GIOGIO FRASCHINI AND MOTOR PARTS INDUSTRIES (COPPERBELT) v ATTORNEY-GENERAL (1984) Z.R. 29 (S.C.)

SUPREME COURT
GARDNER, J.S., MUWO, J.S., AND BWEUPE, A.J.S.
31ST JULY, AND 3RD OCTOBER, 1984
(S.C.Z JUDGMENT NO. 12 OF 1984)

Flynote
Tort - Master and servant - Course of employment - Onus of proof.
Tort - Master and servant - Course of employment - Proper test.

Headnote
A driver who was an employee of the Government of the Republic of Zambia was sent from Chipata to Lusaka on business. His instructions were that during his stay in Lusaka he had to park the vehicle after 1700 hours. Contrary to those instructions the driver drove the vehicle at midnight and was involved in an accident. There was no doubt that the accident was caused by his negligence, but the trial court held that an action against his employers could not succeed on the ground that having driven outside the hours permitted by his employers, the driver could not be said to have been driving in the course of his employment. The plaintiffs appealed.

Held:
(i) If the servant is a servant of a particular class and the act complained of was one which would in ordinary course be within the scone of the employment of servants of that class, this is sufficient to establish a prima facie case that the act complained of was committed by the servant in the course of his employment, and the onus of proof then shifts to the owner to show that the employee was acting outside that scope.
(ii) The true test whether or not a servant is acting in the course of his employment can be expressed in these words: was the servant doing something that he was employed to do?
If so, however improper the manner in which lie was doing it, whether negligent or fraudulent or contrary to express orders, the master is liable.

Cases cited:
(1) Hewitt v Bonvin, [1940] 1 K.B. 188.
(2) Laycock v Grayson, 55 T.L.R. 698.
(3) Storey v Ashton, [1969] L.R. 4 Q.B. 476.
(4) Greer v Brightside Foundry and Engineering Co. Ltd. [1949] 35 B.W.C.C. 9.
(5) London County Council v Catter - moles, (Garage) Limited [1952] All E.R. 582.
(6) Hilton v Thomas Burton (`Rhodes) - Invited, [1901] 1 W.L.R. 705

Other works referred to:

Halsbury's Laws of England, 3rd Edn. Vol. 28, P. 76, para. 78.

For the appellant: H.H. Ndhlovu, of Jaques and Partners.
For the Respondent: B.L. Goel, State Advocate.

Judgment

GARDNER, J.S.: delivered the judgment of the court.

This is an appeal against a judgment of the High Court dismissing the appellant's claim for damages arising out of a motor accident caused by the respondent's driver on the grounds that such driver was on a frolic of his own at the time of the accident. In this judgment we will refer to the appellants as plaintiffs and the respondent as defendant respectively.

The facts of the case were as follows: At 23.50 hours on 15th August, 1975, the first plaintiff was driving a car belonging to the second plaintiff in Lusaka along the Great East road towards the Kabwe roundabout. The defendant's driver was driving the defendant's Land - Rover in the same direction but failed to keep in his lane of the road and collided with the plaintiff's vehicle causing damage. There was no doubt that the accident was caused wholly because of the negligence of the defendant's

driver. Subsequent to the accident the defendant's driver was convicted of drunken driving and the defendant's defence to the claim was that the driver was on a frolic of his own and was therefore not acting in the course of his employment at the time of the accident.

The defendant called one witness, the transport officer from Chipata Provincial Medical Officer's office, who said that he instructed the department's driver to collect some oxygen cylinders from Lusaka. The driver was to take a Land - Rover and left Chipata at 0800 hours in the morning of the 13th of August, 1975, to collect the cylinders, to spend one night only in Lusaka and to return thereafter to Chipata. The driver had instructions to park the Land - Rover in Lusaka at the University Teaching Hospital, Medical Stores or Chainama Hills Hospital after 1700 hours. The witness gave evidence that the driver could not have been returning to Chipata when the accident happened, because the oxygen cylinders had not yet been collected and were in fact collected by someone else some three days after the accident.

