1983 December 14

[DEMETRIADES J.]

MOUSTAFA ZEKI,

Plaintiff.

v.

1. CYPRUS PORTS AUTHORITY,
2. NAKUFREIGHT LTD.,
3. ALEXCO LINES OF GREECE,

Defendants.

(*Admiralty Action No.* 214/80).

Negligence—Master and servant—Unloading of hold of ship—Crane operator not in a position to see cargo that was unloaded but relying entirely on instructions given to him by the person in charge of unloading either orally or by signals—Such person failing to make sure that the signals he gave to the crane operator were the correct ones—And stevedore injured through swinging of load—Accident due to the negligence of person in charge of unloading.

Master and servant—Loan of servant—Who is his employer—The general or the particular employer—Principles applicable—Hire of crane and operator—Operator subject to control of hirer in regard to manner of operation—Accident due to negligence of servant of hirer—Hirer liable for negligence of his servant—General employer not liable.

Costs—Bullock order—Successful defendant—Plaintiff justified in pursuing action against him—Costs payable by plaintiff to this defendant included in the costs recoverable by plaintiff from the unsuccessful defendant.

The plaintiff, a stevedore was, at the request of the second defendant, sent with other stevedores by the Labour Office to the ship "KALLIOPI" for unloading; and he and his colleagues went into the hold of the ship in order to unload bundles of chipboard. Each bundle weighed about one and a half tons and was of a size of 2 m. by 3m. Whilst one of these bundles was being lifted by a crane, which belonged to

the first defendants and was parked on the quay and was operated by one of the first defendants' employees, the bundle swang, hit the plaintiff and as a result he was injured. The operator of the crane was not in a position to see the cargo that was being unloaded from the hold of the ship and that in carrying out his work he had to rely entirely on instructions given to him either orally or by signals by the "koumandos", that is the person in charge of the unloading, who was, at the material time, standing on the deck of the ship. The "koumandos" was in the employment of the second defendants.

The first defendants were a body established by law for the running and management of the Ports of Cyprus and at the material time they were the owners of the crane that was used for the unloading of the cargo and the employers of the crane operator. The crane and its operator were hired to the second defendants after the latter submitted to the former a written application.

The second defendants were shipping agents. It was the allegation of the plaintiff that the second defendants were his employers, but this was disputed by them. They alleged that the employers of the plaintiff were the third defendants, that is the owners of the ship KALLIOPI and that they were merely acting as their agents. After the accident the second defendants submitted a report to the Ministry of Labour and Social Insurance, under the Accidents and Occupational Diseases (Notification) Law, Cap. 176, in which they described themselves as the employers of the plaintiff and that he, at the time he was injured, was employed in the unloading of a ship. In the course of the trial the second defendants called no evidence in what capacity they had employed the plaintiff.

According to the evidence the load swang and hit the plaintiff because the "koumandos" who was giving instructions to the crane operator did not follow the prescribed procedure for the unloading in that he failed to ensure that the signals he gave to the crane operator were the correct ones. The plaintiff was the last man to leave the load and that after leaving the load he went to a safe point in the hold and he could not go beyond that point.

On the following questions:

(a) *Liability for the accident;*

(b) *Which of the two defendants*—1 *and* 2—*was liable for the accident;*

(c) *Who was the employer of the "koumandos".*

Held, (1) that the accident occurred due to the negligence of the "koumandos" as he had failed to make sure that the signals he gave to the crane operator were the correct ones, so that the load could be lifted without swinging; that the plaintiff was not to blame for the accident in which he was involved; and that the crane operator—who was unable to see what was going on in the hold of the ship—had, in lifting the load, to rely entirely on the instructions of the "koumandos" who was negligent in carrying out his duty.

(2) That when the servant of one employer is lent to another employer, the employer at the material time is that employer who can tell the servant not only what he had to do, but also the way in which he is to do it; that since the "koumandos" was the person who was controlling the work of the crane-operator, the employer of the "koumandos" was liable for the accident.

(3) That in the light of the evidence the employers of the "koumandos" were the second defendants and they must bear the consequences; accordingly judgment will be given in favour of the plaintiff and against the second defendants for C£6,000 agreed damages with costs.

(4) That since the plaintiff was justified to pursue his action against the first defendants too, a bullock order should be made, in that the costs payable by the plaintiff to the first defendants will be included in the costs recoverable by the plaintiff from the second defendants, and such costs are to be assessed by the Registrar. Action against defendants 3 withdrawn and dismissed.

