Wilkinson v. Shapiro

Angus C. Wilkinson (Defendant), Appellant; and
Mary Shapiro and Joseph Shapiro (Plaintiffs), Respondents.

[1944] S.C.R. 443

Supreme Court of Canada

1944: November 14 / 1944: November 23.

Present: Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

E.L. Haines and D. Haines, for the appellant. I. Levinter K.C., for the respondents.

Solicitors for the appellant: Haines & Haines. Solicitor for the respondents: J.M. Friedman.

The judgment of the Court was delivered by

KELLOCK J.:-- We are all of opinion that this appeal should be dismissed. The appeal is from an order of the Court of Appeal for Ontario, dated November 18th, 1943, allowing an appeal from a judgment at trial, of McFarland J., with a jury, dated June 9th, 1943, by which the action was dismissed.

The respondents brought the action to recover damages for personal injuries sustained by the respondent Mary Shapiro and for expenses incurred by her husband, the respondent Joseph Shapiro, as the result of an accident happening on or about the 27th September, 1942, while the first named respondent was crossing from north to south on Bloor Street West, in the City of Toronto, in the neighbourhood of Manning Avenue. Whilst so doing, she was struck by an automobile, owned and driven by the appellant.

The jury in answer to the question, "Has the defendant Angus Wilkinson satisfied you that the loss or damage of the plaintiffs did not arise through negligence or improper conduct on his part", answered in the affirmative. The appeal to the Court of Appeal was on the ground of misdirection and non-direction in the charge of the learned trial judge.

In his charge, the learned trial judge, after explaining to the jury the meaning of the term "negligence", pointed out to them that the accident was not one requiring the respondents to prove negligence on the part of the appellant but was governed by the provisions of section 48, subsection 1, of The Highway Traffic Act, which he read. He then proceeded:--

> In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence.
>
> I should also go on to say that when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or in part, by the negligence of the plaintiff. And that is the allegation set up here.

(The italics are mine.) The learned judge then turned to the questions to be submitted to the jury and proceeded:--

> The first question goes directly to the heart of the matter of which I have just been speaking; namely, onus; because the first question reads:

(His Lordship then read the first question.) The jury were then charged that that question had to be answered "Yes, or No" and that, if the answer were in the affirmative, the jury need not answer any of the later questions except the question as to damages. The later questions were the usual ones in actions of this character, as to negligence on the part of the plaintiff and the respective degrees of the negligence of plaintiff and defendant.

The learned judge then proceeded to deal with the evidence and said: "as I see it, the negligence of the defendant, alleged by the plaintiff, was," in certain particulars which the learned judge set out seriatim.

No doubt counsel for the respondents, in his address to the jury, had referred to certain conduct on the part of the appellant as constituting negligence, but the statement of claim did not allege negligence on the part of the appellant at all, and it was not required that it should do so. The learned judge then proceeded to comment on the evidence dealing with the conduct of the respondent Mary Shapiro and the appellant's account of the accident. He then stated: "I think you have heard enough to enable you to come to a decision as to whose negligence caused the accident, or whether both were negligent." After dealing with the question of damages, his Lordship later returned to the first question and repeated his instruction that if the jury found that the appellant had satisfied them that he was not negligent, and answered the first question in the affirmative, they should then proceed to the question of damages but, if they answered question 1 in the negative, they should deal with other questions. He then said: "Remember that the onus is upon the defendant. Any ten of you may agree on the answer to any question, it is not necessary for you to be unanimous."

Objection was taken by counsel for the respondents on the ground that the learned trial judge had not adequately explained to the jury the meaning of section 48, subsection 1, and the learned judge was referred to Winnipeg Electric Company v. Geel [[1932] A.C. 690], and Newell v. Acme Farmers Dairy Limited [[1939] O.R. 36]. The learned judge recalled the jury and on the question of onus said:--

> The contention is made that certain expressions I used might probably have been misleading. I have been asked to make it quite clear to you again, that the onus rests squarely on the defendant to prove to your satisfaction that there was

> no negligence on his part. That onus rests upon him. Any verdict brought in by you must be based upon whether or not the defendant has sustained that onus. Now, I think that is putting it as clearly as I can.

His Lordship then referred to the sections of The Highway Traffic Act dealing with the requirements as to lights and horns, and the jury were instructed that the onus was upon the defendant to satisfy the jury that the section as to lights was observed and that the non-operation of the horn was justified under the circumstances.

