IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L.R.007/1977

BETWEEN	CLARENCE ROBINSON	PLAINTIFF
AND	F.S. AARONS	DEFENDANT

D. Schardsmidt instructed by Miss Yvonne Bennett for Plaintiff.

C.D. Morrison instructed by Dunn, Cox & Orrett for Defendant.

Heard: June 20, 21, 22, 1983.

Delivered: Friday, 13th January, 1984

J U D G M E N T

THEOBALDS J:

The Plaintiff in this action was an electrical linesman. He was at all material times in the employment of the Defendant who was and is a licenced electrician and an electrical contractor carrying on business at 45 Beechwood Avenue in the parish of Kingston. The Plaintiff was not a licenced electrician and the precise nature of his duties while in the employ of the Defendant is one of the main areas of dispute in the pleadings and in the evidence. The Plaintiff in his Statement of Claim sues to recover damages for negligence by the Defendant and or his servants and or agents and for failure by the Defendant to provide a safe system of work. As a consequence of negligence or of such failure the Plaintiff claimed that on or about the 20th July, 1971, he received an electric shock and severe burns and other injuries and fell to the ground from an electric pole on which he was working and was severely injured and suffered loss and damage. In the course of his business as an electrical contractor the Defendant would undertake and carry out certain electrical work for the Jamaica Public Service Company Limited. On the morning of Tuesday, 20th July, 1971 the Defendant having been engaged by the Jamaica Public Service Co. Ltd. to erect a new 35ft. electric pole at Upper Mellwood Avenue near its junction with Mellwood

Way in the Cherry Gardens area of upper St. Andrew as a replacement for the existing pole and to move the existing lines from the old pole at the site to the new pole, accordingly directed the Plaintiff and two other workmen to go with the driver of one of his trucks to the Jamaica Public Service Co. Ltd. depot along Washington Boulevard; they were there to collect the new pole, and transport it to the Cherry Gardens site and there carry out the said work of installing the new pole. The parties are in agreement up to this point. Thereafter there is sharp divergence. The Plaintiff claims that the directions given to him by the Defendant were further to transfer the electric wires from the old pole to the new. The Defendant denies giving the Plaintiff any such further directions to transfer the existing lines from the old pole to the new pole. The Defendant claimed that he carried out an inspection of the lines in the presence of the Plaintiff, instructed the Plaintiff and other workmen to dig the hole and plant the new pole and thereafter to await his return to the site with the necessary equipment and tools for the removal of the secondary lines which he (the Plaintiff) intended to carry out that day himself. I have already identified the precise nature of the Plaintiff's duties while in the employment of the Defendant as being one of the main areas of dispute in the case.
The main issue now appears to be the exact scope and extent of the directions issued by the Defendant to the Plaintiff on that fateful morning of 20th July, 1971. It is not in dispute that on that morning the Plaintiff along with other workmen was engaged in carrying out certain electrical work for the Defendant (his employer) in the Cherry Gardens area of upper St. Andrew. Though not expressly admitted, it is not in dispute that while engaged in transferring high tension wires from the old pole to the new pole the Plaintiff received a

severe electrical shock. This electrical shock burnt his face and other parts of his body and caused him to fall from his perch on the top of the pole down to the asphalt below. In so falling the Plaintiff suffered severe injuries. Indeed medical reports dated 26th January, 1975, 18th January, 1972, 3rd December, 1976 and 17th June, 1983 from Professor Harry Annamunthrodo, P.V. Poonai, F.R.C.S., C. Hamilton M.B., B.S. Senior House Officer in Ophthalmology, and A. Bannister Poyser M.B., B.S., D.D., were tendered and admitted in evidence by consent as Exhibits 1 to 4 inclusive respectively. Collectively they show beyond any question that the injuries suffered by the Plaintiff were severe, extensive and far reaching in their permanency. If suffered by the Plaintiff while carrying out the directive of his employer in circumstances in which liability by the employer would ensue the damages would of necessity be heavy. If however suffered by the Plaintiff while on "a frolic of his own" if one is permitted to borrow this expression and in express disobedience of the instructions of the employer and with full knowledge that he (the Plaintiff) was embarking on an intrinsically dangerous mission and with full knowledge and appreciation of the risks of injury and damage to his person then this would be a complete defence to his claim. A finding of fact on this important issue is germane to the task ahead and I shall advert to same later in the course of this judgment.

