1975
June 25

CHARIS GEORGHIOU

v.

TAKIS GEORGHIOU

[TRIANTAFYLLIDES, P., STAVRINIDES, L. LOIZOU, JJ.]

CHARIS GEORGHIOU,

Appellant-Defendant,

v.

TAKIS GEORGHIOU,

Respondent-Plaintiff.

(Civil Appeal No. 5264).

Findings of fact—New trial—Primarily the task of the trial Court to make findings as to essential facts and regarding the reliability of witnesses—Proper approach of Court of Appeal to findings of fact—In view of certain indisputable facts not safe for the trial Court on the evidence before it to accept version of respondent—New trial ordered, in this particular case, before a differently constituted bench.

Evidence—Previous and subsequent existence of facts—Continuance—Presumption of continuance.

New trial—Findings of fact made by trial Court—Not safe for the trial Court in view of certain indisputable facts, to accept version of respondent—New trial ordered in this particular case.

A car driven by the respondent (plaintiff) collided at night time with the lorry of the appellant (defendant) which had become immobilized when its rear left wheel tyres burst.

The trial Court found that the lorry constituted a nuisance, and, also, that the appellant was guilty of negligence, because the lorry had been left unattended and without being properly lit, so that it had become a dark obstacle on a busy road.

The Court accepted the evidence of the respondent that the rear small lights of the lorry were not on at the time of the collision; and it also accepted his version that a hurricane lamp which, prior to the collision and after the lorry had to be left there by the appellant, had been placed by the police at a place on the road about 50 feet away from the rear of the lorry, was no longer there at the time when the respondent's car

collided with the rear part of the lorry. The evidence of the respondent was found by the trial Court to be corroborated by, the evidence of another witness (Charalambous) called by him who testified that he had driven himself past the lorry and he had nearly collided with it because it constituted an unlit dark obstacle on the road.

On the other hand evidence was given by two policemen, one called by the appellant and one called by the respondent, to the effect that the rear small lights of the lorry were on, and a hurricane lamp was in position 50 feet behind it, and visible to other traffic, about half an hour before the collision. In this connection the Court of Appeal observed, that, on the basis of the rebuttable presumption of continuance, such lights were on at the time of the collision.

Held, 1. It was not safe, for the trial Court, on the evidence then before it, to accept the version of the respondent, especially as his said witness Charalambous may have not been testifying in relation to the crucial period of time which intervened between the departure of the police from where the lorry was and the occurrence of the collision.

2. In the light of all relevant considerations we have reached the conclusion that this appeal must succeed; but, as it is primarily the task of a trial Court to make findings as to essential facts and regarding the reliability of witnesses, we feel that it would not be proper, in this particular case, to substitute our own evaluation of the evidence in the place of that made by the trial Court and to give final judgment against the respondent.

3. Having in mind the proper approach of an appellate Court to findings of fact, as expounded on many occasions, and, in particular, in two cases which have been referred to us by counsel for the respondent, namely *Adem* v. *Mevlid* (1963) 2 C.L.R. 3 at p. 9, and *The Estate of the deceased Alexandros Christou v. Komodromou and Others* (1970) 1 C.L.R. 69, at p. 73, we have decided that in this particular case it is better to order a new trial, which will, necessarily, have to take place before a differently, constituted bench.

Appeal allowed;
new trial ordered.

Cases referred to:

Adem v. *Mevlid* (1963) 2 C.L.R. 3 at p. 9;

Estate of the deceased Alexandros Christou v. *Komodromou and Others* (1970) 1 C.L.R. 69 at p. 73.

Appeal.

Appeal by defendant against the judgment of the District Court of Famagusta (Savvides, P.D.C.) dated the 29th November, 1973, (Action No. 1457/71) whereby the sum of £3,219 was awarded to the plaintiff as damages for injuries suffered by him as a result of a traffic collision.

D. Liveras, for the appellant.

N. Zomenis with *C. Paraskevas,* for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court delivered by:

TRIANTAFYLLIDES, P.: The appellant was ordered to pay, as a defendant, to the respondent, as plaintiff, C£3,219 as damages, on the basis of being to blame to the extent of 60% for a traffic collision which took place on the Nicosia-Famagusta road on October 18, 1967.

A car driven by the respondent collided at night-time with the lorry of the appellant which had become immobilized when its rear left twin tyres burst. The collision was a violent one and the respondent suffered serious personal injuries.

The trial Court found that the lorry constituted a nuisance, and, also, that the appellant was guilty of negligence, because the lorry had been left unattended and without being properly lit, so that it had become a dark obstacle on a busy road.

