JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 130 OF 2005

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE G. SMITH, J.A. (Ag.)

BETWEEN :	GUY'S TRUCKING CO. LTD.	1ST APPELLANT
AND	EVAN WATSON	2ND APPELLANT
AND	RUPERT BARNES	RESPONDENT

Mr. Maurice Manning and Miss Catherine Minto instructed by Nunes Scholefield, Deleon & Co., for the Appellants.

Mr. Ainsworth Campbell, for the Respondent.

December 3, 4, 2007 and February 22, 2008

PANTON, P.

I have read in draft the reasons for judgment written by my learned brother, Cooke, J.A., and I agree that this appeal ought to be allowed, and the matter remitted to the Supreme Court for a new trial.

COOKE, J.A.

1. In view of the conclusion to which I have arrived, it is only necessary for me to deal with the factual circumstances of this case in the barest outline. At

about 9:30 a.m. on the 16th of September, 1997 there was a collision between a "tractor head and trailer" and a motor cycle. The accident took place at the intersection of Port Royal Street and Mathews Lane in Kingston, while both vehicles were travelling in a westerly direction. The respondent was the rider of the motor cycle; the 2nd appellant was the driver of the "tractor head and trailer" and the 1st appellant is the employer of the 2nd appellant. As a result of this collision the respondent received serious injury and his left leg had to be amputated at the knee. He brought an action in negligence against the appellants and on the 28th of October, 2005 he succeeded and was awarded very substantial damages.

2. The appellants have filed a number of grounds in challenge to the correctness of the decision of the court below. However, I shall be concerned only with the first ground which reads:

> "1. The Learned Judge erred as a matter of fact and/or law and/or wrongly exercised her discretion when she rejected the Defendant's application for extension of time to file the Witness Statement of Sergeant Smikle and to call Sergeant Smikle as a witness at the trial."

3. On the 8th of December, 2003 there was a Case Management Conference pertaining to the action brought by the respondent. The two relevant orders made at that conference were:

(i) Service of Witness Statements on or before March 8, 2004.

(ii) Trial to commence on June 27, 2005 for 3 days.

4. On the 16th of June, 2005, the appellants filed a "Notice of Application for Court Orders at Trial". Therein paragraph 2 sought an order:

> "That the Defendants be granted an extension of time within which to file and serve the Witness Statement of Alvin Roy Smikle."

This application was supported by an affidavit of Miss Catherine Minto an Attorney-at-Law and an associate of Messrs Nunes Scholefield Deleon & Co., Attorneys for the appellants. The relevant paragraphs in this affidavit are:

> "17. That I also pray for an Order granting the Defendants an extension of time to file and serve the witness statement of **Sergeant Alvin Smikle.** It is my instructions and I do verily believe that Sergeant Smikle was one of the Police Officers at the scene on the day of the accident.
>
> 18. That Sergeant Smikle was only located in May, 2005 and I met with him and obtained a witness statement on May 17, 2005. Neither the Defendants nor its insurer possessed a statement from Sergeant Smikle prior to May, 2005, and accordingly, no witness summary could have been prepared or exchanged in keeping with the timetable.
>
> 19. That Sergeant Smikle's statement was served on June 3, 2005.
>
> 20. That I verily believe that the Claimant would not be prejudiced by the late service of this statement, as Sergeant Smikle's evidence does not vary the Defendants' case and in fact corroborates the account of the Defendants'

other witnesses, whose statements and summaries have already been served. Accordingly, the Claimant will not be taken by surprise, and is at liberty to cross-examine Sergeant Smikle.

21. That further, Sergeant Smikle is a witness to the accident, and it is in the interest of justice that all relevant evidence be placed before the Court.

22. That the Defendants' failure to serve Sergeant's Smikle's statement was not due to any willful neglect or deliberate attempt to prejudice the Claimant. In the premises, I humbly pray that this Honourable Court will grant an Order in terms of the application filed herein."

5. The notes of evidence indicate that the Court below dealt with the application to extend time after the close of the respondent's case. Apparently this was so done by agreement between the parties. The notes of evidence record the submission of Counsel for the appellants in part as follows:

"This was the earliest opportunity for defendants to make application.

Officer located in May 2005 and not possible to obtain a date for hearing of application.

In Support of application rely on few authorities.

Litpak Ltd v. Harris 1997 PN. L.R. 239.

Page 3 of the authority – final paragraph on 'October 11'.

Page 4. In Costellon v. Somerset Country Council (1993) 1 W.L.R. 256. Sir Thomas

> Bingham M.R. said "as so often happens". Neither of these principles is absolute.
>
> Two competing principles.
>
> 1. Time limit to be adhered to.
>
> 2. Claimant or defendant in this case defendant should not be prevented — Court should not prevent the evidence of critical witnesses excluded from giving evidence.
>
> Witness that defendants intend to call notice given to claimant in excess of three weeks ago. Claimant would not be prejudiced. Officer can be seen as an independent witness. Witnesses for claimant said they did not see any police officer on the scene. Claimant would be in a position to test witness he being an officer of the court. He can only enlighten the Court as to what happened 16/9/97."

6. Also again in part, as taken from the notes of evidence, the submission of Counsel for the respondent was as follows:

> "**Mr. Scharsmidth Q.C.**
>
> Invites Court to look at witness summary of Peter Munroe.
>
> Paragraph 3 when I came inside no police was yet on the scene.
>
> Accident took place on 16/9/97.
>
> Witness statement in year 2005.
>
> ...
>
> One of things Court takes into account application to extend time — attitude or indifference of applicant to orders made by the Court.

On the facts applicant totally indifferent to Order to serve witness statement.

