1982 June 16

[A. LOIZOU, SAVVIDES, STYLIANIDES, JJ.]

IOANNIS CHARALAMBOUS,

*Appellant,*

*v.*

THE POLICE,

*Respondents.*

(*Criminal Appeal No.* 4243).

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*Motor Vehicles and Road Traffic Law,* 1972 (*Law* 86/72)—"*Road*" *in section* 2(1) *of the Law—Essential characteristics of—Irrelevant whether area a private land—Sufficient if it is an open space or place to which the public, but not a particular class or section of the public, have access not by leave but either by tolerance or habitually or without express prohibition and without having to overcome physical obstacles placed by the owner or the person entitled to possession.*

*Road traffic—Careless driving—Sections* 8 *and* 19 *of the Motor Vehicles and Road Traffic Law,* 1972—*Test whether a driver charged with careless driving is at fault is whether prosecution has proved that the accused departed from the standard of a reasonable, prudent and competent driver—Whether or not due care has been exercised is a subjective matter—Negligence sufficient to establish civil liability is all that is required to support a conviction under section* 8—*What has to be decided is whether a driver did or did not exercise due care and this primarily is within the province of the trial Court—Driver knocking down pedestrian whilst driving in the reverse—Due to a physical obstacle (a wall) he could not and did not have a proper look-out—Duty of driver to ensure that in reversing he has a proper look-out and to take reasonable consideration for other road users—Reasonably open to the trial Judge on the evidence before him to find appellant guilty of careless driving.*

*Findings of fact made by trial Court—And conclusions drawn from*

*primary facts—Appeal—Court of Appeal will not disturb the findings of the trial Court unless satisfied that the reasoning behind such findings is unsatisfactory, or they are not warranted by the evidence, considered as a whole—And will only interfere with conclusions drawn from primary facts if the conclusions cannot reasonably be drawn from the primary facts.*

*Words and phrases—"Road" in section 2(1) of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72).*

On 31.8.1980 at Pyrgha village the appellant entered his motor car, looked through his reflecting mirror and started reversing it in a privately owned open space adjacent to the public road. Whilst so reversing he brought the car to a standstill. An old woman who was on that open space at the material time was found on the ground just behind the reversing motor-car wounded and bleeding. In his statement to the police the appellant said that he stopped when he heard a noise coming from the back of his car and in his evidence in Court he said that he stopped in compliance to a call from his daughter that there was an old woman behind his vehicle. The appellant was convicted of the offence of careless driving contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72). The trial Court found on the evidence of the Police Investigator and the statement of the appellant to the police that the accident took place on an open space in front of the house of the appellant which was a continuation of a non-asphalted road, which was used by pedestrians, animals and traffic. In his statement to the Police the appellant admitted that that space was not separate from the road and was used and could be used by vehicles and pedestrians. On this evidence and on its interpretation of the law the trial Court found that the space on which the motor car was being driven was a "road" within the meaning of section 2(1)* of Law 86/72; and that the appellant whilst reversing, due to a physical obstacle—a

* Road is defined as follows by section 2(1) of Law 86/72:

" Road' means any road, street, square, pathway, open place and space to which the public has access and includes any bridge, culvert, ditch, embankment, drain, causeway or supporting wall used in connection with a road".

wall—which was known to him, could not and did not have a proper look-out.

Upon appeal against conviction Counsel for the appellant contended:

(a) That the space or place on which the car was being driven and where the accident occurred is not a road as defined by s. 2(1) of Law 86/72; and,

(b) That the finding of careless driving by the accused was not supported by the evidence adduced and/or was against the weight of the evidence.

*Held*, (1) that the essential characteristic of a "road", as defined is "public access"; that it is irrelevant whether the area is private land; that it is sufficient if it is an open space or place to which the public, but not a particular class or section of the public, have access not by leave but either by tolerance or habitually or without express prohibition and without having to overcome physical obstacles placed by the owner or the person entitled to possession; that the trial Judge, for the reasons given, accepted the evidence of the Police Constable and in this respect the statement of the appellant to the Police; that an appellate Court will not disturb the findings of the trial Court unless satisfied that the reasoning behind such findings is unsatisfactory or that they are not warranted by the evidence, considered as a whole; that this Court is satisfied that the relevant findings of the trial Court were fully warranted by the evidence; that since the public had access to the space in question and were using it freely, without having to overcome obstacles and, to say to least, with the tolerance of the person who was entitled to possession thereof the trial Court rightly held that the space in question was a "road" within the meaning of section 2(1) of Law 86/72; accordingly contention (a) should fail.