Essentially two points arise on this charge: First, the instruction with regard to the first question submitted to them that the appellant could satisfy the burden of proof cast upon him by section 48, subsection 1, by showing that the damage suffered by the female respondent was caused "in part" by her negligence. The second point arises in connection with the manner in which the learned trial judge further dealt with the onus cast upon a defendant by the subsection and his putting of the case to the jury as though their task, under the section, were to examine the conduct of the appellant in certain particulars only so as "to come to a decision as to whose negligence caused the accident, or whether both were negligent", to employ the language of the learned trial judge.

The appeal to the Court of Appeal was allowed, Riddell J.A., dissenting. Laidlaw, J.A., who wrote the majority judgment and with whom Gillanders, J.A., agreed, held that the trial judge was in error in his charge with regard to the first point and that the jury, so charged, could not properly deal with the question as to whether or not the appellant had satisfied the onus of proof resting upon him. We find ourselves in agreement with Laidlaw, J.A., on this point. The appellant could not satisfy the burden placed upon him by showing that the damages were caused in part by the female plaintiff's negligence. His obligation was to satisfy the jury that the loss or damage did not arise through any negligence or improper conduct on his part. If they are so satisfied, that is an end to the matter; if they are not, it would then be open to them to find that the female plaintiff's negligence caused or contributed in part to the accident in accordance with the provisions of The Negligence Act, R.S.O. 1937, c. 115.

With regard to the second point arising on the charge as above referred to, this was criticized by Laidlaw, J.A., but he thought it unnecessary to determine whether this would form a good ground of appeal in view of his opinion on the other point.

With regard to this aspect of the learned trial judge's charge, we think it falls far short of what is required in explaining the nature of the onus cast upon a defendant by subsection 1 of section 48 of The Highway Traffic Act and is quite misleading. If the jury were to be put in a position to discharge their duty, it was essential that the learned trial judge should direct them properly as to the law and as to how that law was to be applied to the facts before them, as they might find them. As to the relevant law, it is only necessary to refer to the judgment delivered by Lord Wright in the privy Council in Winnipeg Electric Company v. Geel [[1932] A.C. 690, at 695 and 696], and to the judgment of Duff J., as he then was, in the same case [[1931] S.C.R. 443, at 446]. We find ourselves in agreement with the statement of the law of Middleton, J.A., in Newell v. Acme Farmers Dairy Limited [[1939] O.R. 36, at 43], as follows:--

> The jury may find itself quite satisfied that the defendant has failed to meet the statutory onus cast upon him. But each of the jurors may have a different ground for so thinking, and it may be impossible for a jury who rightly believe

> that the accident was caused by negligence to specify exactly in what the negligence consisted.

It is not necessary to repeat or amplify these authorities. They indicate the requirements of a satisfactory explanation of the effect of the legislation under consideration. The charge in the case at bar does not comply with these requirements and we think that a verdict based on it cannot stand. What the learned judge said to the jury after they were recalled was quite inadequate to rectify the error existing in his previous instructions to them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

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" " Roy Lindsay Kellock J.
" " James Wilfrid Estey J.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA:

The Hon. Louis St-Laurent K.C.

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These judgments imply that, if the three charges had been properly on the charge sheet, they could have been tried together, and this is clearly the assumption underlying section 856 in relation to an indictment. If the question had been simply whether there was jurisdiction under part 18 to try two charges together, it would have been quite unnecessary to emphasize the precise procedure followed or to make any reference to section 834.

Then does part 18 exclude all joinder of counts in a charge sheet? The commitment on the five charges was unobjectionable. Section 827 requires, for the purposes of election, that the prisoner be informed that he is charged with "the offence", which ordinarily means that upon which he has been committed, but the singular number is not to be taken as a limitation. By subsection 3,

> the prosecuting officer shall prefer the charge against the accused for which he has been committed for trial or any charge founded on the facts or evidence disclosed on the depositions.

Section 834 has already been considered. Section 839, giving all powers of amendment, authorizes the division of a count under section 891.

By the common law rule, an indictment could in general contain any number of counts. In felonies, when it appeared that they did not all arise out of the same body of facts, the court, not as a matter of jurisdiction but of judicial discretion, followed this practice: if the discreteness was detected before the prisoner pleaded, the court would quash the indictment; if it did not appear until after plea, the prosecutor was called upon to elect upon which count he would proceed; but after verdict the joinder was not available on a writ of error. So long, however, as the counts were statements of different offences arising out of what was in substance a single transaction, there was no misjoinder and all could be tried together: *The King* v. *Lockett et al.* (1), and in this background both the purpose of section 856 and the interpretation of part 18 are clarified. If a joinder of two or more counts, arising as in this case, were not allowed, then either speedy trials would be limited to commitments on a single charge or a separate trial would be necessary for each of any number of charges

(1) [1914] 2 K.B. 720.

