OF 1943. No 5

IN THE HIGH COURT OF AUSTRALIA.

RUDALL & OTHERS

V.

DEACON & ANOTHER

ORIGINAL

REASONS FOR JUDGMENT.

Oral Judgment delivered at Melbourne

on Monday 1st November, 1943

H. J. Green, Govt. Print., Melb.
C.2774

RUDALL & OTHERS

v.

DEACON & ANOTHER.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a decision of the Supreme Court of South Australia given by His Honour Mr. Justice Mayo in an action for negligence brought by the executor and the widow of Bruce Fotheringham Kerr deceased. Kerr lost his life as the result of a collision between a car driven by him and a stationary truck which was standing on the road between Adelaide and Gawler. The truck was driven by the defendant Reynolds, who was a servant of the defendant Deacon. The truck broke down while it was travelling - there was engine trouble - and Deacon found himself unable to remedy the trouble. The truck stopped on the roadway and was left there while Deacon walked to Gawler to get assistance. Darkness came on and the truck was still there. The vehicle, when the driver left it, was on the bitumen part of the road facing north. The offside wheel was 5'5" from the western edge of the bitumen. It was, therefore, well on the bitumen. There was on the western side of the bitumen a strip of macadamised road about 2'6" wide and beyond that grass, and, as a matter of physical possibility, the truck might have been moved to the grass and away altogether from the bitumen so as not to create any obstruction. With the means at their disposal, however, Deacon and a passenger Weeks, who was travelling with him in the truck, were unable to move the truck and accordingly it was left there.

It is found as a fact, and there is evidence upon which the finding is justifiable, that there was a red light on the rear of the truck. It was situated 2'9¼" in from the offside edge of the lorry. That light, it is found, was alight at the time of the accident. A man named Payne was driving a truck in a southerly direction on the road with his lights on, driving on the bitumen. He pulled off the bitumen immediately before the moment of the accident. His evidence is that he was driving on the bitumen and he does not remember, apparently, turning to the left to leave the bitumen, but his truck was in fact found /

found, it is said, practically opposite the stationary truck and right off the bitumen, so evidently he ~~diverted at least some time~~ changed his course before the actual accident happened. Payne saw Kerr's car approaching. Kerr was driving an Oldsmobile car with his headlights on. On the findings of fact of the learned judge Kerr would have seen the red light at the rear of the stationary truck. Kerr ran into the stationary truck. There was a very serious smash and the damage to the car and the damage to the truck showed that the impact was very great indeed. The learned judge found that Kerr was driving at a very high speed. His car hit the truck at the rear offside wheel with sufficient force and violence to bend the axle and fracture the casing and to smash up his own car very seriously indeed, as the statement of the repairs necessary to recondition the car shows. Kerr was killed and his executor and his widow bring this action.

His Honour, in a very careful judgment, in which the facts are very fully stated and examined, finds, first, that there was negligence on the part of the defendant driver, but secondly that there was contributory negligence on the part of Kerr, and for the latter reason the action failed. The negligence on the part of the defendant driver consists in his leaving the truck where he did leave it - lighted as it was. I have there endeavoured to include in one sentence all the allegations which lead to the inference of negligence on the part of the defendant, with possibly this addition, that if he had stayed behind with the truck and warned approaching traffic, he would have more fully discharged his duty, though there is no finding on that matter. It is in any event a matter of inference as to which this Court is in as good a position to make up its mind as the learned judge.

In the first place His Honour referred to sec. 125 of the Road Traffic Act 1934-1939, which provides:-

> "If any person leaves any vehicle ..... stationary on the carriage-way of any road, and not being drawn in as near as practicable to the left hand side of the road, he shall be guilty of an offence."

