~~P.C.~~
~~GNG.~~ 2

Appeal
23 OF 1964

Judgment 4, 1965

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

SINCLAIR EUGENE SWAN

- and -

SALISBURY CONSTRUCTION COMPANY LIMITED

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
London, E.C.3.

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
- 4 FEB 1966
LONDON, W.C.1.
80915

IN THE PRIVY COUNCIL

ON APPEAL FROM THE SUPREME COURT OF BERMUDA

B E T W E E N :-

SINCLAIR EUGENE SWAN — Appellant

-and-

SALISBURY CONSTRUCTION COMPANY LIMITED — Respondent

CASE FOR THE APPELLANT

1. This is an appeal in forma pauperis by Special Leave of the Judicial Committee granted the 12th day of December, 1963 from a Judgment and Order of the Supreme Court of Bermuda (Smith, Assistant Judge) dated the 10th day of June 1963, whereby the said Court dismissed the claim of the Appellant against the Respondent for damages.

2. The questions raised on this appeal are :-

(a) whether the learned trial judge drew the correct inferences from the facts given in evidence.

(b) whether the judgment was correct in law.

(c) whether the learned trial judge was correct in law with regard to the question of the burden of proof, in particular in relation to the system of work operated by the Respondent at the material time.

3. The Appellant and Respondent are hereinafter referred to respectively as "the Plaintiff" and "the Defendant".

4. Upon the 31st day of October, 1962 the Plaintiff issued a Writ of Summons against the Defendant in the Supreme Court of Bermuda which bore the following endorsement :-

"The Plaintiff's Claim is for damages for injury to the Plaintiff owing to the negligence of the defendant its servants or agents while the plaintiff was employed by the defendant as a pile driving lead man on a crane and in the course of such employment."

5. On the 14th day of November 1962 the Plaintiff filed a Statement of Claim which in so far as it related to liability and not to particulars of injuries suffered by the Plaintiff or to particulars of special damage, was in the following terms :-

"1. On the 28th day of September, 1959, the plaintiff was employed by the defendant as a skilled labourer and was ordered by the defendant to work on the leads of a crane that was driving piles in the process of the construction of a building.

2. Whilst the plaintiff was so employed in working on the said leads the said crane toppled over causing the plaintiff to be thrown to the ground and pinned under the said leads and suffer severe injuries.

3. The defendant as an employer impliedly agreed with the plaintiff or alternatively it was the duty of the defendant as an employer to provide a safe system of work and effective supervision of the said driving of the piles. The defendant or its servants or agents committed breaches of the said agreement or were negligent in that it or they :

(1) Failed to ensure the stability of the said crane in relation to the nature of the operation and of the surface of the ground;

(2) Failed to provide a sufficient number of workmen for the pile driving operations, including a workman to give signals to the crane operator;

(3) Failed to provide a means of ascertaining the degree to which the jib of the crane could be safely extended having regard to the weight on the leads of the said crane;

(4) During the said pile driving operation extended the jib of the said crane excessively, causing it to over-balance and topple over.

(5) Failed to take any or any proper precaution for the safety of the plaintiff."

The said Statement of Claim was amended during the hearing of the action, but not so as to effect the parts set out above.

6. On the 7th day of December 1962 the Defendant delivered a defence in which the accident and injury to the Plaintiff were admitted, but liability for the accident was denied on the grounds of :-

(a) volenti - which was abandoned at the trial;

(b) inevitable accident;

(c) contributory negligence.

The last ground was rejected by the learned trial judge and ground (b) was pleaded in the following terms :-

> "8. The defendant avers that the cause of the accident was due to the ground under one of the wheels of the crane giving way. The defendant further avers that the defendant or its employees had no reason to suspect that the ground which gave way under the said wheel would in fact give way and further that normal and reasonable inspection and precautions pertaining to the site of operation of this kind did not reveal the existing condition of the ground under the said wheel."

