IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Hiripiyage Nimal Premasiri
of "Varuni Enterprises",
Bandarapola, Kirula,
Matala.
PLAINTIFF

C.A. Case No.830/2000(F)
D.C. Matale Case No.
4598/M.R

-Vs-

1. **Attorney General,**
   Attorney General's Department,
   Colombo 02.
2. **Sumanadasa,**
   Inspector of Police,
   Police Post,
   Elkaduwa.
3. **Sarath Wijeratne,**
   Police Constable,
   28839,
   Police Post,
   Elkaduwa.
4. **Mahinda Weerasinghe,**
   R.P.C,
   Police Post,
   Elkaduwa.

DEFENDANTS

NOW BETWEEN

Hiripiyage Nimal Premasiri
of "Varuni Enterprises",
Bandarapola, Kirula,
Matala.
PLAINTIFF- APPELLANT

-Vs-

1. **Attorney General,**
   Attorney General's Department,
   Colombo 02.
2. **Sumanadasa,**
   Inspector of Police,
   Police Post,
   Elkaduwa.
3. **Sarath Wijeratne,**
   Police Constable,
   28839,
   Police Post,
   Elkaduwa.
4. **Mahinda Weerasinghe,**
   R.P.C,
   Police Post,
   Elkaduwa.

DEFENDANT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	Murshid Maharoof with F.A. Mohamed for the Plaintiff-Appellant Sobitha Rajakaruna DSG for the 1st, 2nd and 3rd Defendant-Respondents
Decided on	:	31.08.2018

A.H.M.D. Nawaz, J.

The Plaintiff-Appellant (hereinafter sometimes referred to as "the Plaintiff") instituted this action against the 1st, 2nd, 3rd and the 4th Defendant seeking damages jointly and severally in a sum of Rs.250,000/- for alleged damage caused to his lorry bearing No.42 Sri 7326 on 21.01.1993. The plaint dated 14th December 1993 averred, *inter alia* the following:

On the day in question his lorry which had been let on a contract of hire was transporting Albizzia logs belonging to one Senaratne. Upon a suspicion of an illegal transportation of timber, the vehicle was stopped at Elkaduwa junction and those in the lorry were taken into custody and the driver of the lorry was ordered to drive the lorry all the way to the Elkaduwa police post. What happened at the police post becomes material for the resolution of the issues in the case. The plaint further averred that the driver of the lorry was ordered to stop the vehicle opposite the Elkaduwa police post and thereafter the driver and the others were summoned inside the police post for questioning.

It was at this stage that the 4th Defendant-Respondent who was on duty providing security at the police post moved the lorry and as he drove the vehicle negligently, it ran down a precipice and the lorry was destroyed. The District Court of *Matale* held the 4th Defendant-Respondent liable, whilst declaring that 1st Defendant (Attorney-General), 2nd Defendant (I.P. Sumanadaasa) and 3rd Defendant (P.C. Sarath Wijeratne) had no

vicarious liability. So the issue before this Court is whether the 4th Defendant acted within the scope of his employment or he had acted outside. The Court has held that he had acted outside the scope of his employment and therefore the 4th Defendant alone was liable. It is against this finding that the Plaintiff-Appellant has appealed.

The evidence led in the case has to be evaluated in order to ascertain whether the finding of the learned District Judge reached the right decision on vicarious liability.

A servant is said to have acted in the course of his employment in the following cases:-

1. When he does a wrongful act authorized by the master, *e.g.*, if a master engages a servant to assault a man, the master must be liable for the act committed by the servant.
2. When the servant does in a wrongful and unauthorized manner an act authorized by his master.

"In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is 'yes', the second question is to see whether the employer must shoulder the servant's liability". *Per* Lord Denning M.R. in ***Young v. Edward Box & Co. Ltd.***[1]

On the question of 'in the course of employment' the test set out by Sir John Salmond in his textbook on tort has been commonly used by the Courts:-

> *"It is clear that the master is responsible for the acts actually authorised by him; for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to an employer of an independent contractor, is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them....On the other hand if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master*

[1](1951) 1 T.L.R. p. 789 at p. 793

is not responsible; for in such a case, the servant is not acting in the course of his employment, but he has gone outside of it. As is often the case, the principle is easy to state but difficult to apply".[2]

A master becomes liable for the acts done by a servant, only in the event the servant acted "in the course of his employment" or "within the scope of his employment". The question whether the servant was acting within the scope of his authority is in every case a question of fact-*see* ***Marsh v. Moores.***[3] The dividing line which separates the acts which fall within the scope of the servant's authority from those which fall outside is never rigid; it is flexible and has to be decided having regard to all the facts and circumstances of each case.