The learned trial commissioner in the course of his judgment commented as follows:

> "If therefore Chisale (the defendant's driver) was just arriving in Lusaka, he would clearly be acting in the course of his employment and the fact that he had stopped somewhere for a drink would be irrelevant as long as he had resumed being on his employer's business when the accident occurred. "

The learned trial commissioner went on to say that in the present case the driver was drunk and was driving the vehicle when it should have been parked. He then said that the vehicle was coming from the direction of Kabwe road and the possibility that the driver was just arriving fom Chipata did not

arise, since Kabwe road is not the way from Chipata. Unfortunately the learned trial commissioner had misheard this part of the evidence, and counsel for both parties agreed that in fact the evidence was that the driver was coming from the direction of Chipata and both vehicles were driving in the same direction. After a preliminary hearing the case was therefore sent back to the learned commissioner for a review of his judgment in light of the agreed evidence.

Subsequently the learned commissioner, who was then the learned Acting Chief Justice, reviewed his previous judgment and delivered a ruling in the light of the agreed evidence that the defendant's driver was in fact driving from the direction of Chipata. A ruling was then delivered in which it was said.

> "The road which I had erroneously thought to be the one on which the defendant's driver was travelling had of course been a factor in my decision . However, it was not the only factor. I agree that the place of accident was inconclusive. It only remains to be seen whether on the remainder of the factors which I had set out I would still say he was on a frolic. As already stated, the defendant's driver was drunk which shows that he had interrupted his course of employment at some stage prior to the accident. He was driving the vehicle at midnight when he had instructions to always park the car after 1700 hours either at Chainama Hills Hospital or the University Teaching Hospital or at the Medical Stores. The defendant's driver did not follow this instruction and, despite the amendments, I am still of the view that he was at the material time on a frolic of his own . . ."

It is noted that reference was made to " the road which I had erroneously thought to be the one on which the defendant's driver was travelling", and "I agree that the place of accident was inconclusive". In fact there was no error in relation to the road. The error related to the direction in which the driver was travelling, and although the place of the accident may have been inconclusive it was of course material in considering whether the driver was travelling on the right road in the right direction towards the right parking destination, which could be evidence that he was driving in the course of his employment. In this connection counsel for the plaintiffs and the defendant both agreed that the Medical Stores, referred to as being one of the approved parking places for the driver, was situated in the Lusaka industrial area, and a person travelling from Chipata along the Great East Road towards Medical Stores would, in the course of his journey, pass through the place at which the accident occurred.

In order for the plaintiff to succeed in a claim for damages against the defendant it is of course necessary to establish that the defendant's driver was employed as a driver, and that the accident occurred while he was driving in the course of his employment. The only evidence that was called to assist in deciding the issue of whether or not the driver was in the course of his employment was that of the only defence witness, Mr Mwansa, who was a transport officer in charge of the driver. The driver himself did not give evidence.

The evidence of the transport officer establishes that the driver left Chipata at 0800 hours on the 13th August 1976, and that he was going to Lusaka to collect oxygen cylinders from Zambia Oxygen Company. The witness gave evidence that the driver was expected back on the 15th August

after spending one night in Lusaka. This court takes judicial notice of the fact that the distance between Chipata and Lusaka is 569 kilometres. Counsel for the defendant argued that the driver should have reached Lusaka before 1700 hours on the 13th August, but there was no evidence to this effect from the transport officer. If the driver could have arrived in Lusaka after one day's travelling, it is difficult to understand the transport officer's evidence that he expected the driver back on the 15th of August instead of on the evening of the 14th of August. However, be that as it may, there was obviously a long delay between the time that the driver left Chipata and the time of the accident at 2350 hours on the 15th August, 1975, and there is no evidence to indicate what transpired to cause the presence of the driver at the place of the accident at such a late hour two days after he left Chipata. There was no evidence to indicate the mechanical condition of the Land - Rover

which might have been of some assistance in finding whether or not there had been a mechanical breakdown. The only evidence was that the accident occurred late at night two days after the driver, as argued the defendant, should have arrived in Lusaka, and that the driver was so drunk at the time of the accident that he was convicted of drunken driving.