7. The action commenced upon the 25th day of March, 1963, continued the following day and concluded upon the 29th day of March 1963. The Plaintiff gave evidence in support of the allegations set out in the Statement of Claim and stated that on the day in question he was a member of a four man gang who were driving 60 feet long piles into marshy ground for the foundation of a new building. On previous occasions when working on marshy ground planks had been put down for the crane to run on, but there were no planks on this day. Three wire leads had to be fitted to hold the pile in place while it was being driven. Two men were normally used for this operation which necessitated them being lifted about 40 feet. The third man was the crane driver while the fourth man was the foreman who remained on the ground and gave signals to the driver. The three other men in the gang were experienced, but

the Plaintiff had never been up on the lead before that day. Work proceeded normally during the morning, but after lunch the crane driver and the Plaintiff's mate did not return. The foreman drove the crane and told the Plaintiff to go on the lead alone. When the Plaintiff was about 40 feet up the whole machine started to tremble. The Plaintiff was frightened and hung on. He remembered nothing until he regained consciousness in hospital.

In cross-examination the Plaintiff stated that when he started to work for the Defendant Company he was a deck hand on a crane barge and then became the fireman of the steam engine of the crane. He was taken off this work for a few days to work in the pile driving gang. The Plaintiff's mate and the foreman usually worked on the barge while the crane driver normally worked on the land crane. The Plaintiff thought it was dangerous to work with only two men, but felt he had to carry out the foreman's orders or else he might lose his job. According to the notes of the learned trial judge the Plaintiff also stated :-

> "After pile fitted into lead I had to unshackle lead from pile and attach this lead to the cable to the mantle. To do this I had to get to top of lead. Did come down from lead on boom. Didn't go down the lead and then drop to ground. I consider that two men should be on the lead. Dangerous for one man alone. Cause of accident because no one on ground to give crane operator directions. Operators vision restricted."

8. Evidence was given on behalf of the Plaintiff by a Mr. Trott who was a linesman employed by an Electric Light Company who was working across the road from the parties to these proceedings and was about 25 feet away. He saw the Plaintiff up the boom of the crane and then the boom began to fall. He thought it fell forward and then he went with a party of about 30 people and helped to lift the boom in order to release the Plaintiff.

9. Further evidence on behalf of the Plaintiff was given by a Mr. Fough, who was employed by the Post Construction Company and was digging holes prior to the piles being driven in. He said that the place was muddy and marshy, the ground being

soft in some places and hard in others. The surface of the ground was dry, but water commenced at about 3' 6". After lunch he saw the Plaintiff on the top of the lead. He thought it looked a bit dangerous and remarked on it. He noticed the left rear wheel of the crane come off the ground and go down again, whereupon the crane driver looked up at the Plaintiff who was trying to get the pile into position. The witness went on with his work and then he heard a noise and when he looked up he saw the crane falling over to the right. The Plaintiff was hanging on to the boom near the top. He let go and fell before the boom hit the ground. When the witness arrived on the scene, the boom was lying on the Plaintiff's right arm. He also saw that the right wheels of the crane "had sunk into the ground a bit".

10. Evidence was given for the Defendant first by Mr. Diel who was a Director and Superintendent of Work of the Company. He went to the scene of the accident where he found the crane lying on its side with the Plaintiff by the lead unconscious. The right front wheel of the crane had sunk into a hole about 11" deep. The ground around and at the bottom of the hole was firm and he believed that it had given way under the weight of the wheel. The axle bolts were broken. He had inspected the site before the crane was put to work upon it and the ground appeared firm enough to take the weight of the crane, Some fifteen to eighteen piles had been driven on this site without mishap. Sometimes planks were used but usually for levelling the crane. According to the notes of the learned trial judge this witness also stated (inter alia) :-

> "If crane fell through wheel going into hole, Correia could have released weight on end of boom in time to prevent crane capsizing. Crew 4-5 men. Assuming pile already fitted into lead, two men sufficient to connect up hammer and drive pile. If pile had to be lifted and put in position, more men desirable. To fit pile into lead, only one man required on the lead. If the pile is a big one the lead has to be lifted for the pile to be fitted into it..... Needs a foreman in this operation. When pile being fitted to lead, signals pass between operator and man on lead."