The Plaintiff's statement of claim then continued by outlining the load carrying capacity of the wires used by the Jamaica Public Service Company Ltd. in the Cherry Gardens area. The primary lines sited on top of each pole carried 13000 volts and are known as high tension wires. Beneath these primary lines and lower down on the same poles are located the ordinary 220 volt lines used for domestic supply of electricity. These domestic supply lines are alos known as secondary lines. Both the primary and secondary lines on

the pole concerned in this case run from and off the main lines along Carmel Road and Upper Carmel Avenue. These allegations of fact are not at all in dispute, and the purpose thereof appears to be to assist the Court in having a clear picture of the dangers inherent in the normal work and duties of an electric linesman. The Plaintiff goes on to particularize. He avers that at the junction of Carmel Road and Upper Mellwood Avenue there was an electrical switch on the secondary lines which controlled the supply of electricity to the 220 volt lines on which the Plaintiff claims that he was instructed to work. At a point some distance further back on Carmel Road where it runs into Upper Carmel Avenue there was a second switch (a main switch) which controlled all current namely to both the electrical current on the 13000 volt or primary lines and to the 220 volt or secondary lines in the area. The Plaintiff claims that he was required to work on both the primary and secondary lines.

The Defendant joined issue with the Plaintiff on the above averment. He the Defendant, claimed that the main switch was not so situated namely at the junction of Carmel Road where it runs into Upper Carmel Avenue but on a pole at the junction Upper Carmel Avenue and Cherry Garden Drive. The importance of this relatively minor area of disagreement appears to be that while the Plaintiff claimed that both of the said switches for the primary and secondary lines were out of sight from the place where the new pole was being erected and from the wires of the old pole, the Defendant (in his pleadings at any rate) was not prepared to admit that this was so. Naturally if the switches which the Plaintiff states that he had sent Maxwell to disconnect were within his view then he would be hard put to explain why it is that he was not aware that Maxwell had pulled the wrong switches. If Maxwell had in fact drawn the links on the

primary or high tension lines as the Plaintiff claims to have instructed him then the primary and secondary lines would have been both dead and there would have been no danger to the Plaintiff. Maxwell, the Plaintiff claims, was further instructed to bring the links for the disconnected lines to him and according to the Plaintiff Maxwell did so. The Defendant claimed that Maxwell did not return with any links or switches but left them hanging on their respective poles. As it turned out from the Plaintiff's evidence the links or switches for both primary lines and secondary lines were similar in appearance so it is difficult to understand why the Plaintiff on seeing the switches, if indeed he saw any, relied "on this visible proof that the high tension lines had been switched off and disconnected". This is even more difficult to comprehend as the Plaintiff gives sworn evidence that he (Plaintiff) "pick up the switch sticks and gave him (Maxwell) and say just walk go up and kill the primary lines. About 20-25 minutes after he come and tell me he pull all the <u>secondary</u> lines and bring the links". The underlining is mine. It is not without significance that the Defendant stated that on his return to the site after an absence of some three hours at the Jamaica Public Service Orange Street depot it was he (the Defendant) who re-energized the secondary lines by closing the switches/which controlled them. He was not cross-examined as to this, so it would be a safe finding that it was the secondary lines and the secondary lines only that Maxwell had de-energized and that he told the Plaintiff so. The Plaintiff himself has said that Maxwell told him so, so how then could he aver in his statement of claim that "relying on this visible proof that the high tension lines had been switched off and disconnected, the Plaintiff climbed the old pole, disconnected the wires and commenced to fix them to the new pole". He had every reason to know that only the secondary lines had been disconnected. Additionally the Plaintiff

avered that "unkown to the Plaintiff and to all concerned all the lines were at the time indeed 'dead', but this was because there had been a general electrical power outage in the entire area, and not because they had been switched off by Maxwell". The Plaintiff's evidence in chief on this point is that when Maxwell returned from the errand on which he had been sent - namely to go to the main line and draw the links he Maxwell informed the Plaintiff that "there was a power cut". Under cross-examination the Plaintiff further strengthened this by stating -

> "It was my impression that when Maxwell tell customers they tell him there is a power cut on anyhow".