(2) That the test as to whether a driver charged with careless driving is at fault may be said to be whether the prosecution has proved that the defendant departed from the standard of a reasonable, prudent and competent driver; that whether or not due care has been exercised is a subjective matter; that the

particular circumstances of each case have to be examined; that negligence sufficient to establish civil liability is all that is required to support a conviction under s. 8 (see *Christos Rayas* v. *The Police*, 19 C.L.R. 308); that it has to be decided whether that driver did or did not exercise due care and this primarily is within the province of the trial Court; that it is the duty of a driver to ensure that in reversing he has a proper look-out and to take reasonable consideration for other road users, actually or with reasonable foreseeability potentially on the road; that in the present case the primary facts, as found by the trial Court, were warranted by the evidence before it; that this Court will only interfere if the conclusion of the trial Court cannot reasonably be drawn from the primary facts; that it was reasonably open for the trial Court to reach the conclusion it did and this Court has not been persuaded to disturb the conclusions of the trial Court; that the accident occurred due to the reversing of the car of the appellant which knocked down the old pedestrian; that the appellant, whilst reversing, due to a physical obstacle—the wall—which was known to him, could not and did not have a proper look-out; accordingly contention (b) should, also, fail.

*Appeal dismissed.*

Cases referred to:

*Harrison* v. *Hill* (1932) S.C. (J.) 13;

*Bugge* v. *Taylor* [1941] 1 K.B. 198;

*Buchanan* v. *Motor Insurers' Bureau* [1955] 1 All E.R. E.R. 607;

*Houghton* v. *Scholfield* [1973] R.T.R. 239 (Q.B.D.);

*Regina* v. *Show* [1974] R.T.R. 225 (C.A.);

*Deacon* v. *A.T. (a minor)* [1976] R.T.R. 244;

*Cox* v. *White* [1976] R.T.R. 248;

*Polykarpou* v. *Polykarpou* (1982) 1 C.L.R. 182;

*Andrews* v. *Director of Public Prosecutions*, 26 Cr. App. R. 34 at p. 48;

*Simpson* v. *Peat* [1952] 1 All E.R. 447;

*Rayas* v. *Police*, 19 C.L.R. 308.

**Appeal against conviction.**

Appeal against conviction by Ioannis Charalambous who was convicted on the 10th July, 1981 at the District Court of Larnaca (Criminal Case 6400/80) on one count of the offence of driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 and was sentenced by Eliades, D.J. to pay a fine of £20.—.

*A. Andreou*, for the appellant.

*S. Georghiades*, Senior Counsel of the Republic, for the respondents.

*Cur. adv. vult.*

A. LOIZOU J.: The judgment of the Court will be delivered by Stylianides, J.

STYLIANIDES J.: The appellant was convicted and sentenced by the District Court of Larnaca of the offence of driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972.

The appellant on 31.8.1980 at Pyrgha village reversed his mini-bus Registration No. TLK. 525 on an open space outside his house, adjacent to the public road. An old woman, who was on that open space at the material time, was found on the ground just behind the reversing motor-car, wounded and bleeding and her injuries necessitated putting her leg in plaster.

The trial Court found on the evidence before it and on its interpretation of the Law that the space on which the mini-bus was being driven is a road within the meaning of the Law and that the prosecution brought home to the accused that he reversed without making sure that it was safe for him to do so and without having a proper look-out and as a result thereof he knocked down and injured the old woman.

The appeal is directed against the conviction which is challenged on two grounds:-

(a) That the space or place on which the car was being driven and where the accident occurred is not a road as defined by s.2(1) of Law 86/72; and,

(b) That the finding of careless driving by the accused was not supported by the evidence adduced and/or was against the weight of the evidence.

