

J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL No. 78/71

Before: The Hon. Mr. Justice Fox - Presiding
The Hon. Mr. Graham Perkins
The Hon. Mr. Justice Hercules (Ag.)

CAROL GARREL v. A. M. DUNCKERS
trading as Duncker's Texaco
Service Station

Mr. J. Leo Rhynie for the Plaintiff/Appellant
instructed by Mr. P. Levy of Livingston & Levy
Mr. K. van Cork and Mr. Keith Jarrett for Respondent/Appellant.

11th February, 1972.

FOX, J.A.:

This is an appeal from a decision of Mr. G. M. Vanderpump, Resident Magistrate for St. Andrew in which he gave judgment for the defendant in an action of negligence. The decision was made on 8th December, 1969.

In her statement of claim, the plaintiff alleged that "on the 8th day of December, 1968 the plaintiff's motor vehicle.... was damaged in a collision brought about by the negligence of a serviceman acting as the servant and/or agent of the defendant alternatively the plaintiff claims to recover the said amount as damages for breach of contract of bailment in that the defendant failed to take reasonable care to protect the property of the plaintiff after same had been entrusted by the plaintiff to the defendant for servicing by the defendant as a gas station operator." The amount claimed was £450.5/-.

In support of her claim, the plaintiff's husband gave evidence that on the 8th of December, 1968, he gave the car to Jeff Lloyd, a person who on that day appeared to be in charge of **Dunkers's** Texaco Service Station on Shortwood Road. Mr. Garrell said that he gave the car to Lloyd to be greased and serviced by the station. He delivered the keys of the car to Lloyd. Some time later that day, he returned to the station and discovered that the

car had been damaged whilst being driven on the road by Lloyd. Mr. Garrell stated that he had not given Lloyd permission to drive the car on the road.

The defences stated at the commencement of the trial were several. The substantial defence was that Lloyd was not acting as the servant or agent of the defendant at the time, and a denial of the existence of a contract of bailment. In support of these defences, the defendant gave evidence, confirmed by Lloyd, to the effect that Mr. Garrell had brought the car there and had given it to Lloyd to be worked upon by Lloyd in an independent capacity; in the words of the evidence, "as a 'roast'". The critical issue at the trial therefore, was whether Lloyd had received this car as the agent of the defendant for servicing by the defendant through the servant of the defendant or whether the car had been delivered to Lloyd in his individual capacity for servicing.

The Resident Magistrate found for the defendant. In his reason for judgment dated 21st August, 1970, he stated that he accepted the evidence of Lloyd that Mr. Garrell had asked him to fix the **brakes** as a 'roast'. He also held that there was no contract or bailment between the plaintiff and the defendant. He found that the giving of the work to Lloyd by Mr. Garrell was unauthorised. He concluded that in those circumstances the defendant could not be held liable.

Accompanying the several grounds of appeal which were filed, was an affidavit by Mr. Anthony Bruce Basden Judah sworn to on the 14th of September, 1970. In that affidavit, Mr. Judah alleged that he was a solicitor of the Supreme Court of Judicature of Jamaica and a partner in the firm of Messrs. Judah, Desnoes and Company. At the time of the trial of the action, he was practising as a barrister-at-law and had been briefed by the solicitors to appear as counsel on behalf of the plaintiff. He appeared in that capacity on the various days of the trial. He was present on the 8th December, 1969, when His Honour Mr. Vanderpump "gave judgment in open court for approximately one hour during the course of which

he made certain findings of fact." Mr. Judah alleged in his affidavit that he recalled very well the findings of the learned Resident Magistrate and that during the course of the oral judgment he took brief notes of these findings and the judgment, and that his affidavit was prepared from, and his memory of what had transpired had been refreshed by his notes. A photostat copy of Mr. Judah's notes accompanied his affidavit. In paragraph 6 of his affidavit Mr. Judah specifically stated in ten paragraphs, the substantial findings of the learned Resident Magistrate in specific respects.

