Privy Council Appeal No. 17 of 1983

George Akl *Appellant*

v.

John Aziz *Respondent*

FROM

THE COURT OF APPEAL OF THE GAMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH JUNE 1984

Present at the Hearing:

LORD KEITH OF KINKEL
LORD SCARMAN
LORD BRIGHTMAN
LORD TEMPLEMAN
SIR GEORGE BAKER

*[Delivered by **Lord Scarman**]*

The appellant (plaintiff at trial) was travelling from Bakau to Banjul as a passenger in a car owned and driven by the respondent (defendant at trial), when an accident occurred in which he sustained severe personal injury. The accident occurred at or near midnight on 31st October 1975 on a stretch of road described as straight but with a slight bend to the right ahead of them. There was a car coming from the opposite direction to that in which they were going. To avoid a collision the respondent swerved to his right or nearside. Almost immediately he lost control of the car, which careered across the road from right to left and crashed into a rice field beyond. The other car did not stop and has never been identified.

The appellant's case is that the respondent was driving too fast in the circumstances, and that his excessive speed was a cause of the accident. The respondent denies negligence, giving as his explanation of the accident that he was "....completely blinded by the high lights of a car coming on the opposite side and on my lane...." and that in trying to avoid a collision he swerved to the right, causing his nearside wheels to go off the surface of the road so that a tyre burst and he lost control. He gave

this explanation to his insurance company on 23rd December 1975, incorporated it in paragraph 5 of his pleaded Defence, and gave evidence at the trial to the same effect save in one significant respect, namely that in evidence he said only that the oncoming car was in the middle of the road.

The appellant, as well as the respondent, gave evidence at the trial. So also did a sergeant of The Gambian police force who was called to the scene of the accident. This was the totality of the evidence at trial on liability save for a statement alleged to have been made by the appellant to a doctor some five years later and denied by him. After considering the totality of the evidence the trial judge found that the accident was caused by the respondent driving too fast in the night when he was meeting another vehicle and when he was either in the bend of the road or approaching it. He awarded the appellant D250,951 damages and D10,000 costs.

The respondent appealed on the issue of liability. The Court of Appeal allowed the appeal, holding that the trial judge failed to evaluate the primary facts correctly and further that he misdirected himself in law. The appellant now appeals by special leave to their Lordships' Board.

Learned counsel for the respondent made it clear at the outset of argument before the Board that he could not support the Court of Appeal's view that the trial judge had misdirected himself as to the standard of care required by law in this class of case. The learned judge had ruled that the standard was that of what a reasonable man would have done in the respondent's situation, *Hazell v. British Transport Commission* [1958] 1 W.L.R. 169, 171. Counsel maintains, however, that the learned judge did fall into error when he ruled that because, in his view, no defence of tyre burst had been pleaded he must ignore the evidence as to tyre burst in reaching his decision.

Counsel's concession on standard of care was in their Lordships' view undoubtedly correct: there was no misdirection. The judge was, however, wrong to ignore the evidence, such as it was, of tyre burst; and for two reasons. First, tyre burst was pleaded: paragraph 5 of the Defence. Secondly, even if it had not been expressly pleaded, it was a factor which could have a bearing on the denial of negligence, which was the essence of the Defence. Whether this error invalidates the trial judge's finding that driving too fast was a cause of the accident is, however, quite another matter, to which their Lordships will return at a later stage.

The learned judge accepted the appellant's version of what happened. Indeed he thought that it was

common sense and supported by the respondent's evidence. According to the judge's note of the evidence (there was no transcript) the appellant said that the respondent was driving at a speed recorded on the speedometer as 80 m.p.h.; that because of his speed the nearside wheels of the car went off the road when the respondent swerved to his right; that the respondent tried to bring the car back on to the road; but that he lost control and the car somersaulted into a swamp. In cross-examination it was put to him that the respondent was driving at 50 m.p.h., that the other car came at speed towards him and blinded him with his high lights, thus causing the accident. The appellant replied that the suggestion was incorrect and that there were no high lights from the other car. It was not put to him that there was a tyre burst.

The respondent said in evidence that the other car was in the middle of the road, that he swerved to the right, that a rear tyre burst on some gravel by the edge of the road, and that he then lost control. He admitted that he was driving fast but estimated his speed as no faster than between 50 and 60 m.p.h. Under cross-examination he gave a number of answers which without doubt strongly influenced the decision of the trial judge. First, he said that he was not aware until some days later of the possibility of a tyre burst: the plain inference is that he was unaware of a burst at the time of the accident. Secondly, when it was put to him that, had he driven at a slower speed, the accident would not have happened, he replied that it would not have happened if his speed had been about 30 m.p.h. Thirdly, asked why he did not stop when he saw the other vehicle approaching with its high lights and when he was blinded by them, he replied that he could not stop because he was speeding. Fourthly though he said that he could not see ahead, he noticed that the oncoming car was a white Renault 4. Finally, in answer to the judge he admitted that he did not feel or notice in any way a tyre burst.