Invites Court to look at Miss Minto's affidavit paragraphs 16, 17 & 18.

Does not answer the simple fact defendant knew of existence of two policemen and did absolutely nothing to procure any statement. It would not have taken any effort to locate the two policemen.

Section 29.11 1 C.P.R. [sic] Rules where a witness statement is not served.

Court looks at all factors – party not to be taken by surprise. Game is played with cards on the table.

Witness statement of Samuel Guy second Core bundle page 23 paragraph 5.

Affidavit sworn to 7/6/04 paragraph 6.

Explanation in Miss Minto's affidavit does not accord with paragraph 6.

In considering whether or not to grant the application Court should consider among other things whether failure to comply with order to serve witness statements resulted from inaction or indifference to the Order and whether or not a good explanation has been given. Sergeant Smikle is in the Force."

7. The learned trial judge made her ruling on the following date, the 28th June, 2005. This was as follows:

"**Adjourned to 28/6/05**

Court rules 28/6/05

1. Having regard to the Affidavit evidence of Catherine Minto sworn to on 22/6/05 the defendants have not demonstrated that they made any serious efforts to locate Sergeant Smikle between the time of the accident and when the statement was secured which is almost eight years.

2. Miss Minto has deponed that the evidence of Sergeant Smikle is in keeping with the other evidence for the defence consequently on her own words the statement sought to be adduced does not vary the defendants case as set out in paragraph 20 of her affidavit.

It is on these grounds that I have exercised my discretion not to grant the application pursuant to Rule 29.11 of the Civil Procedure Rules 2002."

8. In her judgment the learned trial judge said at page 4:

"The Defence sought to tender the statement of Sergeant Smikle and this application was made pursuant to Rule 29.11 of the Civil Procedure Rules 2002.

Rule 29.11 provides:

(1) Where a witness statement or witness summary is not served in respect of an intended witness within the time specified by the Court then the witness may not be called unless the Court permits.

(2) The court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under Rule 26.8 application.

Mr. Morgan learned Counsel for the Defendants urged the Court to grant the application and submitted that the Court should consider the consequences of excluding the evidence of Sergeant Smikle.

> Mr. Donald Scharsmidth Q.C. learned Counsel for the Claimant submitted that in considering whether or not to grant the application the Court should consider among other things whether failure to comply with order to serve witness statements resulted from inaction or indifference to the order and importantly whether or not a good explanation has been given.
>
> I accepted these submissions as correct in law and find that no good explanation was given."

9. I now turn my attention to Rule 29.11 which has already been set out above. Under Rule 29.11 (1) the permission of the Court had to be obtained before Smikle could be called as a witness – as pursuant a case management order of 8th December, 2003 his statement had to have been served by the 8th March, 2004. (See para. 3 supra) Under Rule 29.11 (2) the judicial discretion whether or not to grant permission embraces two stages. Firstly there must be a consideration as to whether or not the applicant "has a good reason for not previously seeking relief under Rule 26.8 applications". If the trial judge answered the question pertinent to the first stage in the negative then the application must fail. If the trial judge considers that there was good reason for not previously utilizing a Rule 26.8 application, it does not follow that permission to call the proposed witness will automatically be given. There is a compelling reluctance on my part to attempt to prescribe criteria which trial judges should employ in exercising their discretion in the second stage, for I am not so prescient as to contemplate the manifold circumstances which may, and no doubt will arise. Undoubtedly the discretion at the second stage must be

exercised with a view to the contending parties having a fair trial. The overriding objective of our Civil Procedure Rules 2002 is that of "enabling the Court to deal with cases justly".

10. I am of the view that the application to extend time as fashioned by the appellants in the Court below is really a Rule 26.8 application. The proper application at the trial should have been for permission to call Smikle although his statement had not been served within the ordered timetable. However, the parties treated the application to extend time as if it was one for calling Smikle as a witness. So did the learned trial judge — see her ruling in paragraph 6 above. There was material before the Court for the learned trial judge to exercise her discretion within the ambit of Rule 29.11. Did she exercise her discretion judicially?

11. I do not think she did. She eschewed the two stage analysis which I think is necessary to give effect to Rule 29.11. There is no indication from her ruling or in her judgment that there was any consideration of what I have categorised as the first stage. Further, the fact it took the appellant "almost eight years" to secure a statement from Smikle, does not by itself necessarily mean that calling him as a witness would have made the trial unfair to the respondent. This is even more so when the second reason in her ruling was to the effect that Smikle's evidence would not add anything to the appellant's case. In her judgment, the learned trial judge seemed to have placed unwarranted emphasis on what she regarded as the absence of a "good explanation" as to why it took

so long to secure a statement from Smikle. The learned trial judge appears to have wholly ignored the submissions of Counsel for the appellant which emphasized that the calling of Smikle would not in anyway have been prejudicial to the respondent. I do not intend to say any more as my conclusion is that there has been no proper adjudication on the issue of whether or not Smikle should have been permitted to have been called at the trial. Perhaps I should issue a word of warning. In these applications it is certainly not wise to engage in attempting to prejudge the credibility of a proposed witness and then factor any such preconceived impression as a consideration for the granting or refusal of the application.

12. I would allow the appeal and set aside the judgment of the court below. I would further remit this case to the Supreme Court for a new trial. I am unaware of any impediment which militates against this course.

G. SMITH, J.A. (Ag.)

Having had the benefit of reading the reasons for judgment of my learned brother Cooke, J.A., I concur.

PANTON, P.

ORDER:

The appeal is allowed. The judgment of the court below is set aside. A new trial is ordered, to take place as soon as possible. Costs of the appeal are to await the outcome of the new trial.