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although they all arose out of the same transaction, and the real object of part 18 would, in large measure, be defeated. Section 710 in part 15 shows with what specific language such a limitation of trial has been prescribed.

The ground, then, upon which the court below proceeded lay in a misconception of what the *Balciunas* judgment (1) decided and the appeal must be allowed but, as the accused had appealed as well on the facts and this ground has not been considered below, I would return the case to the Court of King's Bench to be dealt with accordingly.

Appeal allowed.

1944
*Nov. 14.
*Nov. 23.

ANGUS C. WILKINSON (DEFENDANT). APPELLANT;

AND

MARY SHAPIRO AND JOSEPH SHAPIRO (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Negligence—Motor vehicles—Evidence—Trial—Action for damages for injuries to person struck by motor car—Onus of proof under s. 48 (1) of Highway Traffic Act, R.S.O. 1937, c. 288—Nature and extent of the onus—Trial Judge's charge to jury.

Plaintiff claimed damages for personal injuries caused by her being struck, while crossing a street in Toronto, Ontario, by a motor car driven by defendant. At trial, the jury, asked if defendant had satisfied them that plaintiff's loss or damage did not arise through negligence or improper conduct on defendant's part (the question being framed with regard to the onus created by s. 48 (1) of *The Highway Traffic Act*, R.S.O. 1937, c. 288), answered in the affirmative; and the action was dismissed. The Court of Appeal for Ontario ([1943] O.R. 806) ordered a new trial, on the ground of error in the trial Judge's charge to the jury. Defendant appealed to this Court.

Held: The appeal should be dismissed. The trial Judge, in charging the jury, erred in the following respects:

(1) In stating that "when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or in part, by the negligence of the plaintiff". Defendant could not satisfy the burden placed upon him by said s. 48 (1) by showing that the damages were caused in part by plaintiff's negligence; his obligation was

PRESENT:—Kerwin, Hudson, Taschereau, Kellock and Estey JJ.

(1) [1943] S.C.R. 317.

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to satisfy the jury that the loss or damage did not arise through any negligence or improper conduct on his part; if they were so satisfied, that was an end to the matter; if they were not, it would then be open to them to find that plaintiff's negligence caused or contributed in part to the accident in accordance with the provisions of *The Negligence Act*, R.S.O. 1937, c. 115.

(2) In putting the case to the jury as though their task under said s. 48 (1) were to examine defendant's conduct in certain particulars only so as (in the language of the charge) "to come to a decision as to whose negligence caused the accident, or whether both were negligent". (No doubt plaintiff's counsel, in addressing the jury, had referred to certain conduct of defendant as constituting negligence; but the statement of claim had not alleged negligence, nor was it required that it should do so.) That manner of dealing with the onus fell far short of what is required in explaining its nature and was misleading. A jury may properly find that a defendant has failed to meet the statutory onus (each juror possibly having a different ground for so thinking) without being able to specify exactly in what the defendant's negligence consisted.

Winnipeg Electric Co. v. *Geel*, [1932] A.C. 690, at 695, 696; [1931] S.C.R. 443, at 446, cited. Statement of the law in *Newell* v. *Acme Farmers Dairy Ltd.*, [1939] O.R. 36, at 43, approved.

APPEAL by the defendant from the judgment of the Court of Appeal for Ontario (1) which (Riddell J.A. dissenting) vacated and set aside the judgment of McFarland J. (dismissing the action on a finding by the jury) and ordered a new trial. The action was for damages by reason of personal injuries to one of the plaintiffs (wife of the other plaintiff) caused by her being struck, while crossing a street in Toronto, Ontario, by a motor car driven by the defendant. The ground of the judgment in the Court of Appeal was that, with regard to the onus created by s. 48 (1) of *The Highway Traffic Act*, R.S.O. 1937, c. 288, there was error in the trial Judge's charge to the jury.

E. L. Haines and *D. Haines* for the appellant.

I. Levinter K.C. for the respondents.

The judgment of the Court was delivered by

KELLOCK J.—We are all of opinion that this appeal should be dismissed. The appeal is from an order of the Court of Appeal for Ontario, dated November 18th, 1943,

(1) [1943] O.R. 806; [1944] 1 D.L.R. 139.

allowing an appeal from a judgment at trial, of McFarland J., with a jury, dated June 9th, 1943, by which the action was dismissed.