Their Lordships do not doubt that the learned trial judge was fully justified upon the state of the evidence as revealed by his note in finding that the respondent was not blinded by the high lights of the oncoming car and that his speed was excessive in the circumstances and a cause of the accident. Further, it was a reasonable inference for the judge to draw from the respondent's own evidence that it was because of his speed that the car left the road when he swerved to the right and that his subsequent loss of control of the car was not causative of the accident but itself a consequence of his excessive speed, which was causative.

The learned judge did consider whether, if he had found that the respondent was blinded by the high

lights, he would have been led to a different conclusion. He thought not; and for the convincing reason that, if the respondent could not see ahead, it would have been grossly negligent of him to continue to drive at 50 m.p.h. - let alone 80 m.p.h. - towards the oncoming car. Their Lordships would add that the road, where the accident occurred, passes through rice fields, and is straight with only a slight bend to the right some distance ahead. The oncoming car's lights, whether full or dimmed, must have been visible for some time before the accident. The presence of a car coming towards him could not have been a matter of surprise to the respondent, unless he was failing to keep a proper look-out.

The judge also considered the evidence of tyre burst, although he had decided to ignore it. He said that, had he thought it necessary to make a decision, he would have rejected the evidence of tyre burst as "most unconvincing". Their Lordships consider that he was fully justified in this assessment of the evidence.

The Court of Appeal, however, reversed the judge. The Court made a number of criticisms, the accumulation of which led them to allow the respondent's appeal. First, they criticised the judge for failing to make an express finding as to the position on the road of the oncoming vehicle. The evidence was, however, neither precise nor complete. No measurements of the road were given in evidence, nor any measurements of the respondent's car or of the Renault 4. All that was said was that the Renault was in the middle of the road: and it is clear from the question put by the judge to the respondent at the very end of his evidence that the judge was well aware that the Renault was said to be in the middle of the road as it approached. No doubt, the judge also bore in mind the respondent's earlier evidence that, had he been travelling at 30 m.p.h., there would have been no accident. Such was the state of the evidence that it could not be determined with any degree of certainty, whether, as the incident developed, there was, or was not, room for the respondent to pass on his nearside without going off the road. The judge was, therefore, right to leave that question un-determined: but he did have the respondent's evidence that he was going too fast to avoid the swerve to the right which took his car off the road.

The Court's second criticism was directed against the finding by the trial judge that the respondent's excessive speed caused the accident. Citing *Quinn v. Scott and Another* [1965] 2 All E.R. 588, the Court held that the judge had fallen into error in that he had proceeded upon the assumption that a high speed on a freeway can, of itself, amount to evidence of negligence. With respect, the learned trial judge

never committed himself to any such abstract proposition. He considered all the evidence and concluded that in the circumstances, which included the visible presence of a car approaching him on the middle of the road at night, the respondent maintained a speed which was excessive because, as the respondent himself recognised, it prevented him from avoiding an accident, which on his own admission he could have avoided had he been travelling more slowly.

The Court's third criticism was of the finding by the trial judge that the respondent was not blinded by the high lights of the oncoming vehicle. In their Lordships' opinion this finding was open to the trial judge upon the evidence. But their Lordships would go further: upon the evidence the judge's finding accorded with the balance of probabilities.

Counsel for the respondent added a fourth point which, though mentioned by the Court of Appeal, does not appear to have been treated by the Court as of crucial importance. Criticising the learned trial judge for ignoring the evidence of the tyre burst, Counsel submitted that the tyre burst could sufficiently explain the accident as happening without negligence on the part of his client. Their Lordships reject the submission. First, the learned trial judge considered the evidence of a tyre burst to be unconvincing: their Lordships see no reason to dissent from his view of the evidence. Secondly, if there was a tyre burst, it arose because as a result of the respondent's excessive speed he could not stop or otherwise avoid the swerve which took the nearside wheels of the car off the road surface.

In their Lordships' opinion the Court of Appeal fell into error in concluding that the learned trial judge failed to evaluate the primary facts correctly. The judge was fully justified in finding that excessive speed on the respondent's part was a cause of the accident. Their Lordships accordingly allow the appeal and restore the judgment of the Supreme Court. The respondent must pay the appellant's costs here and in the Court of Appeal.