His /

His Honour was of opinion that there had been a breach of this provision. It is a provision which creates an offence, but it may be fairly read as designed for the protection of the public, and failure to comply with it is on the face of it negligence. I do not think it is necessary to determine for the purpose of this appeal the precise meaning of the words "as near as practicable". His Honour interpreted them in what I might call an objective sense. His Honour in effect said: "Here rests the truck. There was abundant space on the left hand side of the road in which the truck could have been placed physically and the truck was not moved to the left hand side of the road, and therefore there was a breach of the section." If the section, however, is construed more subjectively and "practicable" is interpreted as meaning practicable in all circumstances of the case, including the practical possibility of moving the vehicle, then it may be that there would have been a defence to a charge under this section.

But whatever the true interpretation of that provision may be, it is quite plain that the defendant's truck was not so lighted as to comply with the requirements of sec. 42(1a) of the Road Traffic Act 1934-1939 because the vehicle was more than 6'6" wide, the time was after sunset, and it did not have a lighted lamp attached to the extreme off side of the vehicle. The statutory provision describes the nature of the lamp which must be carried - it must show to the front and to the rear. In this case there was no such lamp attached to the off side of the vehicle, and there was a breach of that provision, which is plainly intended for the safeguarding and protection of the public.

His Honour held that another provision - sec. 42(1)(b) - had n not been infringed. This is a provision which applies to any motor vehicle which is at any time between half an hour after sunset and half an hour before sunrise on any road. It requires every motor vehicle falling within that description to carry attached thereto a lighted lamp carried on the off side of the rear of the motor vehicle, and the

provision /

provision proceeds to specify the characteristics of the lamp to be carried. There was a lamp on the vehicle at the rear, as I have said. It was 2'9¼" in from the off side edge of the lorry. The lamp was not on the off side end of the rear of the truck. It has been contended by Mr. Hogan that this provision means that the lamp must be on the off side end of the rear of the motor vehicle. His Honour, on the other hand, held that it meant that the lamp should be carried at the rear of the vehicle on the off side half of the line which marks the rear of the vehicle. His Honour pointed out that the provision was not that the light should be carried on the off side of the vehicle. Other phrases might have been used which would have made it clear (if it were so intended) that the lamp was to be carried at the rear corner of the vehicle, or even extended beyond the off side if, for example, the stub of an axle extended beyond the body of the vehicle. In my opinion His Honour was right in the construction which he gave to this provision. I am very considerably influenced in reaching that opinion by the provisions of sec. 42(1a) where these words appear: "Every motor vehicle .... shall carry attached to the extreme off side of the vehicle". The distinction between the phrase "the off side of the rear of the vehicle", and the phrase "extreme off side of the vehicle", is, to my mind, significant. If the provision in sec. 42(1)(b) meant at the rear corner, to use a sufficiently accurate phrase, and not somewhere on the off side half of the rear of the vehicle, then I am unable to see the necessity for the change in language in the amendment introduced subsequently by Parliament when sec. 42(1a) was introduced. I agree with His Honour that though there was a breach of sec. 42(1a), there was no breach of sec. 42(1)(b) in this case. The result, however, is,whatever view may be taken of sec. 42(1)(b), that there was certainly a breach of sec. 42(1a), so that I think negligence on the part of the defendant was plainly established.

The question which has been more particularly argued upon the appeal is the question of contributory negligence. His Honour found that the driver was guilty of contributory negligence. He drove at a high speed through a narrow space between one vehicle, which was in front of him, and of which he could see a rear light, and another

vehicle /

vehicle with its lights on which was approaching from the opposite direction. He passed, as I have worked out the evidence for myself after listening to argument, at the furthest within about 1'9" of that light. Now was he entitled to act upon the assumption that that light was what has been called a loading light so that he could take it to be on the rear off side corner of the vehicle, so that if he missed the light he would presumably miss the vehicle? His Honour said at p. 62 of his judgment:

> "the motor car was so guided by the deceased as to clear the rear light of the lorry by 1 ft. 7 in. to 1 ft. 9 in."

The learned judge said:

> "If that light had been on the extreme offside of the rear, as Mr. Hogan contends it should, the deceased might have been deemed negligent in driving too close,"

(I leave out a reference to the possibility of someone standing alongside the light. I think if there had been someone standing alongside the light other questions would have arisen).