The Court accepted the evidence of the respondent that the rear small lights of the lorry were not on at the time of the collision; and it accepted, too, his version that a hurricane lamp which, prior to the collision and after the lorry had to be left there by the appellant, had been placed by the police at a place on the road

about 50 feet away from the rear of the lorry, was no longer there at the time when the respondent's car collided with the rear part of the lorry.

The evidence of the respondent was found by the trial Court to be corroborated by the evidence of a witness called by him, a certain Kallis Charalambous, who testified that he had driven himself past the lorry and he had nearly collided with it because it constituted an unlit dark obstacle on the road.

Evidence was given by two policemen, a constable, who was called by the respondent, and a sergeant, who was called by the appellant, that they had gone both together to where the lorry was and that they had switched on all its small lights (front and rear), that they had placed two hurricane lamps, one at a distance of 50 feet from the front and the other at the same distance from the rear of the lorry, as a warning to other traffic, and that they remained there for about a quarter of an hour in order to make sure that the precautionary measures which they had taken, as above, were visible and effective. They testified, further, that within about half an hour after they had gone away from there they were informed about the collision of respondent's car with the lorry, which occurred at approximately between 6.30 and 7.00 p.m.

We are, thus, faced with the indisputable facts that the read small lights of the lorry were on, and a hurricane lamp was in position 50 feet behind it, and visible to other traffic, about half an hour before the collision.

We have, however, been invited by counsel for the respondent to accept that through some happenings, about which no direct evidence was adduced, the lamp ceased to be where it had been placed, or at least ceased to be visible, and that the two rear small lights of the lorry went out.

It is true that one of these two lights was smashed due to the collision and that the other one was found not to be on after the collision (having, in all probability, gone out because of the effect of the collision); but the two front small lights were found to be still on

and the other hurricane lamp was still at its place, in front of the lorry, after the collision.

On the basis of the rebuttable presumption of continuance (see Phipson on Evidence, 11th ed., p. 129, paragraph 291, and Cross on Evidence, 4th ed., p. 32) and in the absence of any satisfactory evidence to the contrary, it is reasonable, in our view, to assume that, at least, the two rear small lights of the lorry must have been on, and thus visible, at the time of the collision; we do not express the same view about the hurricane lamp because it was argued, and was accepted by the trial Court, that it could have been thrown off the road, or somehow damaged, by other traffic, which had passed by that place before the collision.

The trial Court has not found in its judgment how the two rear small lights could have gone out before the collision without the front small lights having not gone out too—(and no evidence at all was adduced in this respect)—nor has it given any adequate reason why, in the circumstances, it accepted as safely reliable the evidence of the respondent, and of his witness Charalambous, that the rear small lights were not on just before the collision.

It is very important to bear in mind that in view of the long time which had elapsed between the collision and the trial—(more than six years)—and as the said witness Charalambous could only speak from memory about the approximate, and not the exact, time at which he passed by the place of the accident and saw, as he has testified, the lorry without its lights on and without any hurricane lamp in the road, it is possible that he passed by that place after the time when the lorry came to a stop there but *before* the police had arrived and switched on the lights and placed the hurricane lamps in front and behind it; and this possibility does not appear to have been weighed by the trial Court in dealing with the evidence relied upon by it.

We are faced with a situation in which, in view of other indisputable facts, it was not safe, for the trial Court, on the evidence then before it, to accept the version of the respondent, especially as his said witness Charalambous may have not been testifying in relation

to the crucial period of time which intervened between the departure of the police from where the lorry was and the occurrence of the collision.

In the light of all relevant considerations we have reached the conclusion that this appeal must succeed; but, as it is primarily the task of a trial Court to make findings as to essential facts and regarding the reliability of witnesses, we feel that it would not be proper, in this particular case, to substitute our own evaluation of the evidence in the place of that made by the trial Court and to give final judgment against the respondent; having in mind the proper approach of an Appellate Court to findings of fact, as expounded on many occasions, and, in particular, in two cases which have been referred to us by counsel for the respondent, namely *Adem* v. *Mevlid* (1963) 2 C.L.R. 3, 9, and *The Estate of the deceased Alexandros Christou through the Administratrix Elli Alexandrou* v. *Komodromou and Others* (1970) 1 C.L.R. 69, 73, we have decided that in this particular case it is better to order a new trial, which will, necessarily, have to take place before a differently constituted bench.

As regards the costs of this appeal they should be awarded in favour of the appellant and against the respondent. The order for costs made by the trial Court is set aside and the fate of those costs is to be decided at the new trial.

The appeal succeeds, thus, to the extent stated in this judgment.

Appeal allowed.
New trial ordered.
Order for costs as above.