*GROUND NO.* 1:

The definition of "road" in the Motor Vehicles and Road Traffic Law, as set out in s.2(1) of Law 86/72, is as follows:-

> " 'Road' means any road, street, square, pathway, open place and space to which the public has access and includes any bridge, culvert, ditch, embankment, drain, causeway or supporting wall used in connection with a road".

An identical definition is found in the Motor Car Regulations, 1951, regulation 2, and in the Motor Vehicles and Road Traffic Law No. 61/54 which was repealed and substituted by Law 86/72. The essential characteristic of a "road", as defined, is "public access". Any open place or space to which the public has access is a road within the ambit of this definition.

The question that poses is whether the place the appellant was driving on was a road within the meaning of this section. This is a question of mixed law and fact. The place where the accident occurred was not a road in the ordinary sense of the word.

A provision with regard to "public access" in exactly similar terms was considered in the Scottish case of *Harrison* v. *Hill* (1932) S.C. (J.) 13. In the course of his judgment the Lord Justice-General, Lord Clyde, said at p. 16:-

> "It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may therefore be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it. I think that, when the statute speaks of 'the public' in this connection, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farm-house or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways. I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the

public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as matter or fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed—that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs. I include in permission or allowance the state of matters known in right of way cases as the tolerance of a proprietor".

Lord Sands said at p. 17:-

"In my view, any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied".

This similar question was considered and the aforesaid dicta of the Scottish Judges were applied by the English Courts for the last 40 years, starting from the case of *Bugge* v. *Taylor*, [1941] 1 K.B. 198.

In *Buchanan* v. *Motor Insurers' Bureau*, [1955] 1 All E.R. 607, McNair, J., pointed out that the public for this purpose is the general public rather than people who have a specific concern with walking on the area in question. (See also *Houghton* v. *Scholfield*, [1973] R.T.R. 239 (Q.B.D.): *Regina* v. *Shaw*, [1974] R.T.R. 225 (C.A.); *Deacon* v. *A.T.* (*a minor*), [1976] R.T.R. 244; *Cox* v. *White*, [1976] R.T.R. 248).

The best way of showing that a member of the general public has access to a road with at least the tolerance of the owner of the property is to show that a member of the public does in fact so use it.

In the end it comes down to a simple question of fact as the law is quite plain. It is irrelevant whether the area is private land. It is sufficient if it is an open space or place to which the public, but not a particular class or section of the public, have access not by leave but either by tolerance or habitually

or without express prohibition and without having to overcome physical obstacles placed by the owner or the person entitled to possession.

The trial Court found on the evidence of P.W.1, the police investigator, and the statement of the appellant to the police that the happening took place on an open space in front of the house of the appellant. That space is a continuation of a non-asphalted road, almost at the same level, which was used by pedestrians, animals and traffic. In the statement given by the appellant to the police he admitted that that space was not separate from the road and was used and could be used by vehicles and pedestrians.

It was submitted by learned counsel for the appellant that as the evidence of P.W.2, Stavroulla Nicolaou, is to the effect that she did not notice either pedestrians or cars to use that space, which she, however, described in her evidence as 'platia' (square), and the fact that the appellant in his short testimony before the Court retracted his statement, his findings were not warranted by the evidence. The trial Judge, for the reasons given, accepted the evidence of the police constable and in this respect the statement of the accused to the police.

Appeals in this country are by way of rehearing both on fact and on law. The principles upon which the Court of Appeal acts where findings of fact and inferences drawn therefrom are concerned, are now well settled and have been repeated in a great number of cases. Briefly an Appellate Court will not disturb the findings of the trial Court unless satisfied that the reasoning behind such findings is unsatisfactory, or they are not warranted by the evidence, considered as a whole.

In *Maroulla Stylianou Polykarpou of Kato Pyrghos* v. *Savvas Polykarpou*, (1982) 1 C.L.R. 182, I had opportunity to say the following with regard to the principles relevant to interference by an Appellate Court with the findings of the trial Court:-

> "It is the practice of an appellate Court not to interfere with the verdict of the trial Court which had the advantage of hearing the witnesses and watching their demeanour unless some very strong ground is put forward establishing that the verdict is against the weight of the evidence. That this is a most salutary practice there can be no doubt, as

a study of the notes of evidence, even when taken with the utmost accuracy, cannot possibly convey to the mind of a Judge the same impression which the oral examination of the witnesses and their demeanour under that process would have made upon the same Judge, if it had been his duty to hear the case in first instance. It is for the appellant to show that the conclusions arrived at by the Court, appealed from, are erroneous. In a case where the matter turns on the credibility of witnesses, it is obvious that the trial Court is in a far better position to judge the value of their testimony than we are. We are, of course, not oblivious of the fact, that quite apart from manner and demeanour, there are other circumstances which may show whether a statement is credible or not, and we should not hesitate to act upon such circumstances, if, in our opinion, they warranted our intervention".