This is precisely what the Defendant has set out in his statement of defence viz -

> "The Plaintiff well knew that there was a power cut as Maxwell had told the Plaintiff that a resident told him that there was a power cut in the area and the current had not yet been restored"

So one is faced with the unusual situation where not only is the Plaintiff failing to prove what he avers in his Statement of Claim but actually proving affirmatively what the Defendant advances by way of a denial and answer.

It was at about this stage of the evidence that the Plaintiff was asked in Cross-examination if he had ever heard the expression "beating the power cut". His reply was yes; then he went on to say he had never heard that expression. He explained his change by stating that he did not understand clearly, and he denied that Maxwell had said anything about "beating power cut". I was not impressed. I formed an impression that the witness was taken by surprise. If the Plaintiff swear that on his return Maxwell told him that he had pulled all the secondary lines and yet the Plaintiff proceded to

to work the primary line would it not be probable that Maxwell would make use of the expression "beating the power cut", for this was exactly what was being done. Even to a layman, that is, one not versed in the electrical linesman trade, it is my view that that expression is self explanatory. The Defendant on the other hand, albeit a electrician of much more experience than the Plaintiff said he knew that phrase and understood it to mean "a person working a line during an unscheduled power cut". He added that in his view such a person "is literally committing or attempting suicide". Events of the 20th July, 1971 show exactly how right the Defendant was. Turning now to the main issue in the case namely did the Defendant instruct the Plaintiff to remove or transfer the primary or secondary lines or any lines at all from the old pole to the new or was the Plaintiff simply told to plant the new pole and await the Defendant's return. The Plaintiff's case is argued on the premise that it is unlikely that a workman would voluntarily procede to do work which he was not instructed to do. But is this necessarily true or is the contrary just as probable? Planting a new pole is merely the first step towards a complete job, that complete job involving the transfer of the electric wires from the old pole to the new. It is a question of progressing from the unskilled labour to the technical or skilled labour. The car wash man if the keys are inadvertently left in the ignition will not only wash but find some excuse to move the vehicle from one position to another. The man who mixes mortar progresses from that to rendering of walls and so on ad infinitum. If he does the extra work satisfactorily he naturally looks to his employer for some acknowledgment of his efforts. If he damages himself or his employer's property while doing something he was not instructed to do is it fair or proper for him to seek compensation from the employer on the basis that the latter has failed to provide a safe system of work

or to supervise and instruct him properly as to the dangers inherent to the task he is performing. Still, if a skilled man adopts a dangerous course of conduct not for the sake of saving himself trouble but primarily in order to get on with his employer's business the Courts will be slow to put blame on him if in so doing he causes damage to himself. (See Machray v Stewarts & Lloyds Ltd /1964/ 3 A.E.R. p.306). It is all a question of sticking to balance. Here the Plaintiff, and the Plaintiff alone says he got certain instructions. The Defendant, and the Defendant alone says no such thing; I instructed you to plant a new pole and await my return. It becomes now a question of fact as to who the Court accepts as truthful and accordingly the surrounding circumstances and the demeanour of the respective protagonists are the only key. Pause therefore briefly with me while I go through the evidence. It is true to say that the Defendant was throughly and searchingly cross-examined. Equally is it correct that in his final address learned counsel for the Plaintiff was unable to point a questioning finger at the Defendant's evidence or demeanour, apart of course from the suggestion that it would be strange for the Plaintiff to do work he was not asked to do. I have already commented briefly on this above. I paid close attention to the Defendant's demeanour and he impressed me as a witness of truth. I could not, with justification, put a question sign against any aspect of his testimony or the manner in which he testified. He was not discredited in any way. Weighing the Plaintiff in the same scale and making allowances for the fact that he had been very seriously injured and had gone through a traumatic experience I was not impressed with his answers to the questions on "beating the power cut" dealt with above. I was impressed by the Plaintiff's admission that that by pulling the links on Carmel Road the whole area of about three hundred (300) homes

would be without power, but all he did was send Maxwell with one Notice Card to advise about one dozen residents in the area a few minutes before Maxwell would have pulled the links. His evidence in re-examination -

> "I ask him if he (Maxwell) kill the main and he said some of the links hang down on the pole".

