BANDOE *v.* JACOB

WEST AFRICAN COURT OF APPEAL (Foster-Sutton, P., Coussey, J.A. and Luke, J. (Sierra Leone)): June 17th, 1955
(W.A.C.A. Civ. App. No. 2/55)

[1] **Civil Procedure—appeals—procedure—amendment of grounds of appeal—further ground may be considered without amendment if justice of case warrants it—respondent must have sufficient opportunity to contest point:** While an argument that is not made the subject of a specific ground of appeal, or cannot arise under a general ground of appeal, will not normally be considered by the West African Court of Appeal in the absence of an application for leave to amend the grounds of appeal to add such argument, it may be considered under r.12(6) of the West African Court of Appeal Rules, 1950, provided the respondent is given sufficient opportunity of contesting the point, if it appears to the court that the justice of the case warrants it (page 409, lines 1–24).

[2] **Civil Procedure—pleading—matters to be specifically pleaded—defence of inevitable accident need not be specifically pleaded:** The defence of inevitable accident need not be specifically pleaded and is open to a defendant under a plea of no negligence (page 409, lines 32–35).

[3] **Courts—West African Court of Appeal—amendment of grounds of appeal—further ground may be considered without amendment if justice of case warrants it—respondent must have sufficient opportunity of contesting point:** See [1] above.

[4] **Evidence—burden of proof—negligence—defence of inevitable accident—once negligence prima facie established, burden on defendant to show accident inevitable:** Once a *prima facie* case of negligence has been established by a plaintiff, the burden is on a defendant wishing to set up the defence of inevitable accident to prove the cause of the accident and that the accident was inevitable in consequence of it, or to show all the possible causes, one or other of which produced the effect, and that with regard to any one of those possible causes the result could not have been avoided (page 409, line 40—page 410, line 12).

[5] **Evidence—previous proceedings—criminal cases—previous conviction on same facts—evidence of criminal proceedings inadmissible in civil action—contradiction between guilty plea and denial of negligence may be raised in cross-examination:** The fact that the defendant in a civil action has pleaded guilty in previous criminal proceedings arising out of the same facts is irrelevant to the subsequent civil action, although the defendant may be cross examined as to why he

admitted the charges against him and yet denies negligence (page 410, lines 19–28).

[6] **Tort—negligence—inevitable accident—burden of proof—once negligence prima facie established, burden on defendant to show accident inevitable:** See [4] above.

[7] **Tort—negligence—inevitable accident—defence need not be specifically pleaded—available to defendant on plea of no negligence:** See [2] above.

[8] **Tort—negligence—evidence—previous criminal proceedings arising out of same incident irrelevant to civil action—contradiction between guilty plea and denial of negligence may be raised in cross-examination:** See [5] above.

The plaintiff (now the respondent) brought an action against the defendant (now the appellant) in the Supreme Court to recover damages for injuries sustained and loss incurred as a result of the negligence of the defendant's servant.

The plaintiff hired a car from the defendant which was driven by a servant of the defendant. In perfect driving conditions and with no other car being involved the car left the road and crashed, injuring the plaintiff. The driver was charged with careless driving and driving a vehicle which was defective to his knowledge, and pleaded guilty. The plaintiff then instituted the present proceedings against the defendant to recover damages for negligence.

At first instance the defendant only pleaded the absence of negligence, but then sought to adduce evidence supporting the defence of inevitable accident. The Supreme Court (Kingsley, J.) ruled that this defence could not be set up where it was not specifically pleaded, and, after taking account of the conviction of the defendant's driver on a plea of guilty in the earlier criminal proceedings, gave judgment for the plaintiff.

On appeal by the defendant, he contended that the Supreme Court decision was against the weight of the evidence, and that the trial judge erred in law in taking into consideration the criminal proceedings arising out of the same incident. The West African Court of Appeal also considered whether the rejection by the trial judge of evidence supporting the defence of inevitable accident could be raised on appeal when it was not made the subject of a ground of appeal.

Cases referred to:

(1) *The Merchant Prince*, [1892] P. 179; (1892), 67 L.T. 251, applied.

(2) *Rumbold* v. *London C.C.* (1909), 25 T.L.R. 541; 53 Sol. Jo. 502, applied.

Legislation construed:

West African Court of Appeal Rules, 1950 (P.N. No. 17 of 1951), r.12:

"(5) The appellant shall not without the leave of the Court urge or be heard in support of any ground of objection not mentioned in the notice of appeal, but the Court may in its discretion allow the appellant to amend the grounds of appeal upon payment of the fees prescribed for making such amendment and upon such terms as the Court may deem just.

(6) Notwithstanding the foregoing provisions the Court in deciding the appeal shall not be confined to the grounds set forth by the appellant:

Provided that the Court shall not rest its decision on any ground not set forth by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."