Judgment for plaintiff against the second defendants for C£6,000 *with costs.*

Cases referred to:

Bhoomidas v. *Port of Singapore Authority* [1978] 1 All E.R. 956;

Mersey Docks and Harbour Board v. *Coggins and Quiffiths (Liverpool) Ltd. and McFarlane* [1946] 2 All E.R. 345.

Admiralty action.

Admiralty action for special and general damages for injuries sustained by the plaintiff whilst employed in an unloading operation on board the ship Kalliopi.

A. Lemis, for the plaintiff.

P. Ioannides, for defendants No. 1.

V. Tapakoudes, for defendants No. 2.

No appearance for defendants No. 3.

Cur. adv. vult.

DEMETRIADES J. read the following judgment. The plaintiff, a stevedore at the port of Limassol, claims special and general damages for injuries he received on the 1st August, 1979, whilst employed in the unloading of cargo from the ship KALLIOPI. In the course of the hearing of this action, the parties informed the Court that the special and general damages to which the plaintiff may be entitled, on a full liability basis, have been agreed at C£6,000.–.

In the morning of the day on which the plaintiff met with this accident, he was, at the request of the second defendants, sent with other stevedores by the Labour Office to the ship KALLIOPI for unloading it. This ship was anchored alongside a quay of the old port of Limassol. In the afternoon, and after the cargo which was on the deck of the ship had been unloaded, he and his colleaques moved into the hold of the ship in order to unload bundles of chipboard. Each bundle weighed about one and a half tons and was of a size of 2m. by 3m. Whilst one of these bundles was being lifted by a crane, which belongs to the first defendants and was parked on the quay and was operated by one of the first defendants' employees, the bundle swang, hit the plaintiff and as a result he was injured.

According to the evidence adduced by all the parties, the operator of the crane was not in a position to see the cargo that was being unloaded from the hold of the ship and that in carrying out his work he had to rely entirely on instructions given to him either orally or by signals by the 'koumandos', that is the person in charge of the unloading, who was, at the material time, standing on the deck of the ship. It is an

undisputed fact that the 'koumandos' was in the employment of the second defendants.

The first defendants are a body established by law for the running and management of the Ports of Cyprus and at the material time they were the owners of the crane that was used for the unloading of the cargo and the employers of the crane operator. The crane and its operator were hired to the second defendants after the latter submitted to the former a written application, which was produced and is exhibit No. 2 before the Court.

The second defendants are shipping agents. It is the allegation of the plaintiff that the second defendants were his employers, but this was disputed by them. They allege that the employers of the plaintiff were the third defendants, that is the owners of the ship KALLIOPI and that they were merely acting as their agents.

According to the evidence of the plaintiff and his witnesses, the procedure for the unloading of the bundles of the chipboard was the following: The stevedores employed for the unloading had at first to pass under the bundle one shampani—fiber rope —and then tie it around the bundle. When this was done, they would signal to the 'koumandos' to give instructions to the crane operator to lift the load slightly. The stevedores then would pass under the bundle another rope and then again tie it around the bundle. The stevedores then hooked the sling of the crane on this second rope and the crane operator, on the instructions of the 'koumandos', would then let the bundle down. After the bundle is settled down, the 'koumandos' would give instructions to the crane operator to lift the load. The bundle was not to be lifted until all the stevedores, except one who would remain near the load holding the sling until the wire of the crane got the strain, would leave and go to a safe place and the load could then be lifted. If the load was not in a perpendicular position, i.e. the derrick of the crane was not right over the hold, the 'koumandos' would give instructions to the crane operator to lift the load slowly until it reached the middle of the opening of the hold and then lift it. If, however, there was another load lying or resting on the one that was being unloaded, then the 'koumandos' '

instructions to the crane operator would be to lift the load slowly and lower it down and follow this procedure until the load was freed. Then he would give further instructions to the crane operator to bring the load to the middle of the opening and then lift it straight up.

It is an undisputed fact that the load that hit and injured the plaintiff was not in a perpendicular position and that there was another load resting on it. According to the plaintiff and his witnesses, the load swang and hit the plaintiff because the procedure that is described hereinabove was not followed and that the plaintiff was the last man to leave the load as he was the one who had hooked the sling and that after leaving the load he went to a safe point in the hold and that he could not go beyond that point.