Mr Goel on behalf of the defendant has asserted before this court, that the onus is on the plaintiff to show that the driver was driving in the course of his employment at the time of the accident. He argued that, in default of evidence as to what exactly occurred, the driver's drunkenness and the late hour support a presumption in favour of the defendant that the driver was on a frolic of his own. Mr Goel supported his argument, that the onus was on the plaintiff, by reference to the case of *Hewitt v Bonvin* (1), in which case a son had permission to drive his father's motor car and used it for his own purposes to drive two girl friends. Due to the negligent driving of the son a friend who accompanied the party was killed, and it was held by the Court of Appeal in England that the son was not driving the car as his father's servant or agent, and that therefore the father was not liable. In the course of his judgment MacKinnon L. J., observed:

> "If in this case the plaintiff is to make Bonvin, the father, liable for the Vantages he claims, he must establish that the son was driving the car as the servant of his father, and in the course of his employment."

Mr Goel argues that the last phrase indicates that the onus is on the plaintiff to establish that the driving is in the course of employment. We respectfully agree with MacKinnon L. J. that on the facts of that case the onus was on the plaintiff to establish that the son was driving in the course of employment. The general law relating to the onus of proof is set out in Halsbury's Laws of England (3rd Edition) Volume 28 p. 76 as follows:

> "78. *Proof of vicarious liability.* If it is sought to make a master liable for the negligence of one who is proved to have been employed by him as a servant of a particular class, and the act complained of was one which would in the ordinary course be within the scope of the employment of servants of that class, this is sufficient to establish a prima facie case that the act complained of was committed by the servant in the course of his employment...."

This principle was followed in the case of *Laycock v Grason* (2) where Asquith, J. held:

> "Where a plaintiff, who has been injured by the negligent driving of a motor-car by an employee of the owner, establishes that the driver had the owner's authority to drive the car for some purposes, presumption is raised that the employee was acting within

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> the scope of his employment, and the onus of proof then shifts to the owner to show that the employee was acting outside that scope."

In the present case the evidence established that the defendant's driver was employed as such at the time of the accident and had set out from Chipata to drive a vehicle on the defendant's business. He was therefore proved to have been employed by the defendant as a servant of a particular class, namely, driver, and the act complained of, that is the driving of the defendant's vehicle, was one which would in the ordinary course be within the scope of his employment as a driver. On the authorities therefore the onus was on the defendant to prove that the driver was on a frolic of his own if such was the case.

As we have seen the journey to travel to Lusaka on the Great East Road past the point at which the accident occurred was authorised by the defendant and the only evidence to support the defendant's claim that the driver was on a frolic of his oven was that the accident took place late at night on the 15th August, that in the ordinary course of events the driver would have been expected to arrive in Lusaka. by the evening of the 13th August, that the driver was drunk and he should not have been driving after 1700 hours because he had instructions to park at one of the three specified places before that hour. So far as the time at which the driver should have parked is relevant in considering whether a breach of any instructions in this respect, would take the driver outside the course of his employment, the evidence of the transport officer was as follows: "If the accident occurred at midnight on 15th of August, I can say the driver was not on duty. I say this because usually when a driver comes to Lusaka when it is about 1700 hours the driver must park his vehicle either at UTH or Medical Stores or Chainama Hospital. We usually tell drivers that they must park their cars at 1700 30 hours". And later in cross-examination, "On the 15th of August, 1975, I did not telephone Lusaka to enquire. I was still waiting for him to come even if it was at night." And further, "If a driver wishes to start off after 1700 hours if he was delayed he can do so." From this evidence it is apparent that, despite the alleged prohibition on driving after 1700 hours, the driver had a discretion to travel after that hour.

As was said in the first High Court Judgment, if the driver was just arriving in Lusaka he would clearly be acting in the course of his employment and the fact that he had stopped somewhere for a drink would be irrelevant as long as he had resumed being on his employers' business when the accident occurred. This is in accordance with the established case law on the subject. One of the earliest cases laid down the simple test to be applied. In *Storey v Ashton* (3), the defendant sent his carman and a clerk with a horse and cart to deliver some wine and bring back some empty bottles. On their return, when about a quarter of a mile from the defendant's office, the carman, instead of performing his duty and driving to the defendant's office, depositing the bottles and taking the horse and cart to the stables in the neighbourhood, was induced by the clerk, it being after business hours,

to drive in another

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direction on business of the clerk and whilst they were thus driving, the plaintiff was run over owing to the negligence of the Carmen. It was held that the defendant was not liable, for the carman was not doing the act, in doing which he was guilty of negligence, in the course of his employment as servant. In that case Lush J. observed.,:

> "The question in all such cases as the present is whether the servant was doing that which the master employed him to do.'