C.B. Rogers-Wright for the defendant-appellant;
Edmondson and *Massally* for the plaintiff-respondent.

COUSSEY, J.A.:

This is an appeal from a judgment of the Supreme Court of Sierra Leone (Kingsley, J.) awarding the plaintiff damages for injuries sustained and loss incurred through the negligence of the defendant's servant, who was the driver of the defendant's motor car in which the plaintiff was a passenger.

The undisputed facts can be stated very briefly. The car had been hired by the plaintiff from the defendant. It was in sole control of the driver. While proceeding down an incline on a dry road in daylight with no traffic in the opposite direction, the car suddenly left the road on its wrong side, and after proceeding some distance along the bush verge of the road collided with a tree or mound which, violently arresting the car's progress, resulted in the plaintiff being thrown forward against the windscreen of the car, thereby causing wounds to the plaintiff, of which the most serious is the complete loss of his left eye.

The notice of appeal contains only two grounds of appeal which require consideration, namely, that the decision is against the weight of evidence, and that the learned trial judge was wrong in law in taking into consideration the conviction of the defendant's servant, the driver, in a magistrate's court on charges based on the accident.

In the course of his submission for the defendant, Mr. Rogers-Wright sought to argue vigorously under the first ground that there was an improper rejection of evidence consequent upon a ruling of the trial judge that the defence of inevitable accident was not open to the defendant upon the defence delivered and, therefore, no questions could be asked and, it follows, no evidence could be led to establish that defence.

We ruled at the time, after hearing Mr. Rogers-Wright at some length, that the argument was not open to the defendant under the general ground that the decision is against the weight of evidence, and that as it had not been made the subject of a specific ground of appeal there was no appeal as to this aspect of the trial. Further the defendant had not applied for leave to add the matter complained of as an additional ground of objection, and a verbal application made only when the difficulty was pointed out to Mr. Rogers-Wright was too late to be entertained. This was in conformity with r.12(5) of the West African Court of Appeal Rules, 1950. The hearing of the appeal was then concluded and it was adjourned for judgment.

Upon further consideration it appeared to us that the justice of the case demanded that consideration should be given to the point raised by Mr. Rogers-Wright as there is substance in it. Acting, therefore, under r.12(6) of the Rules, we invited Mr. Edmondson, counsel for the plaintiff, to answer the point raised by Mr. Rogers-Wright, which he did.

The hearing of the action took an unfortunate turn. Negligence having been alleged by the plaintiff and denied by the defendant, when counsel for the defendant sought to put to the plaintiff in cross-examination questions to found the defence that the accident was caused by a failure of the steering gear to operate, the court ruled that this line of defence "which savours of act of God" (meaning inevitable accident) had not been specifically pleaded and could not be taken. In the course of his judgment, however, the learned judge referred to *Rumbold* v. *London C.C.* (2), which decides that the defence of inevitable accident need not be specifically pleaded and is open to a defendant under a plea of no negligence, and the learned trial judge remarked that in coming to his decision he had therefore taken this line of defence into consideration.

But the fact remained that, governed by the ruling referred to above, the defendant did not lead evidence to establish inevitable accident. At the trial the position was that the plaintiff having established a *prima facie* case of negligence the onus was on the

defendant to prove inevitable accident. He had to show that the cause of the accident was one he could not avoid. In *The Merchant Prince* (1), a case of a ship's steam steering gear getting jammed, Lord Esher, M.R. observed ([1892] P. at 188; 67 L.T. at 253): "If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?" To sustain this defence a defendant must show what was the cause of the accident and show that the result of that cause was inevitable, or he must show all the possible causes, one or other of which produced the effect, and must further show with regard to any one of these possible causes that the result could not have been avoided: *per* Fry, L.J. (*ibid.*, at 189; 254).

But in his judgment the learned judge commented adversely to the defendant upon his failure to call evidence as to the condition of the motor car before or immediately after the accident to determine whether it could have been prevented by the exercise of reasonable care, and this without permitting such evidence to be called at the trial.

There is one further matter for comment. Passages of the judgment appealed from indicate that the learned trial judge may have considered the fact that the defendant's driver pleaded guilty to charges of careless driving and driving a vehicle defective to his knowledge as conclusive on the issues of negligence and inevitable accident. But the criminal proceedings were *res inter alios* so far as concerned the defendant, and negligence must be determined independently of the conviction, although the driver could be cross-examined as to why he admitted the charges laid against him if he was denying the blame.

In the circumstances the court is compelled to order a new trial. I would therefore allow the appeal, set aside the judgment of the court below and order that the action be heard *de novo* by another judge.

The defendant will have the costs of this appeal to be taxed. The costs of the abortive trial will follow the result of the new trial.

FOSTER-SUTTON, P. and LUKE, J. (Sierra Leone) concurred.

Order accordingly.