The case for the first defendants is that on the 1st August, 1979, the second defendants applied to them for the hire of two cranes with their operators, for the unloading of the ship KALLIOPI, which was anchored at the old Limassol port and that as a result of the application of the second defendants, they hired to them the cranes with their operators, after the second defendants signed a document, which was produced and is exhibit No. 2, by which the second defendants agreed to pay the charges and to absolve the first defendants from any liability whatsoever for any damage, loss and/or body injuries. This document was signed on behalf of the second defendants by a certain Georghios Georghiou who appeared as the agent and/or representative of the second defendants in all dealings between the first and the second defendants.

The operator of the crane involved in this accident, Andreas Georghiou, D.W.1 for the first defendants, said that, on the instructions of the 'koumandos', he parked his crane on the quay by the side of the vessel and that from the position he was, he could not see what was going on in the hold of the ship and that during the unloading he had to rely entirely on the instructions and signals of the 'koumandos'. Before the accident occurred, he said, he lowered the sling into the hold of the ship and he was then given a signal by the 'koumandos' to lift the load showly. As soon as he started lifting the load, on the instructions of the 'koumandos', he turned it to the right. He felt the load moving and then he received another signal

from the 'koumandos' to lift it out of the hold. As he was lifting the load, he heard shoutings coming from the hold, whereupon he was given a signal by the 'koumandos' to lower the sling into the hold and he complied. The 'koumandos' then instructed him to lift the sling and when the load came out of the hold, he saw an injured man carried on the load.

The case for the second defendants, as this appears to be from their answer, it that—

(a) The plaintiff was, at the material time, employed by the third defendants, i.e. the owners of the ship.

(b) That they were merely acting as the agents of the third defendants.

(c) Assuming that they were the employers of the plaintiff, they took such reasonable precautions for his safety as under the circumstances a reasonable person would have taken in the ordinary course of business.

(d) The plaintiff was solely to blame and/or contributed by his negligence to the accident, and

(e) the accident was occasioned by the negligence and/or breach of statutory duty on the part of the first defendants.

With regard to ground (e) of their case, the second defendants, though they adopt the allegations of the plaintiff regarding the alleged negligence of the first defendants, they plead no particulars regarding breaches of the statutory duties by the first defendants. They, also, had not filed any counterclaim against the first defendants who, on the contrary, by their answer and counterclaim claim indemnity and contribution from the second defendants in the event they are found liable.

In support of their case the second defendants called one witness, namely Georghios Chrysanthou, the 'koumandos' employed during the unloading of the ship. They did not, however, call as a witness Mr. Georghios Georghiou who signed exhibit No. 2 and who, as it was alleged, was the agent and/or representative of the second defendants.

Chrysanthou said that he was the 'koumandos' in charge of

the unloading of the ship KALLIOPI and when he was asked to describe the method of the unloading, he gave the same picture as that given by the witnesses for the plaintiff.

Considering his evidence as to the method used in the unloading of the cargo, I have not the slightest doubt in my mind that the accident occurred due to the negligence of this witness as he had failed to make sure that the signals he gave to the crane operator were the correct ones, so that the load could be lifted without swinging.

Having found that the plaintiff was not to blame for the accident in which he was involved, that the crane operator —who was unable to see what was going on in the hold of the ship—had, in lifting the load, to rely entirely on the instructions of the 'koumandos' and that the latter was negligent in carrying out his duty, the question that poses before me for decision is which of the two defendants is liable for the accident.

In deciding who is the master of a servant whose wrongful act is in question, many difficulties arise as an employee who is lent or hired to another employer may have two masters, but in law he can only have one master controlling his work at any given time.

In Charlesworth on Negligence, 6th ed., p. 44, para. 76, there are stated the following:

> "*Servant of one employer lent to another employer.* A servant may be the general servant of one person, and yet his services may be temporarily put at the disposal of another, who may be described as the particular employer. In such a case, although the general employer may pay the servant, select him for the work in question and have the power of dismissing him, the particular employer may in some circumstances be liable for the servant's negligence while engaged in his particular employment".

And at p. 46, para. 78, Charlesworth, supra, summarises the law on the subject as this may be derived from the case-law as follows:

> "1. The presumption is that the servant remains the servant of the general employer, the burden of proof being

on those who assert the contrary. The burden is a heavy one but it can be discharged in exceptional circumstances.