> "Was the deceased entitled to act on the assumption the rear light marked the extreme off side, and that no one would be standing on, or emerging from, that side? I have already indicated that in my opinion sec. 42(1)(b) does not justify any such assumption. Nor is there any proof that rear lamps by common usage are placed at the extreme offside or even within one foot therefrom, and I can not take judicial notice of such a usage, if indeed it is a fact. If the deceased acted upon any such hypothesis in steering the car it was not justified."

Then I reach the passage which, in my opinion, is decisive in the case:-

> "What was the deceased entitled to deduce from the absence of a loading light on either side? A proper conclusion would have been that neither the lorry, nor its load exceeded 6 ft. 6 in. in width."

(The deceased presumably was unable to see whether the truck was 6'6" wide or wider. He would not see that.) "If the rear light might lawfully and without infringing the regular practice of roadusers" (I leave out the phrase "without infringing etc.").

> "If the rear light might lawfully ..... be placed at any point on the offside up to within a few inches of the medial point, the deceased would take an unjustifiable risk, bearing in mind sec. 42(1)(b) and (1a), if he attempted to pass in closer proximity than three feet to the light. The absence of a loading light did not warrant him steering within two feet of the rear light."

In other words as I see it, looking at it from the point of view of the driver of the car, he was not to know, and could not tell whether

the light which he saw was a light which was on the extreme offside edge of the car, or a light which was some distance inside that edge. He drove through at a high speed and took the chance and ran into a danger zone which he could easily have avoided by waiting until the other truck had passed and waiting to see what was happening in relation to the truck in front, whether it was stationary or moving. Instead of that, he took the chance and unfortunately took it too fine. In my opinion there is evidence to justify the finding of contributory negligence. The finding cannot be said to be against the evidence and the weight of the evidence. I would therefore dismiss the appeal.

The appeal will be dismissed with costs.

RUDALL & OTHERS.

v.

DEACON & ANOTHER.

JUDGMENT. RICH J.

I agree.

RUDALL & OTHERS

v.

DEACON & ANOTHER.

JUDGMENT. McTIERNAN J.

I agree that the appeal should be dismissed. I am not convinced that the learned trial judge drew an erroneous conclusion from the facts: that is, the conclusion that the deceased was negligent at the time of the accident: and that his negligence was the effective cause of the accident. I assume only, that it was a breach of duty and therefore prima facie negligence to leave the motor lorry where it was at the side of the road and it was also negligence to omit to exhibit a light on the lorry in accordance with sec. 42(1a). It is not necessary in these circumstances to interpret sec. 42(1)(b) and to determine whether there was also a breach of those provisions. I should say, however, that as at present advised I think that the interpretation of the learned trial Judge and the Chief Justice is correct.

It is not sufficient for deciding the issues in this case as the appellant's Counsel has mainly done, to concentrate on the probable implication in the position of the red light on the stationary lorry and to ask whether it was merely an error of judgment on the deceased driver's part to drive as if the light marked the offside end of the lorry. It is necessary to bear in mind that Payne's vehicle was approaching and that the deceased driver of the motor car ought to have seen it if in fact he did not see it. The fact that this vehicle was approaching had a very important bearing upon the question what it was reasonable for the deceased to do in the circumstances. He could not of course take due and reasonable care for his own safety by ignoring that vehicle. Giving him credit for the assumption that a careful driver would have thought that the light marked the offside end of the rear of the stationary vehicle, yet it is a demonstrable fact that he allowed a clearance of less than two feet - perhaps only eighteen inches - between his car and the stationary vehicle. Taking into accoun the width of the bitumen and metal sides of the road, the fact that it was night, and all the circumstances, did the trial judge go wrong in drawing the conclusion that the deceased fell short of the standard of a reasonably careful driver in maintaining his speed and driving between the stationery vehicle and the approaching vehicle? I am not satisfied that His Honour did so.

There is ample foundation for the inference that the deceased did not exercise due and reasonable care to avoid hitting the stationary vehicle and that this omission materially contributed to his fatal injuries.