In cross-examination this witness stated that he

found the Plaintiff lying with his hand under the lead which was about 40 feet from the top of the boom. He did not see about 30 men lift anything off the Plaintiff. He (Mr. Diel) got to the scene about 12 minutes after he was informed of the accident. He thought that if there had been planks under the wheels it was possible they would not have sunk. There were no automatic indicators in the cranes of the Company, but the witness had a table showing weights and angles. No specific instructions were given by the Company about safety angles and the angle of boom had to be measured by eye. He had never seen an automatic indicator advertised.

11. Further evidence for the Defendant was given by the foreman Mr. Correia who was driving the crane at the time of the accident. He said that in the morning there was a crew of three labourers one of whom was the Plaintiff, the crane operator and himself. In the afternoon there was only the Plaintiff and himself. A pile was in position held up by a cable from the crane. It was not yet in the lead. He told the Plaintiff that the two of them would go ahead and drive this pile. After the witness had finished hoisting, the Plaintiff was getting ready to pull the top of the pile into position in the lead. The right front wheel of the crane sank into the ground and the lead and the boom started to go away from the crane. Everything vibrated and the witness shouted "Jump, Swan", but he did not do so. The witness had to decide whether to drop the lead and save the crane or to hold the lead and let the boom swing so as to slow down the rate of the fall. He did the latter "and the whole thing went over". The Plaintiff went down with the lead. As far as the witness knew he was never hanging on to the boom. If he had been he would have seen him. The witness had inspected the site several days before and the ground appeared to be safe. After the accident the Plaintiff's hand was under the lead and a number of men lifted the lead to get the hand clear. The hole was 12-18" deep. The bolts attaching the wheel to the axle had sheared off. This witness also stated that the Plaintiff had worked on a pile driving job before and had been up the lead, but this was his first day on this particular site. He

had worked in his gang for some time doing pile driving and erecting steel. He denied that the left wheel rose and fell as described by Mr. Fough as he did not feel it. Under certain circumstances it would not be dangerous for the wheels to lift, but they should not if the crane was properly levelled on firm ground and the weight was within the capacity of the crane. If the left rear wheel had lifted, there would have been a greater weight on the right front wheel. He thought that the Plaintiff was 18-25 feet in the air when he shouted to him to jump.

12. The Judgment of the Supreme Court of Bermuda was delivered by the Honourable Sir Allan C. Smith M.C. Assistant Justice upon the 10th day of June 1963 in the course of which he made the following finding of fact as regards the Plaintiff:-

> "The Plaintiff.....was normally employed as a fireman on a floating steam crane, had never before this day been called upon to climb up the lead and fit the pile into it, though of course as fireman of the floating crane he had participated before in pile driving operations and there was some evidence that he had been at times a member of the crew of a land based crane driving piles."

13. The learned trial judge found as a fact that the Plaintiff did not transfer or attempt to transfer from the lead to the boom and thus rejected the evidence of Mr. Trott and Mr. Fough that the Plaintiff was on the boom at the time when the crane began to topple. Criticisms of the Plaintiff for failing to jump and of the foreman for letting the crane swing were both rejected on the ground that it would be unfair in view of the instant action that was required and both acted "in the agony of the moment".

The learned trial judge does not appear to have considered the submission made by learned Counsel for the Plaintiff that it was a reasonable requirement for the employer to take precautions against the sort of accident that occurred and to have laid down instructions about what was to be done by members of a pile driving gang in the event of such emergency. It is respectfully submitted that the swinging of the boom and also the shouting to the Plaintiff were relevant factors that should have been considered in deciding whether the Defendant Company were operating a safe system of work.