2. The employer at the material time is that employer who can tell the servant not only what he has to do, but also the way in which he is to do it. If the servant when doing the negligent act is merely exercising the discretion vested in him by the general employer and not obeying detailed directions given by the particular employer, he remains the servant of the general employer.

3. The contract between the employers may provide that the servant shall be the servant of the particular employer. This contract is not conclusive. It cannot be used 'to contradict the fact, if it is the fact, that the complete dominion and control over the servant has not passed from one to the other'.

4. If the servant is not employed to work or drive any machine, vehicle or animal belonging to the general employer, it is easier to find that he has become the servant of the particular employer ... .

5. When the servant is employed to work or drive any machine, vehicle or animal belonging to the general employer, he exercises the discretion in its management delegated to him by the general employer and, subject to what is stated above, remains the servant of the general employer".

The leading authority on the subject which was applied in the recent case of *Bhoomidas* v. *Port of Singapore Authority*, [1978] 1 All E.R. 956, is the case of *Mersey Docks and Harbour Board* v. *Coggins and Quiffiths (Liverpool) Ltd. and McFarlane*, [1946] 2 All E.R. 345, in which it was held—

"(i) The question of liability was not to be determined by any agreement between the general employers and the hirers, but depended on the circumstances of the case, the proper test to apply being whether or not the hirers had authority to control the manner of the execution of the relevant acts of the driver.

(ii) the board, as the general employers of the crane

driver, had failed to discharge the burden of proving that the hirers had such control of the workman at the time of the accident as to become liable as employers for his negligence, since, although the hirers could tell the crane driver where to go and what to carry, they had no authority to give directions as to the manner in which the crane was to be operated. The board were, therefore, liable for his negligence".

Viscount Simon in his judgment said (at pp. 348, 349):-

"It is not disputed that the burden of proof rests upon the general or permanent employer—in this case the board—to shift the prima facie responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances.

.....

If, however, the hirers intervene to give directions as to how to drive which they have no authority to give, and the driver pro hac vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors".

Lord Porter in delivering his judgment in the same case approached the problem by expressing his opinion as follows (at p. 351):-

"Many factors have a bearing on the result. Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed—all these questions have to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject matter under discussion, but among the many tests suggested I think that the most satisfactory by which to ascertain who is the employer at any particular time is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this, he will, as a rule, be the person liable for the employee's

negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required. The man is left to do his own work in his own way, but the ultimate question is not what specific orders, or whether any specific orders, were given, but who is entitled to give the orders as to how the work should be done. Where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance since it is his crane and the driver remains responsible to him for its safe keeping".

In the light of the authorities cited and my finding that the 'koumandos' was the person who was controlling the work of the crane operator, I find that the employer of the 'koumandos' is liable for this accident.

The last issue that remains for decision is who was the employer of the 'koumandos'. The plaintiff, as I have already mentioned, said that he was employed by the second defendants. It is, also, the allegation of the first defendants that the second defendants were those who had applied for the hire of the crane and its operator. There is, also, in evidence that after the accident the second defendants submitted a report to the Ministry of Labour and Social Insurance, under the Accident and Occupational Diseases (Notification) Law, Cap. 176, which was produced and is exhibit No. 1 before me, in which they describe themselves as the employers of the plaintiff and that he, at the time he was injured, was employed in the unloading of a ship.

The second defendants called no evidence in what capacity they had employed the plaintiff and they tried, through their witness Georghios Chrysanthou, to shift the onus of proving who was the employer of the plaintiff to an unnamed and unspecified person, whom this witness described as the "agentis tou praktoriou" ("representative of the agents"). There is no doubt that this witness purposely avoided saying who was his employer.

In the result, I find that the employers of the "koumandos" were the second defendants and that they must bear the consequences.

In the result, there will be judgment in favour of the plaintiff and against the second defendants for C£6,000.– with costs.

The action against the first defendants is, therefore, dismissed.

With regard to the costs of the first defendants, I find that since the plaintiff was justified to pursue his action against them too, a bullock order should be made, in that the costs payable by the plaintiff to the first defendants will be included in the costs recoverable by the plaintiff from the second defendants, and such costs are to be assessed by the Registrar.

At the conclusion of the hearing of the action, Mr. Lemis made a statement to the effect that he had not proved anything against the third defendants and for that reason he was withdrawing the case against them. The action against the third defendants is, therefore, dismissed with no order as to costs.

Judgment against defendants No. 2 for £6,000.–. *Order for costs as above.*