state of construction as to be made of stones only. The District Court of Nicosia dismissed the action on the ground that the appellant (plaintiff) was not exposed by his employer, the Republic, to an unnecessary risk, because the precaution which would have prevented his being injured in the manner in which he was injured, namely, a diversion of the traffic "would be too costly and not practicable."

Allowing the appeal the Court:

*Held,* (1). The trial Court rightly referred to the case of *Hicks* v. *British Transport Commission* [1958] 2 All E.R. 39 in relation to the principle that an employer has a duty to take reasonable care and so to carry on his operations as not to subject those employed by him to "unnecessary risk"; such principle having been so formulated by Lord Herschell in *Smith* v. *Baker and Sons* [1891] A.C. 325. And as Slade J. stated in the case of *Harris* v. *Bright's Asphalt Contractors Ltd. and Another* [1953] 1 All E.R. 395, at p. 397:

> "In case there is any doubt about the meaning of the word 'Unnecessary', I would take the duty as being a duty..... not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved."

To the like effect see the dicta in the *Hicks* case (*supra*) at p. 49 of Parker L.J.

(2) Where in our opinion the trial Court has erred is in applying the aforesaid principles to the circumstances of the present case. Though we are an appellate tribunal, we not only have the power, but it is our duty to substitute our own inferences for those drawn by the learned trial Judges, once we are satisfied that their inferences were wrong (see, too, in this respect, the views of Parker L.J. in the *Hicks* case, (*supra*) at p. 50).

(3) On the evidence we think that it was reasonably foreseeable by the defendant that an accident could have happened through a passing car flinging a stone; and the severe degree of the injury likely to result, due to such a thing happening, was equally foreseeable. Also, the precautions to be taken to guard against such a risk were obvious: The temporary closing to the traffic of the road at the particular spot, involving, consequently, a diversion of such traffic for the time being. On the other hand the defendant (respondent) never alleged or proved that such precautions were either unnecessary or impracticable or too expensive. We fail, therefore, to see how it was open to the trial Court to hold that a diversion of the traffic would be too costly and not practicable, and, consequently, by necessary implication, that the appellant (plaintiff) had not been exposed to an unnecessary risk; there is nothing on record justifying such a conclusion.

*Appeal allowed with costs.*

The Court refused an application by the appellant for leave to adduce further evidence under section 25(3) of the Courts of Justice Law, 1960, (Law of the Republic No. 14 of 1960).

*Held,* in the light of the jurisprudence governing an application of this nature (see *inter alia*, *Felekkis* v. *The Police* (1968) 2 C.L.R. 151 and in view of the particular circumstances of this case, we have no difficulty in reaching the conclusion that this is not a proper case in which to allow further evidence to be adduced on appeal; what is sought to be proved by such evidence was well within the knowledge of the appellant at the time of the trial.

Cases referred to:

*Felekkis* v. *The Police* (1968) 2 C.L.R. 151;

*Hicks* v. *British Transport Commission* [1958] 2 All E.R. 39;

*Smith* v. *Baker and Sons* [1891] A.C. 325;

*Harris* v. *Brights Asphalt Contractors Ltd., Allard & Saunders, Ltd.*, [1953] 1 All E.R. 395.

**Appeal.**

Appeal by plaintiff against the judgment of the District Court of Nicosia (Mavrommatis and Stylianides D. JJ.) dated 12th March, 1968 (Action No. 3917/65) whereby his claim for damages for injuries he received while being employed as a casual labourer by the Public Works Department of the Government of the Republic, in the reconstruction of a public road, was dismissed.

*E. Liatsos*, for the appellant.

*A. Frangos*, Senior Counsel of the Republic, for the respondent.

The following ruling was delivered by:

TRIANTAFYLLIDES, J.: In this case counsel for the appellant-plaintiff, who appears for the appellant for the first time in this case, has applied for leave to adduce further evidence, under section 25(3) of the Courts of Justice Law, 1960, (Law 14/60).

In the light of the jurisprudence governing an application of this nature (see, inter alia, *Felekkis* v. *The Police*, (1968) 2 C.L.R. 151) and in view of the particular circumstances of this case—and especially of what is stated in the relevant affidavit of the appellant—we have had no difficulty in reaching the conclusion that this is not a proper case in which to allow further evidence to be adduced on appeal; what is sought to be proved by such evidence was well within the knowledge of the appellant at the time of the trial and he should have brought it to the knowledge of his counsel, so that relevant evidence could have been adduced before the trial Court.

This application is, therefore, dismissed.

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The judgment of the Court was delivered by:

TRIANTAFYLLIDES, J.: The appellant appeals against the dismissal, on the 12th March, 1968, of a civil action (D.C.N. 3917/65) brought by him against the Republic in respect of

injuries which he received on the 27th July, 1964, while being employed as a casual labourer, by the Public Works Department of the Government of the Republic, in the reconstruction of part of the Nicosia-Myrtou road.

His injuries were caused—as found by the trial Court—by a stone which was flung at his leg by the wheel of a passing bus; it is not in dispute that at that particular part of the road there were, for the purposes of the road works, heaps of stones along the road, and part of the roadway was at such a state of construction as to be made of stones only.

