[2020] JMCA Civ 65

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 61/2012

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**WILBERT YOUNG**	**APPELLANT**
AND	**LYNBERTH SEBRUN**	**1ST RESPONDENT**
AND	**ALSTON SYBRON**	**2ND RESPONDENT**

Mrs Khadine Dixon instructed by Dixon and Associates Legal Practice for the appellant

George Clue for the respondent

18, 19, 20 June 2019 and 18 December 2020

F WILLIAMS JA

[1] I have read in draft the reasons for judgment written by P Williams JA. I agree that it was for the reasons set out therein that I concurred in dismissing the appeal with costs to the respondents to be taxed, if not agreed.

P WILLIAMS JA

[2] This is an appeal against the decision of Wint-Blair J (Ag), as she then was, ("the learned trial judge") which was made on 9 May 2017 when she entered judgment for

the respondents, Mr Lynberth Sebrun and Mr Alston Sybron, with costs to be taxed if not agreed. In so doing the learned trial judge found that the appellant, Mr Wilbert Young, had not proven his case against the respondents on a balance of probabilities.

[3] We heard this appeal on 18 and 19 June 2019. After hearing counsel on both sides and considering the material, on 20 June 2019 we made the following orders:

> "1. Appeal dismissed.
>
> 2. Costs to the respondents to be agreed or taxed."

At the time we gave brief reasons for our decision with a promise to reduce them to writing and expand, where necessary. We now fulfil that promise, with apologies for the delay.

[4] The claim, which was for damages for negligence, arose from an incident which had occurred on 20 March 2010 at the Monymusk sugar factory where the appellant had fallen some 16 feet from a truck and sustained injuries. He had climbed onto the truck he had driven to the factory, with a load of cane, in order to release a chain which held the cane in place. The chain broke causing him to fall off the truck. The following were the particulars of negligence which were asserted;

> "(i) Causing or allowing the [appellant] to handle a faulty chain;
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> (ii) Requiring the [appellant] to climb on to the truck;
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> (iii) Failing to ensure that it was safe before instructing the [appellant] to carry out his duties working from the top of the said truck;

(iv) Allowing the [appellant] to carry out a duty for which he was not trained or had the know how;

(v) Exposing the [appellant] while he was engaged upon the work to an unnecessary risk of damage or injury from physical contact with the said faulty chain while it was being operated by the [appellant] which they knew or ought to have known;

(vi) In the circumstances failing to provide and/or maintain a safe and proper system of work

(vii) Allowing the [appellant] to work in an unsafe area; and

(viii) Causing or permitting the [appellant] to fall 16 feet from the ground;

(ix) The [appellant] will further contend that the fact that the chain broke in itself gives rise to presumption of negligence on the part of the [respondents]."

[5] In "further amended" particulars of claim the appellant asserted that further or in the alternative the accident was caused by breaches on the part of the respondents, their employees or agents, of their statutory duties under the Workmen's Compensation Act 1938. The particulars of the breach of statutory duty were as follows:

"(i) Failed to provide a safe place of work;

(ii) Failed to provide and implement a safe system of work;

(iii) Failed to provide sidemen to carry out the said duty of unleashing the chain;

(iv) failed to supervise the [appellant] adequately or at all"

[6] The learned trial judge heard the evidence in this matter over two days, 8 and 9 May 2017. In her reasons for judgment, which are unreported, the learned trial judge

noted that the appellant had, on his own evidence, stated that he had been employed to the respondents' haulage company as a driver. She noted that he admitted that he had operated the truck in breach of company policy by driving the truck alone, delivering the cane alone and releasing the chain himself. He agreed that he took a chance on the day of the incident of delivering the cane without the sideman.

[7] The learned trial judge accepted the evidence of the respondents about the system of work which was in place. The policy was for the appellant to bring in the truck and park it in the garage if the sideman, who was assigned to assist on the truck, was absent and for the appellant to report the absence of the sideman. The appellant was under no obligation to get the cane to the factory if the sideman was absent. This policy was communicated to the appellant verbally when he first started the job and at meetings with the workers at the start of the crop.

[8] The respondents said that the appellant was to work with a sideman at all times since it was the sideman who was responsible for releasing the chain on top of the truck and not the appellant. They maintained that the chain was not defective and that the appellant had, in any event, acted outside the course of his employment for which they could not be liable.

[9] The learned trial judge found that the appellant chose to disobey the instructions to bring in the truck in the absence of a sideman and chose instead to climb atop the truck and to release the chain himself. She also found that the appellant knew that climbing atop the truck was not his job. Her ultimate conclusion was that the appellant

was the author of his misfortune. She found him to be an unreliable witness and a stranger to the truth.

[10] The learned trial judge also found that there was not one scintilla of evidence of a faulty chain on the appellant's case. She found that the appellant had "led no evidence to establish his qualifications as an expert in the field of faulty chains nor did he call as a witness, anyone who possessed that expertise".

[11] The grounds of appeal were as follows:

> "1. The learned Judge erred in law and in fact by finding that the Respondents were not negligent or breached their duty to the Appellant as his employer;
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> 2. That the learned judge took evidence and conclusively decided as to the safe system of work by the Respondents by no more than their words that "there would be no work for the [appellant] if his sideman was absent".
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> 3. That the Judge failed to apply the law properly to the facts;
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> 4. That the Judge failed to take into consideration the lack of evidence on the part of the Respondents in regards to their duty to the Appellant as his employers;
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> 5. That the Judge failed to adequately deal with the evidence;
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> 6. That the finding that the Appellant was under no obligation to get the cane to the factory if there was no Sideman is against the weight of the evidence;
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> 7. The learned Judge erred in law and in fact by finding that the cases cited in her Judgment are similar to the Appellant's case;

> 8. That the finding that the Appellant did not prove his case on a balance of probabilities is against the weight of the evidence."