The principle that it is possible for a servant to go on a frolic of his own but to re-enter upon his duties in the course of his employment was followed in the case of *Creer v Brithtside Foundry and Engineering Company Limited* (4). In that ease a workman was employed as a fitter's mate by the defendants. His duties included the driving of the defendant's cars and on a certain dart, repair work had to be done at Alnwick thirty-three miles from Newcastle the defendant's headquarters. The workman was told to drive another man to inspect the job and to decide whether the other man needed the workman's help. If he did not the workman was to drip straight back to the defendant's headquarters at Newcastle. The two accordingly drove to Alnwick where it was decided that the workman's help was not necessary and he was free to return straight to Newcastle. On his return the workman deviated a short distance from the direct route and called at a public house, paid visits to his relatives and after having tea, drove back to the main road from Alnwick to Newcastle. Whilst he was driving on the main road towards Newcastle the car was involved in a motor accident and the workman was killed. In a claim for workman's compensation the County Court judge held that the work- man eves in the course of his employment and the Court of Appeal upheld the decision of the judge. In the course of his judgment the learned County Court judge said "had the deceased workman reached Newcastle, and then, instead of taking the car back to his employer's premises, made some journey on his own account, he would no doubt have passed right outside the course of his employment, and the mere fact that he finally took the car back from his frolic to his employer's premises, meeting with an accident in so doing would not by itself have brought him back into the course of his employment."

In the present case if there were evidence that the driver had reached Lusaka and then deviated from his route, as in the hypothesis referred to by the learned County Court judge, and as in the case of *Storey v Ashton*, we agree that there would be no doubt that, even if he drove back from his frolic towards the Medical Stores this would not have brought him back into the course of his employment. There is of course no evidence as to what the driver was doing before the accident and certainly there was no evidence that he had arrived in Lusaka some time before the accident and spent his time on a frolic of his own before rejoining the Great East Road prior to the accident. There is however evidence that he was over a day late and should, in the ordinary course of events, have already parked his vehicle prior to 1700 hours on the day of the accident. As we have already said the onus of proving that the driver was not driving in the course of his employment is on the defendant, and it cannot

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be said that the evidence of the driver's drunkenness, lateness and failure to park at a specific place by a specified time shifts the onus to the plaintiffs so that they have to prove that the driver had not arrived in Lusaka earlier and had not spent the time until the accident on a frolic of his own. The onus is still on the defendant and, in this connection, we cannot lose sight of the fact that, apart from the driver's being intoxicated there may, on the long journey from Chipata to Lusaka, have been other reasons such as accidents or breakdowns to account for the driver's late arrival. As was said in the first judgment of the trial court, the drinking was irrelevant as long as the driver had resumed being on his employer's business when the accident occurred. So far as the failure to park the vehicle by 1700 hours is concerned we have observed that according to DW. 1 the transport officer, the driver had a discretion to travel after that time at least on the return journey to Chipata and, although in the words of that witness, the driver was "usually" told to park by 1700 hours, it could not be said that, if by reason say of a breakdown the driver was late in arriving in Lusaka, but on his correct route to an authorised parking place, he would be in breach of his instructions to park by a certain time. Even if he were in breach of instructions to park by a certain time he would not necessarily be on a frolic of his own. There are a number of cases in which it has been held that the doing of a prohibited act may be within the scope of employment. In the case of *London County Council v Cattermoles* (*Garage*) *Limited* (5) for instance a general garage hand, who was employed to move motor cars by pushing them and had been forbidden to drive them because he was not competent and had no licence, had to move a van away from some petrol pumps and in so doing, contrary to instructions, entered the van and drove it on to the highway where an accident occurred. It was held by the Court of Appeal that although the garage hand used a prohibited means of moving the van it was his job to move the van and he was therefore in the course of his employment. Further, in the case of *Hilton v Thomas Burton* (*Rhodes*)-*Limited* (6) Diplock, J. said at p. 707:

> "I think that the true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however, improper the manner in which he was doing it, whether negligent... or fraudulent... or contrary to express orders . . . the master is liable."