The claim of the appellant was opposed by the respondent; a statement of defence was filed, in this connection, on the 6th April, 1967.

On the 1st November, 1967, when the action was fixed for hearing, counsel for the respondent (other than the one who has appeared before us today) applied for an adjournment on the ground that, through inadvertance, the respondent's office had not made a note of the date of the hearing; thus, such hearing was adjourned to the 12th December, 1967.

On the said date nobody at all appeared on behalf of the respondent and according to the record before us the hearing "proceeded in default of appearance by the defendant"; the record states that counsel who had appeared for the respondent on the 1st November, 1967 "was called repeatedly and was absent but turned up during the hearing of another action and later on during a break he stated that he cannot possibly appear today as he is engaged in a criminal case. He could not make arrangements to be represented by anybody else but prayed for an adjournment. It was made clear to him that as the case was adjourned once before, this Court could not entertain such an application for the reason given.....".

Procedurally the position was governed by rule 3 of Order 33 of the Civil Procedure Rules; according to this rule all that the appellant had to do was to prove his claim, so far as the burden of proof lay upon him.

The trial Court did find, on the basis of evidence given by the appellant himself, that he was, at the material time, in the employment of the Republic and that he was injured in the course of such employment and in the circumstances already described in this judgment.

Furthermore, the Court rightly referred to the case of *Hicks* v. *British Transport Commission* [1958] 2 All E.R. 39, in relation

to the principle that an employer has a duty to take reasonable care and so to carry on his operations as not to subject those employed by him to unnecessary risk; such principle having been so formulated by Lord Herschell in *Smith* v. *Baker and Sons* [1891] A.C. 325.

Where, in our opinion, the Court below has erred is in applying the said principle to the circumstances of the present case.

It concluded, in effect, that the appellant was not exposed by his employer, the Republic, to an unnecessary risk, because the precaution which would have prevented his being injured in a manner in which he was injured, namely, a diversion of the traffic, "would be too costly and not practicable".

Though we are an appellate tribunal, we not only have the power, but it is our duty, to substitute our own inferences for those drawn by the learned trial Judges, once we are satisfied that their inferences were wrong (see, too, in this respect, the views of Parker L.J. in the *Hicks* case, *supra*, at p. 50).

Before we explain why we think that the trial Court has drawn wrong inferences, it might be useful to note that in the case of *Harris* v. *Bright's Asphalt Contractors, Ltd., Allard & Saunders, Ltd.* [1953] 1 All E.R. 395, Slade, J. stated the following in his judgment (at p. 397), regarding the duty of an employer not to subject his employees to unnecessary risk:

> "In case there is any doubt about the meaning of the word 'unnecessary', I would take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk that the employer can reasonably foresee and against which he can guard by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved".

Also, in the *Hicks* case (*supra*) Parker, L.J., had this to say on the same point (at p. 49):

> "Whether the risk is such that a prudent employer exercising reasonable care should take steps to guard against it depends on a number of considerations—certainly on three: first, whether such an employer could reasonably foresee the risk of accident to an employee; secondly, if so, the degree of injury likely to result; and, thirdly, the nature of the precautions necessary to guard against that risk. If no precautions can guard against the risk, then it cannot

be said to be an unnecessary risk. Equally, if the precautions involve great expence, that is to be put into the scale and weighed with the other considerations".

We think that, on the basis of the facts which were established by the evidence of the appellant, it was reasonably foreseeable by his employer, the Republic's Public Works Department, that an accident could have happened through a passing car flinging a stone; and the severe degree of the injury likely to result, due to such a thing happening, was equally foreseeable. Also, the precautions to be taken in order to guard against such a risk were obvious: The temporary closing to the traffic of the road at the particular spot, involving, consequently, a diversion of such traffic for the time being.

The appellant, both by his statement of claim and by his evidence, alleged that there was failure to take the aforementioned precautions; and the respondent, in the statement of defence, did not allege that such precautions were either unnecessary or impracticable or too expensive; actually, the tenor of the statement of defence points to the opposite.

In the light of the contents of the statement of defence, as well as in the absence of any relevant evidence, we fail to see how it was open to the trial Court to hold that a diversion of the traffic would be too costly and not practicable, and, therefore, by necessary implication, that the appellant had not been exposed to an unnecessary risk; there is nothing on record justifying such a conclusion.

On the material before us we cannot but find that the only proper decision in this case—in the light of its facts and of its procedural history—was that the appellant had proved his claim, in the sense of rule 3, of Order 33, and that he was, and is, entitled to judgment against the respondent.

As the amount of damages is not in issue and they have already been assessed by the trial Court to be £750.— general damages, plus £193 special damages, we order that the judgment under appeal be set aside and that there should be judgment in favour of the appellant for £943 damages, plus costs here and in the Court below, except that the respondent should not be burdened with the costs of the appellant for the adjournment of the hearing of the appeal on the 4th February, 1969.

*Appeal allowed; order for costs as above.*