14. The learned trial judge found as a fact that the crane toppled over because the ground under the right front wheel gave way suddenly. He then considered whether the Defendant Company had failed in their duty to the Plaintiff in two respects :-

(a) inspection of the site;

(b) whether a third man should have been present to give warning of instability

On the first ground, the opinion of the Superintendent and the foreman and the extent of previous operations were referred to. The learned trial judge also pointed out that the crane was standing on the roadway made by trucks across the site. He concluded that it was not reasonable to anticipate further danger and that extra precautions were not required. It is respectfully submitted that the learned trial judge erred in failing to give weight to the evidence relating to the uneven surface and nature of the ground and also to the previous use of planks by the Defendant Company.

On the second ground the learned trial judge concluded that any warning given by a man on the ground would probably have been too late to avoid the accident. It is respectfully submitted that this finding fails to take into account (inter alia) first the evidence of the foreman that he shouted as soon as the right front wheel dropped and that he would have jumped himself and secondly the likelihood of a man on the ground being heard by the Plaintiff while the foreman who was driving the crane was not heard.

15. The learned trial judge expressed the general duty upon employers in the following terms (it is submitted correctly) :-

"An employer is bound to take reasonable precautions to guard against his employees receiving injury."

He then proceeded to give what he described as the chief heads into which this duty to take care would be divided which he set out as follows (again it is submitted correctly):-

"1. He must provide tools and equipment which are adequate for the job and as reasonably safe to use as can be devised

2. He must provide competent and careful employees who will not injure one another by inefficiency or carelessness.

3. He must devise and enforce a safe system of work and where reasonably necessary give special instructions for the avoidance of any dangers which might reasonably be expected."

The learned trial judge then stated that the onus of proof was upon the Plaintiff subject to "the fact that the crane toppled over speaks for itself up to a point, but this by itself is not sufficient. It is respectfully submitted that upon the Plaintiff proving that the crane toppled over due to wheels sinking in the ground, the onus shifted to the Defendant Company to show upon the balance of probabilities that they were not negligent in allowing this to occur and further that the evidence called on behalf of the Defendant was not consistent with any of the three heads of duty set out above. The learned trial judge did not refer in particular to the inexperience of the Plaintiff, the reduction of the labour force or the lack of any procedure to be carried out in the event of danger when he referred to the question or proof, but after the words quoted above relating to the toppling of the crane he concluded his judgment as follows :-

"Taking the evidence as a whole, I am not satisfied that the Plaintiff has proved that he was injured as the result of any failure in the duty which his employer owed to him and give judgment for the defendant. This is undoubtedly a borderline case."

16. The learned trial judge concluded his judgment by stating that if a different conclusion on liability was entertained he would assess the Special Damages at £686.18.9. as agreed and General Damages at £2,000.

17. It is further submitted that had the learned trial judge applied the evidence given during the hearing to the three heads of duty set out in paragraph 15 above he would have concluded that judgment ought to have been entered for the Plaintiff.

18. That upon the 1st day of July 1963 the Plaintiff obtained Conditional Leave to Appeal to your Majesty in Council from the Supreme Court of Bermuda but the Plaintiff was unable to comply with the said conditions in that he was unable to give security in the sum of £500 or deposit the sum of £50 with the said Court or give security in the sum of £200 for the due performance of any order as may be made by Your Majesty in Council relating to the costs of the judgment herein given by the Supreme Court of Bermuda.

19. The Appellant humbly submits that the Judgment and Order of the Supreme Court of Bermuda of the 10th day of June, 1963 be set aside and that judgment be ordered to be given for the Plaintiff for the following amongst other

R E A S O N S

1. BECAUSE upon the facts given in evidence the Plaintiff established his claim for damages.

2. BECAUSE the burden of proof was upon the Respondent to show that there was in operation a safe system of work, which burden was not discharged.

JOHN A. BAKER

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

SINCLAIR EUGENE SWAN

- and -

SALISBURY CONSTRUCTION COMPANY LIMITED

CASE FOR THE APPELLANT

HATCHETT JONES & CO.,
90, Fenchurch Street,
London, E.C.3.