In the present case the defendant's driver was employed to drive a vehicle from Chipata to Lusaka. If, whatever his actions on the way, he was just arriving in Lusaka at the time when the accident occurred, he was still doing what he was instructed to do, and his failure to park by certain time did not take his driving outside the course of his employment. In our view there is nothing in the circumstances of this case to shift the onus to the plaintiffs. The drunkenness of the driver and his late arrival at the place of the accident certainly aroused suspicions that he may have been on a frolic of his own but it cannot be said that those facts proved on a balance of probabilities that the driver was not in the course of his employment. In view of the fact that the driver was charged

and convicted of drunken driving he must have been available for questioning by the defendant to obtain evidence of what he had been doing prior to the accident. No such evidence was available before the trial court and consequently there was no evidence that the driver was on a frolic of us own.

We would emphasise that, since the onus is on the defendant, it cannot be assumed that because of the lateness of the hour the driver had arrived in Lusaka much earlier and had been travelling around the city on a frolic of his own prior to the accident. In view of the fact that there are possible other reasons for the driver's lateness, such lateness would not on its own take his driving outside the course of his employment. It is the duty of the Court, having regard to the onus of proof, to assume that the driving was within the course of employment.The defendant has Lot discharged the onus of proving otherwise.

The appeal as to liability is therefore allowed and we give judgment in favour of the plaintiffs.

As to damages, Mr Goel has pointed out that there were discrepancies in the figures claimed for the cost of repairs to the plaintiff's motor vehicle. In the first letter dated 6th January,1976, setting out the amount of damages, the plaintiff's advocates claimed K968.26. By their letter dated the 19th of February 1976, the plaintiff's advocates pointed out that they had mistakenly claimed in respect of one invoice only and the total amount of their clients' claim was K1,767.95. Subsequently after the issue of the writ, the plaintiffs obtained further estimates dated the 18th of November,1976, which amounted to a total of K2,223.61. Mr Goel has pointed out that the evidence as to whether the repairs were carried out and paid for or whether the car was written off and valued as salvage at K700.00 is the subject of great confusion in the plaintiff's evidence as indicated in the correspondence and the oral evidence of the first plaints.

Mr Ndhlovu on behalf of the plaintiffs has conceded that the third figure of K2,223.61 was a figure arrived at after the cost of labour and spare parts had increased, and he did not press for his claim to be decided in that amount. He pointed out however that the figure contained in the letter dated the 19th of February 1976, was the correct figure of his client's claim and, although it was higher than the first amount claimed there was nothing sinister in this; it was merely a genuine mistake. He pointed out that the figure of K1,767.95 had been acknowledged without admission of liability by the defendant and that the vehicle was available for inspection by the defendants expert witness at that time. He argued that there was nothing to suggest that the latter figure was improper or inflated, and that the estimates which had been submitted with the letter substantiated the figure claimed and were sufficient to support a finding as to damages.

We agree with Mr Goel that the proof of damages in the evidence led before the trial court was not very satisfactory, but we acknowledge that the estimates submitted by the plaintiff's advocates for the defendants are

some evidence to support the claim for damages. As Mr Ndhlovu has conceded that the final figure claimed may have been inflated and he therefore abandons the claim in that amount, we are satisfied that justice would be done by awarding damages in the sum of K1,767.95. We accordingly award damages to the second plaintiff in the sum of K1,767.95 with costs to the plaintiffs in this court and in the court below.

Appeal as to liability of the employer allowed

IN THE MATTER OF SECTION 53 (i) OF THE CORRUPT PRACTICES ACT, NO. 10 OF 1980 AND IN THE MATTER OF ARTICLES 20 (7) AND 29 OF THE CONSTITUTION AND IN THE MATTER BETWEEN:
THOMAS MUMBA - APPLICANT