

134

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)
AT LAUTOKA

000133

Appellate Jurisdiction
Civil Appeal No. 7 of 1978

BETWEEN:

1. GANESH s/o Ram Asre
 2. RAM ASRE s/o Balai
- Appellants

-and-

1. MAHMOOD ALI
 2. ANWAR ALI
 3. IMJAD ALI
- } All sons of
Habib Ali
Respondents

Dr. Sahu Khan, Counsel for the Appellants
Mr. M.T. Khan, Counsel for the Respondents

JUDGMENT

This appeal arises out of an action between motorists who were involved in a collision on the Ba/Tavua Road. A Toyota van, driven ^{by} RAM ASRE ran into the rear of a stationary taxi. No evidence was given as to the time the accident occurred but it is obvious that it occurred at night ^{time}. The owner of the taxi was at the scene about 12 midnight.

P.W.3, the taxi driver, stated that after the accident two boys and a woman got out of the van apart from the driver Ram Asre.

Some time later, Ram Asre, pleaded guilty in the Magistrate's Court to careless driving, and in the civil action instituted by the taxi proprietor in the Magistrate's Court it was conceded by the defendant (appellant) that Ram Asre was negligent.

Ram Asre was not the owner of the Toyota van which he was driving at the time of the accident. It is owned by one Ganesh who is the son of Ram Asre and Ganesh was sued on the basis that as he was the owner of the Toyota van then the driver (his father) was his

servant and/or agent at the material time. The learned Magistrate found for the plaintiff and the defendant now appeals on the ground that the Magistrate erred in law in fact in holding that Ram Asre was the servant and/or agent of his son Ganesh.

Ram Asre, the driver, was not called to give evidence and Ganesh, the owner admitted in cross-examination that his father Ram Asre is an undischarged bankrupt and he has enjoyed this protection from his creditors for almost 30 years. However, his son, Ganesh, runs a thriving business in Tavua in which his father, Ram Asre assists.

Ganesh stated that he is single and lives with his parents as part of a single family unit. The Magistrate took the view that the bankrupt Ram Asre had virtually abdicated his responsibilities as head of the family and permitted Ganesh to assume the financial burden of maintaining his parents and their children. He said that his father was free to use the van whenever he wished provided he, (Ganesh) did not require it for his own purposes.

In his evidence-in-chief Ganesh said of his father taking away the car on the day in question, which was on a Sunday,

"I do not know where he had gone. He went on his own. On his own business. It was a Sunday. My mother and young sisters went with him."

He also indicated that his mother's young brothers had also been in the van.

In cross-examination he said,
"On the Sunday I left the van at home.----I did not know he had it until after the accident. He went to a marriage ceremony. In the afternoon when he came back I came to know."

In re-examination he said the wedding was at an uncle's at Lautoka.

000135

The learned Magistrate did not believe Ganesh's evidence that he did not know that his father was taking the van that Sunday. Having regard to the fact that Ganesh's father, mother, sisters and nephews were in the van it is not surprising that the Magistrate drew the conclusion he did. If, as Ganesh said, they went to a wedding held at his uncle's it would be rather strange if Ganesh were not aware of the wedding and of his family's intention to attend it. The learned Magistrate saw and heard the witnesses and I cannot take the view that his disbelief of Ganesh's evidence was unreasonable.

The learned Magistrate in his judgment, said, "I have no doubt that the son knew and approved of the vehicle's use for the purpose of conveying members of his family to the wedding at his uncle's house."

He found that the son Ganesh was vicariously liable for his father's negligence.

Dr. Sahu Khan for the appellant, Ganesh, submitted that the son/father relationship did not, in itself, raise any presumption of agency or of master and servant. He argued that there was no business association proved between father and son and no evidence that the son was in any way concerned or interested in the wedding.

A perusal of the record indicated that there is no direct evidence that the father, mother and children travelled to a wedding in the van. None of them gave evidence as to where the van had been or the purpose of the journey. Ganesh, in evidence, said that "he came to know" they had been to the wedding in Lautoka. Of course his evidence on that

aspect is simply hearsay but the plaintiff in the Court below raised no objections to the hearsay and in his submissions proceeded on the basis that the van had been used to take the family to the wedding at Lautoka. The appeal before me has also proceeded on that basis.

In Rambarran v. Gurucharan 1970 1 A.B.R. 749 the Privy Council considered the liability of a car owner as principle where a third party is driving the owner's car. They accepted the principle, p.751 'h' that

"Where no more is known of the facts, therefore, than that at the time of an accident the car was owned by A but not driven by A it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence."

They pointed out at p. 753 'g' that A can repel the inference that the driver is his agent in one of two ways:-

"One by giving or calling evidence as to (the driver's) object in making the journey and establishing that it served no purpose of (the owner)."

The other was to state that the driver was not using the car for any purpose of the appellant and then show by cogent evidence that this was so e.g. by showing that the appellant was completely unaware that the car was on the road and that e.g. the driver was using it entirely for his own purposes.