I asked myself what does all this mean to a man who is about to work on a high tension wire, was Maxwell's reply any answer to Plaintiff's all important question? This is the same Maxwell of whom the Plaintiff said in evidence in chief -

> "he come and tell me he pull all the secondary lines and bring the links".

If according to the Plaintiff it was easier and more comfortable to work without the rubber gloves the sole purpose of which is to provide insulation from live not dead lines why did he wear the rubber gloves in the first place if he knew or thought he was working on dead lines. I asked myself whether Plaintiff's wearing these gloves at all was cosistent with feaf that power might be restored at any time and the primary lines would therefore be re-energized if the links had not been pulled.

In relation to his stated intention not to work the primary lines that day the Defendant was able to offer some explanation. He claimed that the Jamaica Public Service Company Limited had a special crew equipped with special vehicles to transfer primary lines without shutting down the power in the area and the Plaintiff's intention was to use this crew, as no extra cost to himself was involved. The existence and function of this Hotline Crew was all comfirmed by the Plaintiff.

If I am wrong in relation to my assessment of the credibility of the Plaintiff and the Defendant on the basis of the several points raised above, then at most it could be said that in relation to credibility on a most charitable view of the Plaintiff's shortcomings the scales were equal.

Where the scales are equal then the Court must resolve the issues by looking to see on whom the burden of proof lies. The Plaintiff would have failed to tip the scales in his favour on a balance of probability or at all and could therefore not succeed in his claim.

In relation to the second limb of his claim namely that the Defendant failed in his common law duty to provide a proper and a safe system of work for the Plaintiff I am of the view that this allegation, like any other fact in the case, had to be proven by some evidence in support thereof. It would not be sufficient in my view to apply the doctrine of res ipsa loquitive Indeed the Plaintiff's evidence in chief was to the effect that he had worked with Maxwell as his assistant for some years and on several different projects. In particular he referred to working with Maxwell on the Delisser Estate project in St. Catherine where primary and secondary lines were involved and that Maxwell knew the difference between primary and secondary lines. Here again the Plaintiff seemed to be proving the defence namely the denial that the Defendant failed to provide a proper and safe system of work for the Plaintiff and also to instruct and warn and educate his employees properly so that they worked safely on the job. The Plaintiff had worked alongside with Maxwell on the job for years and the inference is that during that time he had been a safe and dependable co-worker. Indeed according to the Plaintiff they had even worked together in the Cherry Gardens area before. Even if on the 20th July, 1971 Maxwell had pulled the wrong switches, and it is more than apparent that they were the wrong switches, the Plaintiff's evidence is that Maxwell reported to him (Plaintiff) that he had -

> "pull all the secondary lines and bring the links ..... there is a power cut".

Armed with this information as he was, I find that the Plaintiff was negligent in that -

1) He failed to heed the information that there was an electrical outage in the area and that power was likely to be restored at any time.

2) Failed to make use of the gloves available and which he knew were necessary for his protection when handling lines.

3) Instructed Maxwell to pull switches without first checking to ensure that these switches controlled current on the primary lines.

4) Assumed wrongly that the switches he instructed Maxwell to pull controlled the current on the primary lines.

5) Failed to have any or any sufficient regard for his own safety.

The Plaintiff was beyond any question severely injured while carrying out certain work in the interest of his employer but he was acting at the time in disobedience of the instructions of the Defendant and on the findings above is not entitled to a judgment. There will be a judgment for the Defendant with costs to be agreed or taxed.