1. The Magistrate said he could not believe the story of the defendant.
2. The defendant was properly sued.
3. "At the material time a contract had been entered into with Mr. A. M. Duncker's servant or agent and no independent third person."
4. "That at the material time the plaintiff gave the car to a servant or agent of the defendant to grease and that he believed Mr. Garrell's story regarding this matter and found that the defendant's story was totally unacceptable.....this was a clear case of a custodian for reward....."
5. "The defendant had to discharge the burden of proving that he took proper care and diligence."
6. "The cases of Aitcheson v. Page Motors Ltd. (1935) All E. R. 594 and Sanderson v. Collins (1904-07) All E. R. 561 assist the plaintiff by indicating the kind of duty owed by a bailee; the test being always whether the defendant had taken reasonable care of the goods there."
7. "That the witness Jeff Lloyd was 'a poor thing..... totally unbelievable and that this was not a 'roast'."

Mr. Judah alleged a final finding by the Magistrate wherein he held "that the defendant was in real difficulty because he had to discharge the duty of care when he was not present when the goods

were handed over and that in the circumstances this was impossible and therefore he must succeed."

It will be seen from this assertion in the final finding alleged in Mr. Judah's affidavit, that the Magistrate was of the view that D~~unckers~~ was absolved from liability as a custodian for reward because he was not present when the car was handed over to Lloyd. This basis for the Magistrate's decision is altogether different from that which the Magistrate stated in his reasons for judgment. It was obvious, therefore, that in accordance with the recognised practice, the matter had to be referred to the Magistrate for his comments. This was done. On the 28th of October, 1971, the Registrar of this court returned the original proceedings and the affidavit in support of the appeal to the Clerk of the Courts, St. Andrew with a request that it be brought to the attention of the Magistrate for his written comments thereon. The Registrar asked that four copies of such comments be sent to him. In reply to that request, the Registrar received from the Clerk of the Courts, St. Andrew, a letter dated 5th November, 1971, which states:-

"Mr. Vanderpump has asked me to acknowledge receipt of your memorandum of the 28th ultimo regarding an affidavit in support of appeal herein and to invite your attention to the second head note in the case Jamaica Railway Corporation v. Duff to be found at 5 G.L.R. 34".

The original proceedings were returned with this letter.

I consider this a most unsatisfactory manner of complying with the directions of the Court as they were conveyed to the Magistrate by the Registrar's letter of 28th October, 1971. It is a totally unsatisfactory reply to the allegations in Mr. Judah's affidavit. This affidavit charged in effect that the findings of fact which had been made at the time of the delivery of the oral judgment had been altered. The clear implication was that these altered findings of fact had been made the basis of the Magistrate's written reasons for judgment. This is the "extremely rare" and serious situation envisaged in Jamaica Railway Corporation v. Duff when the court, if satisfied that the alterations had indeed been

made, would be prepared to look behind the written reasons for judgment. In my view, therefore, it is overwhelmingly clear that the Magistrate should have specifically dealt with the several precise assertions which were made in Mr. Judah's affidavit. Upon his failure to do so, I cannot say that these assertions by Mr. Judah have been answered much less specifically traversed.

Counsel for the respondent invited our attention to a note which appears in the record at the last page of the notes of evidence. In the course of that note, this is said:

"Court finds defendant is the proper defendant.....that plaintiff husband gave defendant servant Jeff Lloyd the car to service, this was not possible so he asked him to fix the brakes as a 'roast'. Jeff took the car on a frolic of his own not within the apparent scope of his employment, (he was a serviceman only).....therefore the defendant was not liable and so the action failed. Judgment for defendant with costs to be agreed or taxed".

I agree that in substance this note reflects the thinking which is described in the Magistrate's written reasons for judgment. In my view, however, this cannot be regarded as a satisfactory answer to the sworn allegations of Mr. Judah. These allegations remain uncontradicted by way of any comment by the Magistrate. I am of the view, that in the particular circumstances of this case, such a contradiction by way of the Magistrate's comment was demanded.

The record of the appeal is altogether unsatisfactory. I do not think that the matter should be referred back to the learned Magistrate for any further action. The proper course is to order a new trial before another Resident Magistrate. The appeal should be allowed, and the judgment of the Magistrate set aside. A new trial should be ordered to take place before another Resident Magistrate; the cost of both trials to abide the event. In relation to the appeal, I propose that the court makes no order as to cost.

GRAHAM PERKINS, J.A.: I agree.

HERCULES, J.A.(Ag.): I agree.

FOX, J.A.: The judgment of the court is therefore in the terms I have proposed.