Having given due consideration to the argument advanced by counsel, we are satisfied that the relevant findings of the trial Court are fully warranted by the evidence. The public had access on the space in question. They are using it freely, without having to overcome obstacles and, to say the least, with the tolerance of the person who is entitled to possession thereof.

*GROUND No.* 2:

The appellant was charged under s.8 of Law 86/72 which provides that "no person shall drive a motor-car on a road without due care and attention or without reasonable consideration for other persons using the road". This corresponds to the provision of s.12 of the Road Traffic Act, 1930.

In *Andrews* v. *The Director of Public Prosecutions*, 26 Cr. App. R. 34, at p. 48, Lord Atkin, speaking of this section, stated:-

"This would apparently cover all degrees of negligence".

In the case *Simpson* v. *Peat*, [1952] 1 All E.R. 447, which was reargued before a Full Bench of five Judges, as it raised a question of great importance, Lord Goddard, C.J., in delivering the judgment of the Court stated of a defendant charged under section 12(1):-

"The question for the justices is: Was the defendant

exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not, they should convict. If, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved".

Careless driving is objective in the sense that the standard of driving demanded of a driver is an objective standard.

The test as to whether a driver charged with careless driving is at fault may be said to be whether the prosecution has proved that the defendant departed from the standard of a reasonable, prudent and competent driver. Whether or not due care has been exercised is a subjective matter. The particular circumstances of each case have to be examined. We, therefore, consider that negligence sufficient to establish civil liability is all that is required to support a conviction under s.8 (*Christos Rayas* v. *The Police*, 19 C.L.R. 308).

It has to be decided whether that driver did or did not exercise due care and this primarily is within the province of the trial Court.

It is the duty of a driver to ensure that in reversing he has a proper look-out and to take reasonable consideration for other road users, actually or with reasonable foreseeability potentially on the road.

In the present case the primary facts, as found by the trial Court, are warranted by the evidence before it. The appellant entered his car, looked through his reflecting mirrors and started reversing. Before reversing for 15 ft., due to physical obstacle—a wall—he could not see and have a proper look-out behind him. Whilst so reversing, he brought the car to a standstill. In his statement to the police he said that he stopped when he heard a noise coming from the back of his car and in his evidence in Court he said that he stopped in compliance to a call from his daughter that there was an old woman behind his vehicle. The old woman was found lying injured on the ground behind his car; there was blood on the mudguard.

It was submitted by counsel for the appellant, and we agree

with him, that the doctrine of res ipsa loquitur is a rule of evidence applicable to the tort of negligence and as such has no application to the criminal law.

The proposition was advanced before us that the injury to the old woman was not connected in any way with the driving of the appellant as the old woman might have fallen on the ground by herself and raised her leg up and hit on the car. This is an ingenuine fanciful proposition. Having regard to the presence of the vehicle, the presence of the old woman, the reversing of the car, the voice which made him bring his car to a standstill, the position of the injured woman and her injuries, the trial Court reached the conclusion that she was hit by the reversing car of the appellant. The conclusions from the facts are sometimes conclusions of fact and sometimes conclusions of law. The Court will only interfere if the conclusion cannot reasonably be drawn from the primary facts.

It was reasonably open for the trial Court to reach the conclusions it did and we were not persuaded by the able argument of the advocate for the appellant to distrub the conclusions of the trial Court. The accident occurred due to the reversing of the car of the appellant which knocked down the old pedestrian. The appellant, whilst reversing, due to physical obstacle the wall—which was known to him, could not and did not have a proper look-out.

In view of the foregoing we dismiss the appeal.

*Appeal dismissed.*