

SADI SIWINGWA (being personal representative of deceased YUNA NAMWALIZI)  
v JAILOS PHIRI (1979) Z.R. 145 (H.C.)

HIGH  
MOODLEY J  
20TH  
1977/HK/267

COURT

APRIL

1979

**Flynote**

Civil procedure - Admissibility - Admissibility of evidence arising out of previous criminal case - Lack of statutory or judicial authority - law to be applied - High Court Act, Cap. 50, s. 10.

Evidence - Admissibility - Admissibility of evidence arising out of previous criminal case in civil proceedings - Procedure to be followed - Civil Evidence Act, s. 11.

**Headnote**

This was an action for damages and consequential loss for the death of the deceased caused by the negligence of the defendant's servant or agent. A preliminary issue was raised as to whether the fact that the defendant's servant had been convicted of careless driving in relation to the fatal traffic accident which was now the subject of these civil proceedings was admissible in evidence.

**Held:**

- (i) In the absence of any statutory or judicial authority in Zambia in matters relating to practice and procedure, s. 10 of the High Court Act, Cap. 50, provides for the High Court to exercise jurisdiction on those matters in substantial conformity with the law and practice for the time being in force in England.
- (ii) In England a conviction is admissible in evidence under s. 11 of the Civil Evidence Act of 1968. Zambia, following the law and practice observed in England, would follow the same procedure.
- (iii) The procedure concerning the admissibility of convictions is laid down under R.S.C. O. 18, r. 7A

**Cases referred to:**

- (1) Hollington v Hewthorn and Co., Ltd. [1943] K.B. 587.
- (2) Goody v Odhams Press Ltd. [1966] 3 W.L.R. 460.
- (3) Stupple v Royal Insurance Co., Ltd. [1970] 3 W.L.R. 217.

**Legislation referred to:**

Civil Evidence Act 1968 (England), s. 11.

High Court Act, Cap. 50, ss. 9, 10.

Supreme Court Rules, O. 18, r. 7A

For the plaintiff: S.C.M. Malaya, Jaques & Partners.

For the defendant: M.A. Haselden, Ellis & Co.

---

Judgment

**MOODLET, J.:** This is an action for damages and consequential loss for the death of one Yuna Namwalizi deceased, caused by the negligence of a servant or agent of the defendant when driving or managing

p146

motor vehicle Registration No. ADA 1210 14th Street, Ndola/Luanshya Road, at Luanshya on 3rd February 1977. When the matter came up for trial on the 9th April 1979, it transpired that the plaintiff would be relying on the fact that the defendant's servant who is alleged to have been driving the motor vehicle in question, was convicted of careless driving by the Subordinate Court, Luanshya, in relation to the fatal traffic accident which occurred at Luanshya on the 3rd February 1977. After consultation with the advocates for the plaintiff and the defendant, it was decided that the court should determine, as a preliminary issue, whether the fact that the defendant's servant had been convicted of careless driving in relation to the fatal traffic accident, which is now the subject of these civil proceedings, was admissible in evidence.

Mr Haselden for the defendant submits that it was not open for the plaintiffs to adduce in these proceedings any evidence concerning the conviction of the defendant's servant. He relies on the case of *Hollington v Hewthorn and Co., Ltd* (1) where it was held that both on principle and authority, that, the evidence of a conviction in similar circumstances was inadmissible. In that case there was a collision between two motor vehicles on a highway. The plaintiff alleged negligence on the part of the defendant driver. In the case of civil proceedings, the plaintiff sought to give evidence of a conviction of the defendant driver of careless driving, at the time and place of the collision. Lord Justice Goddard delivering the judgment of the Court stated at p. 601:

"The contention that a conviction or other judgment ought to be admitted as prima facie evidence is usually supported on the ground that the facts have been investigated and the result of the previous investigation is, therefore, at least some evidence of the facts that thereby have been established. To take the present case, it could be said that the conviction shows that the Magistrates were satisfied on the facts before them that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who had been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt, although the discussion by text-book writers and in the cases all turn on the admissibility of convictions and not of acquittals. If a conviction can be admitted, not as an estoppel, but as prima facie evidence, so ought an acquittal, and this only goes to show that the Court trying the civil action can get no real guidance from the former proceedings without retrying the criminal case. Without dealing with every case and text-book that were cited in the argument, we are of the opinion that both on principle and authority, the conviction was rightly rejected."

