KABWE TRANSPORT COMPANY LIMITED v PRESS TRANSPORT (1975 LIMITED)
(1984) Z.R. 43 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AND MUWO, JJ.S.
5TH APRIL AND 2ND AUGUST, 1984
(S.C.Z. JUDGMENT NO. 10 OF 1984)

Flynote

Civil procedure - Evidence - Conviction - Evidence of - Admissibility in Civil proceedings.

Evidence - Criminal conviction - Evidence of - Admissibility in Civil proceedings.

Evidence - English practice and procedure - Zambia Evidence Act - Whether English practice applies.

Evidence - Sketch plan - Contents.

Headnote

During the hearing of this appeal two specific issues were raised: (i) whether evidence of previous criminal proceedings could be admissible in civil proceedings; (ii) whether it was proper for a sketch plan produced in, court to contain data which the original sketch plan prepared at the scene of the accident did not contain.

Held:

(i) It is of the utmost importance that all details end measurements should be inserted in the sketch plan at the tinge of viewing the scene of the accident.

Per curium:

(ii) Where there is a specific Act dealing with a matter of law, such as evidence, there is no default of legislation as envisaged by section 10 of the High Court Act and English practice and procedure does not apply. *Siwingwa v Phiri* (1979) Z.R. 145 disapproved.

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Cases cited:

(1) Baker v Market Harborough. Industrial Co-op. Society Limited, [1953] 1 W.L.R. 1472.
(2) Chanda v The People, (1975) Z.R. 131.
(3) Hollington v F Hewthorn anal Company Limited, [1943] 2 All E.R. 35.
(4) Siwingwa v Phiri, (1979) Z.R. 145.

Legislation referred to:

(1) Civil Evidence Act of England, 1968.
(2) Evidence Act of Zambia, Cap. 170.
(3) High Court Act, Cap. 50, s. 10.

For the appellant: A.M. Hamir, Solly Patel, Hamir and Lawrence.
For the respondent: J.H. Jerarey, D.H. Kemp and Company.

Judgment

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

This is an appeal from a judgment of a judge of the High Court. For convenience we will refer to the appellant as the plaintiff and to the respondent as the defendant as they were in the court below. The facts of this case were that the plaintiff's driver was driving on the Lusaka/Kabwe road. The driver was driving an articulated vehicle consisting of one mechanical horse and three trailers. In

the opposite direction the defendant's driver was driving a truck towing a trailer behind it. There was a collision as a result of which two persons in the plaintiff's vehicle were killed but two persons in the defendant's vehicle survived.

This case arises out of a claim by the plaintiff against the defendant for negligent driving as a result of which damage was caused.

The learned trial judge found that there was not sufficient evidence for him to decide which of the two drivers was to blame. He, therefore, in accordance with the recommendations laid down in the case of *Baker v Market Harborough Industrial Co-op Society Limited* (1), found that he had no alternative but to find that both the plaintiff's driver and the defendant's driver were equally to blame for the accident. He awarded fifty percent damages on each side.

Mr Hamir, on behalf of the appellant, has argued that the *real* evidence in the case indicates that both vehicles were driving towards each other and they were near the centre line in the road. The learned trial judge found that it was probable that both vehicles may have been driving near the centre line of the road. He found, however, that there was not sufficient evidence for him to decide whether or not one of the drivers was more to blame than the other, and that is the reason why he decided that each was fifty percent to blame. Mr Hamir, argued that, on the evidence as presented to the court, it was clear that both vehicles were approaching each other near the centre line of the road, and that, if the learned trial judge had been correct in his final analysis of the evidence, it must be accepted that both leading vehicles would have

sustained damage to their right hand off sides. He pointed out that, according to the photographs which were taken after the accident, there was no damage at all to the front off side of the defendant's vehicle and that, therefore, the judge's finding must inevitably have been wrong. If Mr Hamir were correct in his argument we would have to agree that the absence of damage to the right hand side of the front of the defendant's vehicle would indicate that there could not have been a near head-on collision.