[12] The main thrust of the appeal was a challenge to the findings of fact made by the learned trial judge. It is well settled that where the challenge in an appeal is to the findings of fact of a trial judge this court will not lightly interfere and will only do so where it is shown that the judge was "plainly wrong" in his conclusions on the evidence presented (see **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303 and **Watt v Thomas** 1947 1 All ER 582).

[13] Mrs Dixon, on behalf of the appellant, took on this task by pointing largely to the evidence of the respondents and noting what she described as inconsistencies in their evidence which she opined should be viewed as "employers' attempts to cover their back".

[14] Counsel opted to discuss the first six grounds of appeal together under two main headings. The first major plank of her submissions was that the appellant was acting in the course of his employment. Counsel did not seek to challenge the evidence that a sideman was the person tasked to release the cane from the appellant's truck but instead urged that the respondents were at fault for failing to ensure that there was always a sideman to assist the appellant. She submitted that the learned trial judge should have fully examined the legal considerations of the appellant's admission that he was doing the job of driver and sideman before concluding that he had not acted within the course of his employment.

[15] The second plank of counsel's submissions was that the respondents failed to discharge their common law duty of care to the appellant by not providing a safe system of work. She submitted that the learned trial judge erred in the acceptance of the evidence of the respondents, without more. Counsel contended that the evidence did not show that there was any system of work. She further contended that there was no supervision of the sideman by the respondents.

[16] Counsel submitted that it was the duty of the respondents to have known that the appellant and perhaps other drivers performed the role of drivers and sidemen and to take steps to ensure it was not being done. She submitted that had the learned trial judge "scrutinised the evidence with closer eyes, it draws the reasonable inference that the respondents knew but turned a blind eye to the lack of adequate staff and thus a blind eye to the risks of untrained men performing the duties requiring specific skills and training". Counsel concluded on this issue that there was a failure by the respondents to have a system which itself reduced the risk of injury from the "appellant's foreseeable carelessness". It was also counsel's submission that using the "but for principle" it was clear that but for the absence of the sideman the accident would not have occurred.

[17] Mr Clue, in response on behalf of the respondents, was content to point to the evidence of the appellant which he contended clearly established that but for the appellant's decision to do the work assigned to the sideman, he would not have been injured. Counsel relied on the decision of this court in **Wayne Ann Holdings (T/A**

Superplus Food Stores) v Sandra Morgan [2011] JMCA Civ, where at paragraph [17] Harrison JA, writing on behalf of the court, had this to say

> "In a negligence action, a legal burden is cast on a claimant to prove his case on the balance of probabilities and this burden remains throughout. If he establishes proof of negligence on the part of a defendant the burden shifts to the defendant to give an explanation as to how the accident happened.
>
> ...a legal burden is placed on a claimant to prove negligence and not on a defendant to disprove it. If facts are proven which raise a prima facie inference that an accident resulted from the failure of a defendant to exercise reasonable care, then the claimant's action will succeed unless the defendant, proffers an explanation which is sufficient to displace the prima facie inference that he had failed to take reasonable care."

[18] Counsel submitted that, at the end of his case, the appellant had failed to prove any negligence on the part of the respondents. He contended that, in any event, the learned trial judge was entitled to accept the evidence from the respondents that a system was in place which was adequate in the circumstances to ensure the appellant's safety once the appellant did what he was employed to do. Counsel further submitted that where the appellant had failed to adhere to the company's policy the respondent's obligation of their duty of care ended.

Discussion

[19] In reviewing the evidence of the appellant the first fact that I found must be noted was that in his witness statement he stated that he was employed to the respondents' company as a tipper truck driver. He went on to explain that on the day in question he had "no choice but to release the chain [himself] because the sideman who

was employed to release the chain was absent from work and no one was sent in his place". Thus from these assertions in his witness statement, it seemed to me that the appellant was clearly acknowledging an awareness that he had in fact stepped outside of the role for which he was employed to perform a task that eventually led to his accident.

[20] Under cross-examination he acknowledged that each truck was assigned a sideman and that the roles of the sideman and the driver were different. He accepted that as a driver he was just to drive the truck into the field and collect the cane. He further agreed that the sideman was to fasten the cane onto the body of the truck and was the one who had received training to carry out that task. Significantly, the appellant had also agreed that the respondents had given him instructions that his role, once the cane was taken to the factory, was to "tip off the cane after the sideman unleashes the chain".

[21] Further the appellant had admitted that his concern that day was that if he made no trips to the factory with cane he would not have been paid. He went on to accept that the task the sideman had to perform was a technical job for which he had received no training. Ultimately, he agreed that he took a chance when he went to work without the sideman that had been assigned to work on his truck although he said he had done so without telling the respondents because they were not there and he had no means to contact them.

[22] Despite the valiant effort on her part, Mrs. Dixon was unable to demonstrate that the learned trial judge was plainly wrong in arriving at her decision that there was no negligence on the part of the respondents. There was sufficient evidence to support the learned trial judge's findings especially that the appellant had been the author of his own misfortune on his evidence that he took a chance to perform a job he was not trained or employed to do. Counsel for the appellant failed to advance any arguments that convinced me that the findings of the learned trial judge should be disturbed.

[23] It was for these reasons that I concurred that the appeal was therefore to be dismissed with costs to the respondents to be taxed if not agreed.

FOSTER-PUSEY JA

[24] I have read in draft the reasons for judgment of P Williams JA and I agree with the reasoning therein as it accords with my own reasons for concurring with the order made on 20 June 2019.