The basis of liability of a master appears to be the same in English law. Watermeyer C.J. in the case of ***Feldman (Pty) Ltd. v. Mall,***[4] pointed out that, ".....the expression" scope of employment" is apt to be misleading, unless one is alive to the fact that the words "scope of employment" are not equivalent to "scope of authority". One is apt, when using the expression "scope of employment" in relation to the work of a servant, to picture to oneself a particular task or understanding or piece of work assigned to a servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to master's instructions are outside the scope of his employment: but such a conception of the meaning of "scope of employment" is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished: some may even indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained..... Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts".

---

[2] Salmon & Heuston, *Torts,* 21st Edition, p 443.
[3] (1949) 2 K.B. 208, 215
[4] 1945 S.A.L.R. (A.D.) 733

During the examination in chief of the 4th Defendant, there is evidence that because the driver of the lorry who gave him the key prior to his moving the lorry. This shows that no superior officers who were present at the time commanded him to move the lorry. The unassailed testimony of the 4th Defendant was that the key was never handed over to him by any of the officers who were on duty at the time of the occurrence of the incident.

In the course of the formal evidence given by an Assistant Superintendent of Police Sumana Bandara, he marked in evidence an out-of-court statement made to him by the 4th Defendant. This out-of-court statement had been recorded for the purpose of holding a disciplinary inquiry against the 4th Defendant. The officer who recorded the out of court statement made by the 4th Defendant was himself giving evidence of what he heard from the 4th Defendant about the incident and the statement clearly demonstrates that the 4th Defendant acted on his own in taking the driver's seat and moving the lorry before it went down the precipice-see the statement marked as **1V2.** This is a comprehensive statement in which the 4th Defendant describes as to how he wanted the lorry to be shifted to a location where the lorry would not obstruct anyone. When he embarked on that exercise, he felt that the lorry had no brakes and he shouted out for the driver whereupon the driver too got into the driver's seat and tried to stop the lorry which had begun its downward slide.

Thus this statement contains a slew of admissions which are admissible against the 4th Defendant under Sections 17(1), 18(1) and 21 of the Evidence Ordinance. These admissions are no doubt capable of being rebutted by the maker of the admissions in terms of Section 31 of the Evidence Ordinance which states that admissions are not conclusive proof of the matter is admitted, but they may operate as estoppels under the provisions hereinafter contained. The expression "*the provisions hereinafter contained*" will include Section 115 of the Evidence Ordinance. If the admissions are not rebutted by contrary evidence, needless to say they become conclusive proof. So when there is no rebuttal of the fact of taking over the vehicle and moving it when the precipice is close at hand, the negligence of the 4th Defendant is conclusive. There is evidence on the record

that the 4th Defendant was only authorised to guard the police post. Upon his own admissions in his extra curial statement, it is quite clear that he had undertaken the activity of getting into a lorry and driving it, maybe for a laudable objective of parking it at a safe haven without the lorry becoming an obstruction, but needless to say, he could have accomplished this task by requesting the driver of the lorry to perform this activity.

The above would not fall within Salmon's test in order to render the 1st, 2nd and 3rd Defendants liable. Salmon's test is to the effect that a master, 'is liable even for acts which he has not authorised, provided they are *so connected* with acts which he has authorised, that they rightly be regarded as modes-though improper modes-of doing them'. In my view the *close connection* test as evidenced by cases such as ***Lister v .Hessey Hall***[5] would not render the 1st, 2nd and 3rd Defendants in this case vicariously liable for the act of the 4th Defendant, when he had gone too far to be acting in the course of his employment in having driven a lorry too close to a precipice.

There is also the unchallenged evidence of Police Inspector Karunaratne of *Matale* Police that the principal duty of the 4th Defendant was to provide security to the police post. The act of the 4th Defendant in driving the lorry was entirely unlawful and this unlawful act could hardly come within the scope of his employment. There is evidence that the 4th Defendant kept aside his weapon before he got into the lorry to drive it. This activity is prohibited by the regulation of the Sri Lanka Police Rules. According to the Regulation of the Sri Lanka Police Rules, a weapon could be kept aside only during lunch hour or in illnesses and it is mandatory to record such movement in the record books. This evidence remains uncontradicted and unchallenged.

Thus it is clear that the 4th Defendant was in breach of his obligations under the Police Regulations and the 1st, 2nd and 3rd Defendant-Respondents could not be in *pari delicto* with the 4th Defendant on that score.

In the circumstances I find that the judgment of the learned District Judge dated 24th July 2000 cannot be faulted for taking the view that the 1st to 3rd Defendant-Respondents

[5](2002) 1 AC 215.

were not vicariously liable for the act of the 4th Defendant. So I would affirm the said judgment and proceed to dismiss the Appeal of the Plaintiff-Appellant.

JUDGE OF THE COURT OF APPEAL