Lord Denning M.R. reviewed numerous authorities in Launchbury v. Morgans 1971 2 W.L.R. 601 and he approved the following statements which appears at 607 G,

"The law puts an aspecial responsibility on the owner of a vehicle/^{who}allows it to go on the road in charge of someone else, no matter whether it is his wife, his servant, his friend or anyone else. If it is being used in the owner's interest the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern."

His Lordship gave illustrations of that proposition by reference to husband and wife and a car in the husband's name which the wife had permission to use at any time, similiar to the father, Ram Asre, in the instant case. He stated at p. 608 that the wife in using the car to take the husband to work, children to school, and going shopping was clearly the agent of her husband. In all those matters the husband had some interest in the use to which the car was put. His lordship went to the extent of saying that if the wife went to a coffee party she would drive there as her husband's agent. He likened the wife's position to that of the chauffeur whom the husband could not afford to employ but who on all the foregoing occasions, if a chauffeur existed, would be the husband's agent. No doubt that would also cover her taking the children to a birthday party, a wedding or such like social functions.

In the instant case the wedding was at the home of the owner's uncle at Lautoka. Ganesh, (the appellant) used the term uncle and it is somewhat late at this stage to suggest, as Dr. Sahu Khan did, that the term "uncle" could cover all types of unrelated persons and the marriage was not necessarily that of a close blood relative. Could one be expected to conclude that Ganesh, as the mainstay of his parents' home and children was not aware that a marriage was taking place at his uncle's? His parents, sisters and nephews were aware

000138

6.

of it? Clearly they intended to go to the wedding and the van was no doubt the obvious mode of transport. In my view, the Magistrate was fully justified in concluding that Ganesh, as financial head of the family had an interest in the conveyance of his mother, sisters, nephews and father on the journey of 30 or more miles from Tavua to Lautoka. They could go to Lautoka by bus or by taxi but whatever the mode of transport adopted there can be little doubt Ganesh would meet the cost of the transport charges. An alternative mode of transport was that the father RAM ASRE should take them there and back in the van which was at hand. In so doing I am of the opinion that the Magistrate was correct in holding that Ram Asre was Ganesh's agent.

In case it be held that I was wrong in accepting the hearsay evidence of Ganesh that the van had been used to transport his family to a wedding then I will approach the issue on the basis of the exclusion of that evidence. The acceptable evidence would then be that the parents, their children and the wife's young brothers were passengers in a van being driven by Ram Asre from the direction of Ba to Tavua. It ran into the rear of a taxi. There is in the absence of Ganesh's hearsay no evidence as to where it had been or where it was going. However, the law raises a presumption that RAM ASRE, driving with Ganesh's permission was the latter's servant or agent at the material time. The presumption can be rebutted by Ganesh showing that RAM ASRE was using the motor vehicle for a purpose in which Ganesh had no interest at all. I would think that the presumption would be strengthened by the fact that the driver was his father and that the passengers in the van were all members of Ganesh's immediate family, all or most of whom he was responsible for maintaining.

If one excludes the hearsay evidence of Ganesh that the van had taken them to a wedding in which he alleges he had no interest then there is no evidence as

7.

to what purpose the van was being used for. The assumption is that it was being used for some purpose in which Ganesh was at least partly interested. It is for him to rebut that presumption. If one excludes the hearsay there is no evidence as to the purpose for which it was being used. Accordingly on that basis Ganesh's appeal would also fail.

The second ground of appeal is that the evidence did not show that Ganesh owned AL 046 which according to the Statement of Claim was the registered number of the Toyota van. In evidence Ganesh stated that he owned AC 046. No doubt the Statement of Claim contained an error in reciting the number of the van as AL 046 instead of AC 046.

In the Statement of Defence Ganesh admitted that RAM ASRE was driving the van registered number AL 046 but denied that he was the owner of it. P.W.3, a policeman who went to the scene gave the number of the van as AC 046. There is no doubt that the van was properly described as a Toyota van; P.W.3 shows that RAMASRE produced a certificate of insurance which must have been for AC 046 and P.W.3 said it was in the name of Ganesh. It is admitted that Ram Asre was driving Ganesh's van. Whatever the number of the van it was clearly Ganesh's van and driven by Ganesh's father. There is little doubt that using the letter "L" instead of "C" in the Statement of Claim could be nothing more than an error.

In admitting in para 2 of the Statement of Defence that Ram Asre was driving AL 046 the defendant (Ganesh) fell into the same error as the plaintiff or was he was telling a deliberate lie, knowing full well that he had no car numbered AL 046. If it was a deliberate lie then he is guilty of contempt. One may deny things that are obviously in dispute e.g. negligence ownership, agency and so forth. But to deliberately lie as to facts the truth of which are known to the party pleading is contempt of Court.

8.

141
000140

That ground fails.

Ground III which alleges that the Magistrate's findings are insupportable on the evidence as a whole has been dealt with on the first issue which as been dismissed.

The appeal fails, The appellant will pay the respondent's (plaintiff's) costs.

LAUTOKA,

-(sgd.) J.T. Williams,

7th July, 1978

JUDGE