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In his charge, the learned trial judge, after explaining to the jury the meaning of the term "negligence", pointed out to them that the accident was not one requiring the respondents to prove negligence on the part of the appellant but was governed by the provisions of section 48, subsection 1, of *The Highway Traffic Act*, which he read. He then proceeded:—

> In this case, to put it frankly, the onus is upon the defendant Wilkinson to satisfy you that the injuries to the plaintiff were not caused by his negligence.
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> I should also go on to say that when a defendant is called upon to prove that the damage was not caused by his negligence or improper conduct, he might prove it by showing that it was caused, in whole or *in part*, by the negligence of the plaintiff. And that is the allegation set up here.

(The italics are mine.) The learned judge then turned to the questions to be submitted to the jury and proceeded:—

> The first question goes directly to the heart of the matter of which I have just been speaking; namely, onus; because the first question reads:

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No doubt counsel for the respondents, in his address to the jury, had referred to certain conduct on the part of the appellant as constituting negligence, but the statement of claim did not allege negligence on the part of the appellant at all, and it was not required that it should do so. The learned judge then proceeded to comment on the evidence dealing with the conduct of the respondent Mary Shapiro and the appellant's account of the accident. He then stated: "I think you have heard enough to enable you to come to a decision as to whose negligence caused the accident, or whether both were negligent." After dealing with the question of damages, his Lordship later returned to the first question and repeated his instruction that if the jury found that the appellant had satisfied them that he was not negligent, and answered the first question in the affirmative, they should then proceed to the question of damages but, if they answered question 1 in the negative, they should deal with the other questions. He then said: "Remember that the onus is upon the defendant. Any ten of you may agree on the answer to any question, it is not necessary for you to be unanimous."

Objection was taken by counsel for the respondents on the ground that the learned trial judge had not adequately explained to the jury the meaning of section 48, subsection 1, and the learned judge was referred to *Winnipeg Electric Company* v. *Geel* (1), and *Newell* v. *Acme Farmers Dairy Limited* (2). The learned judge recalled the jury and on the question of onus said:—

> The contention is made that certain expressions I used might probably have been misleading. I have been asked to make it quite clear to you again, that the onus rests squarely on the defendant to prove to your satisfaction that there was no negligence on his part. That onus rests upon him. Any verdict brought in by you must be based upon whether or not the defendant has sustained that onus. Now, I think that is putting it as clearly as I can.

(1) [1932] A.C. 690.

(2) [1939] O.R. 36.

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Essentially two points arise on this charge: First, the instruction with regard to the first question submitted to them that the appellant could satisfy the burden of proof cast upon him by section 48, subsection 1, by showing that the damage suffered by the female respondent was caused "in part" by her negligence. The second point arises in connection with the manner in which the learned trial judge further dealt with the onus cast upon a defendant by the subsection and his putting of the case to the jury as though their task, under the section, were to examine the conduct of the appellant in certain particulars only so as "to come to a decision as to whose negligence caused the accident, or whether both were negligent", to employ the language of the learned trial judge.

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With regard to the second point arising on the charge as above referred to, this was criticized by Laidlaw, J.A., but he thought it unnecessary to determine whether this would form a good ground of appeal in view of his opinion on the other point.

With regard to this aspect of the learned trial judge's charge, we think it falls far short of what is required in explaining the nature of the onus cast upon a defendant by subsection 1 of section 48 of *The Highway Traffic Act* and is quite misleading. If the jury were to be put in a position to discharge their duty, it was essential that the learned trial judge should direct them properly as to the law and as to how that law was to be applied to the facts before them, as they might find them. As to the relevant law, it is only necessary to refer to the judgment delivered by Lord Wright in the Privy Council in *Winnipeg Electric Company* v. *Geel* (1), and to the judgment of Duff J., as he then was, in the same case (2). We find ourselves in agreement with the statement of the law of Middleton, J.A., in *Newell* v. *Acme Farmers Dairy Limited* (3), as follows:—

> The jury may find itself quite satisfied that the defendant has failed to meet the statutory onus cast upon him. But each of the jurors may have a different ground for so thinking, and it may be impossible for a jury who rightly believe that the accident was caused by negligence to specify exactly in what the negligence consisted.

It is not necessary to repeat or amplify these authorities. They indicate the requirements of a satisfactory explanation of the effect of the legislation under consideration. The charge in the case at bar does not comply with these requirements and we think that a verdict based on it cannot stand. What the learned judge said to the jury after they were recalled was quite inadequate to rectify the error existing in his previous instructions to them.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Haines & Haines.*

Solicitor for the respondents: *J. M. Friedman.*

(1) [1932] A.C. 690, at 695 and 696.

(2) [1931] S.C.R. 443, at 446.

(3) [1939] O.R. 36, at 43.

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