Mr Haselden further submitted that in so far as English Law is concerned, the decision in *Hollington's* case (supra) was reversed by the Civil Evidence Act of 1968. Section 11 (1) of that Act provides:

"In any civil proceedings the fact that a person has been convicted of an offence by or before any Court in the United Kingdom or by

a court martial there or elsewhere shall . . . be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence . . . but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section."

Section 11 (2) provides:

"In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court martial there or elsewhere (a) he shall be taken to have committed that offence unless the contrary is proved; and (b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts upon which the conviction was based, the contents of any document which is admissible as evidence of the conviction and the contents of the information, complaint, indictment or charge sheet on which the person in question was convicted shall be admissible in evidence for that purpose."

It would appear therefore that on the facts such as those of *Hollington's case (supra)*, once the conviction had been proved, and the negligence in respect of which the driver was convicted, identified, the courts in England in terms of the 1968 Act will now be bound to find in favour of the plaintiff unless the driver or his employer disproves negligence on the balance of probabilities.

Mr Haselden argues that the courts in Zambia should not give effect to s. 11 of the Civil Evidence Act of 1968 of the United Kingdom. He contends that the *ratio decidendi* of *Hollington's case (supra)* is still good law in Zambia and that in those circumstances the courts should not admit in civil proceedings any evidence concerning the conviction of the defendant's driver. He submits that even if the provisions of the Civil Evidence Act applied in Zambia, the plaintiff had failed to comply with the provisions of R.S.C.O. 38, r. 20, concerning hearsay evidence, especially as the Zambian Evidence Act, Cap. 170, does not authorise the admissibility of convictions as provided for by the United Kingdom Civil Evidence Act of 1968. Thus, it is Mr Haselden's contention that in this regard the courts in Zambia should abide by the common law which existed pre-1968 in England and, accordingly, the decision in *Hollington's case (supra)* is still good law in Zambia. For those reasons, evidence concerning the conviction should not be admitted.

Mr Malama for the defendant submits that while the decision in *Hollington's case (supra)* was the law pre-1968 it was not necessarily good law. In fact the decision in *Hollington's case (supra)* was criticised as bad law. Lord Denning who had argued the case for the admissibility of the conviction in *Hollington's case (supra)* had this to say in the case of *Goody v Odhams Press Ltd (2)* at p. 463:

"It would not be sufficient to prove that he was convicted of the train robbery. The reason is because there is a strange rule of law which says that a conviction is no evidence of guilt, not even prima

facie evidence. That was decided in *Hollington v F Hewthorn & Co., Ltd.* I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that the decision was wrong at the time. I still think that it was wrong. But in this court we are bound by it."

Lord Salmon in the same case said as follows at p. 465:

"The defendants sought to amend, no doubt, because of the strange rule of law enshrined in *Hollington v F. Hewthorn & Co., Ltd.*, that in a civil court proof of a conviction is not even prima facie evidence that the convicted man was guilty. I wholeheartedly agree with the Master of the Rolls criticism of that decision. It is to be hoped, now that law reform is in the air, it may perhaps be reconsidered."

Thus it was because of the wide criticism that was levelled against the decision in *Hollington's* case (*supra*) and as a result of the recommendations of the Law Reform Committee under the Chairmanship of Lord Pearson, the rule of law enshrined in *Hollington's* case (*supra*) was reversed by the Civil Evidence Act of 1968. The matter came up once again in the case of *Stuppel v Royal Insurance Company Limited* (3). This is a case which came before the Court of Appeal presided once again by Lord Denning M.R. It was held in that case that the effect of s. 11 (2) (a) of the Act of 1968 was to shift the legal burden of proof. Lord Denning at pp. 223 and 224 states as follows:

"I think that the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself. For instance, if a man is convicted of careless driving on the evidence of a witness, but that witness dies before civil action is heard (as in *Hollington v Hewthorn* [1943] 1 K.B. 587); then the conviction itself tells in the scale in the civil action. It speaks as clearly as the witness should have done had he lived. It does not merely reverse the burden of proof. If that was all it did, the defendant might well give his own evidence negating want of care and say: 'I have discharged the burden. I have given my evidence and it has not been contradicted.' In answer to the defendant's evidence, the plaintiff can say to him: 'But your evidence is contradicted. It is contradicted by the very fact of your conviction.' In addition Mr Hawser sought as far as he could, to minimise the effect to shift the burden. In this, too, he did not succeed. The Act does not merely shift the evidential burden as it is called. It shifts the legal burden of proof. . . . Take a running down case where a plaintiff claims damages for negligent driving by the defendant. If the defendant has not been convicted the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving, the legal burden is shifted. It is for the defendant himself. At the end of the day, if the Judge is left in doubt, the defendant fails because the defendant has not discharged the legal burden which is upon him. The burden is, no doubt, the civil burden. He must show, on the balance of probabilities that.

p149

he was not negligent: see *Public Prosecutor v Yuvaraj* [1970] 2 W.L.R. 226, 231, in the Privy Council quite recently. But he must show it nevertheless. Otherwise he loses by the very force of the conviction."