Mr Jearey, for the respondent/defendant, has argued however that the evidence did not support a finding by the learned trial judge that there was a near head-on collision, rather he argued, the learned trial judge found that there was insufficient evidence to establish how the accident happened. He pointed out that the most important witness for the plaintiff was the plaintiff's third witness who arrived at the scene shortly after the accident and was a qualified mechanic. This witness gave his views as to the cause of the accident that, on the curve of the road shown on the sketch plans which were presented to the court, the defendant's vehicle and trailer must have "jack knifed" and that the defendant's vehicle must have been on its wrong side of the road because of the evidence of a deposit of mud and oil stains at what he considered to be the point of impact. However, this witness, when questioned by the learned trial judge, gave evidence that made his reconstruction of the accident, to say the least, doubtful because that reconstruction depended upon one of the trailers being dragged for at least fifty metres and he said that there was no evidence of such dragging.

Mr Jearey also criticised the nature of the sketch plans which wore submitted to the court. In this respect, we would draw the attention of the parties to the comments that we made in the case of *Chanda v The People* (2), in which we said as follows:

> "(ii) The "real" evidence (ie. skid or other tyre marks, the position of broken glass and dried mud droppings, the Position of the vehicles after the accident, the nature and lotion of damage to the vehicles and so on), will frequently enable the court to resolve conflicts between the evidence of eye witnesses, and should be carefully observed and recorded by the police officer who examines the scene."

In this case, the sketch plans did indicate the information required. However, some of the measurements were not included in the original sketch plan made at the scene of the accident but were inserted later. We do not think that this failure affects the results of this appeal. How ever, we agree with Baron D.C.J., that it is of the utmost importance that all details and measurements should be inserted in a sketch plan at the time of viewing the scene of the accident.

The learned trial judge, in his judgment, made it quite clear that he was doubtful whether the opinion of the plaintiff's third witness, albeit that he was the most immediate witness after the accident, was reliable.

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Mr Jearey has argued that it is the responsibility of the plaintiff to prove an act of negligence by the defendant and, he has quite properly pointed out that the learned trial judge had the advantage of seeing the witnesses and was able to evaluate their evidence.

A further point on a matter of law has been raised by Mr Jearey, that is whether it is improper in the courts of this country for evidence of previous criminal convictions to be produced. Mr Jearey has referred us to the case of *Hollington v F. Hewthorn & Company Limited* (3), in which it was held that a certificate of a conviction cannot be tendered in evidence in civil proceedings. The ratio decidendi of that case was that the criminal proceedings were not relevant and that they were "res alios inter acta". The case of *Siwingwa v Phiri* (4), which was decided in this country by a High Court judge resulted in a ruling that the Civil Evidence Act 1968 applied in this country by virtue of section 10 of the High Court Act, which provides that the practice and procedure at present prevailing in the courts of England and Wales shall apply in this country. Mr Jearey argued that that provision can be called in aid in default of any legislation in Zambia. There is in fact in Zambia an Evidence Act, Cap. 170,in which there is no provision for the calling of evidence in criminal proceedings to assist a decision in civil proceedings. This Court has been asked to decide whether the provisions of section 10 of the High Court Act enables courts in this country to decide that there is an absence of legislation when, in this specific instance, there is a definite act dealing with evidence. We have no hesitation in finding that, where there is a specific act dealing with a matter of law, such as evidence, in this country, there is no default of legislation as envisaged by section 10 of the High Court Act. The result, therefore, is that there is no provision for convictions in criminal trial to be referred to and taken note of in a civil trial. For this reason, therefore, albeit that our remarks are obiter dicta, the decision in the case of *Siwingwa v Phiri* (4), must incur the disapproval of this court.

Despite Mr Hamir's argument that the plaintiff's third witness is a qualified motor mechanic and that he was the first to arrive at the scene of the accident, we agree with Mr Jearey that this does not assist in an argument that the learned trial judge's decision was wrong. As Mr Jearey has pointed out, this was a most complicated accident involving a vehicle towing a trailers and a mechanical horse towing two trailers, and even an expert in dynamics would probably find it difficult to reconstruct the accident to determine the cause. The plaintiff's third witness, however, was not an expert in dynamics and his evidence on the facts before him, which could have been misinterpreted, was of no great assistance to the learned trial judge.

We dismiss this appeal with costs to the respondent.
Appeal dismissed

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