Mr Malama submits that the principle of *stare desisis* still applies in Zambia. He contends that where the laws in Zambia do not provide for a situation such as in the instant case, then the High Court here must have recourse to and abide by the decisions of the Superior Courts in England. The courts must therefore follow the provisions of the Civil Evidence Act 1968 in the absence of any comparable statutory provisions in Zambia.

I have given anxious consideration to the rival arguments in this preliminary issue and I find I am unable to agree with Mr Haselden's submissions in this regard. While the decision in *Hollington's* case (*supra*) may have been the common law of England prior to 1968, the decision was reversed by the enactment of the Civil Evidence Act, 1968. It is quite clear that since the passage of the 1968 Act the Courts in England are duty bound to admit evidence of a conviction in civil proceedings. I can not see how it can be argued now that the courts in Zambia should not give effect to the law as it applies today in the United Kingdom.

Section 10 of the High Court Act, Cap. 50, provides as follows:

"The jurisdiction vested in the court shall, as regards practice and procedure, be exercised in the manner provided by this Act and the Criminal Procedure Code, or by any other written law, or by such rules, order or direction of the court as may be made under this Act, or the said Code, or such written law, and in default thereof in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice."

There is no ambiguity in the above section. Thus in the absence of statutory or judicial authority in Zambia in matters relating to practice and procedure then the High Court in Zambia will exercise jurisdiction in those matters in substantial conformity with the law and practice for the time being in force in England. The operative words are "in substantial conformity with the law and practice for the time being observed in England in the High Court of Justice". It should be added that s. 9 (1) of the High Court Act, Cap. 50, empowers the High Court to possess and exercise all the jurisdiction, powers and authorities vested in the High Court of Justice in England. Now the law concerning the admissibility of a conviction as evidence in civil proceedings "for the time being observed in England" is that such evidence is admissible in terms of s. 11 of the Civil Evidence Act of 1968. It follows therefore that in Zambia the High Court is bound to follow the "law and practice for the time being observed in England" and admit evidence concerning a conviction in civil proceedings.

Finally I come to rule of practice concerning the admissibility of convictions. R.S.C. O. 18, r. 7A provides as follows:

p150

"(1) If any action which is to be tried with pleadings any party intends, in reliance on section 11 of the Civil Evidence Act 1968 (convictions as evidence in civil proceedings) to adduce evidence that a person was convicted of an offence by or before a court in the United Kingdom or by a court martial there or elsewhere, he must include in his pleading a statement of his intention with particulars of (a) the conviction and the date thereof, (b) the court or court martial which made the conviction, and (c) the issue in the proceedings to

which the conviction is relevant."

RS.C. O. 18/7A/2 provides:

"If a party desires to rely on s. 11 of the Civil Evidence Act 1968, his pleadings must comply with the following requirements, namely:

- (1) It must expressly state that he intends to adduce evidence at the trial that a person, whether or not a party to the proceedings, was convicted of a criminal offence, whether on plea of guilty or otherwise; and
- (2) It must give the specified particulars required.

It should not be assumed that pleading particulars of the conviction is itself sufficient to specify the issue in the proceedings to which such conviction is relevant: Particulars of this fact must be stated in the pleading. 'Unless the pleading of a party complies with the above requirements, he will not ordinarily be enticed at the trial to adduce evidence of such conviction or to rely upon Section 11 of the Act, and, subject to the directions of the trial Judge, he may first have to obtain leave to amend his pleading. On the other hand, the conviction of a criminal offence is admissible in evidence under Section 11 (1) of the Act, even though the person so convicted is not a party to the proceedings, and in such case, it may well be that the imperative requirements as to pleading criminal conviction may have to be relaxed."

Thus, for the foregoing reasons, Mr Haselden's preliminary objection fails. I hold that, subject to the provisions of R.S.C. O. 18/7A, the plaintiff is entitled to adduce in these civil proceedings evidence concerning the conviction of the defendant's servant.

Preliminary objection rejected

---