[2013] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 105/2010

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN	**RONALD CHANG**	**1ST APPELLANT**
AND	**NATASHA CHANG**	**2ND APPELLANT**
AND	**FRANCES ROOKWOOD**	**1ST RESPONDENT**
AND	**NEVADO LISTZ**	**2ND RESPONDENT**

AND

BETWEEN	**RONALD CHANG**	**1ST APPELLANT**
AND	**NATASHA CHANG**	**2ND APPELLANT**
AND	**FRANCES ROOKWOOD**	**1ST RESPONDENT**
AND	**NEVADO LISTZ**	**2ND RESPONDENT**
AND	**FELICIA VASSELL**	**3RDRESPONDENT**
AND	**AYESHA MAXWELL**	**4TH RESPONDENT**

AND

BETWEEN	**RONALD CHANG**	**1ST APPELLANT**

AND	**NATASHA CHANG**	**2ND APPELLANT**
AND	**FRANCES ROOKWOOD**	**RESPONDENT**

Kent Gammon instructed by Kent Gammon & Co for the appellants

Oswest Senior-Smith and Mrs Denise Senior-Smith instructed by Miss Stacia Pinnock for the 1ST and 2ND respondents

Jack Hines for the 3RD and 4TH respondents

1, 2 November 2011, 31 July 2012 and 4 October 2013

DUKHARAN JA

[1] This is a consolidated appeal from a judgment of Straw J delivered on 15 August 2010, in the Supreme Court, following a trial lasting over four days. This matter resulted from a claim founded in negligence arising out of a collision on 22 September 2007, at about 2:00 am along Hope Road in St Andrew between two motor vehicles, one driven by the 2nd appellant Natasha Chang and the other by the 2nd respondent Nevado Listz.

[2] On 1 and 2 November 2011, we heard arguments and reserved our decision until 31 July 2012, when we dismissed the appeal with costs to the respondents to be taxed if not agreed. We promised then to give written reasons. This is a fulfillment of that promise.

Background

[3] As stated, on 22 September 2007, at about 2:00 am, Mr Nevado Listz, the driver of a RAV 4 motor vehicle, was proceeding westerly along Hope Road in the vicinity of Ardenne Road when a collision occurred between his vehicle and a Hyundai Getz motor vehicle driven by the 2nd appellant, Natasha Chang. The 1st appellant, Ronald Chang, was the owner of the Hyundai Getz. The 2nd respondent, Frances Rookwood, was the owner of the RAV 4. There were three passengers in the RAV 4. They were Felicia Vassell and Ayesha Maxwell (the 3rd and 4th respondents), as well as a witness Odane Thomas. Both Miss Maxwell and Mr Thomas received injuries. They sued both drivers and the owners of the respective vehicles for loss incurred and injuries sustained. The Changs sued Miss Rookwood and Mr Listz for negligence and damages sustained as a result of the accident. Miss Rookwood and Mr Listz filed an ancillary claim against the Changs alleging negligence and/or contributory negligence.

The Evidence

[4] The 2nd appellant, Miss Chang, said in evidence that she drove up to the intersection of Hope and Lady Musgrave Roads in the right of two lanes proceeding to Half Way Tree. She said that the RAV 4 was already stationary in the left lane. However, she did not stop but slowed down as the stoplights had changed to green.

[5] Miss Chang further said that she drove off ahead of the RAV 4 and then put on her indicator to enter the left lane which was about 300 feet above the intersection with Ardenne Road. She said she saw the headlights of the RAV 4 behind her in the left lane.

A few seconds before turning left onto Ardenne Road, she put on her indicator. As she began to turn, the RAV 4 crashed into the left rear of her vehicle and slid along the entire left side of her vehicle. There was extensive damage to the left front as well as the left rear of the vehicle.

[6] Mr Listz, the driver of the RAV 4, stated in evidence that he was travelling on Hope Road towards Half Way Tree. Mr Thomas was seated behind him to the right, Miss Vassell in the left rear seat and Miss Maxwell in the left front passenger seat.

[7] Mr Listz said he arrived at the stoplight at the intersection of Hope Road and Lady Musgrave Road. The lights were on red so he stopped. He was in the left of two lanes proceeding westerly down Hope Road. The Hyundai Getz came down in the right lane. Mr Listz moved off when the lights indicated green. He said he was proceeding at about 50 km per hour. The Getz merged into the left lane ahead of his vehicle after passing through the stoplight and then re-entered the right lane. When the vehicles reached the intersection with Ardenne Road on the left, the Getz , which was a little ahead of the RAV 4, suddenly put on its left indicator and swerved left to turn onto Ardenne Road. The left side of the Getz collided with the right front of the RAV 4.

[8] Mr Listz lost control of the RAV 4, which then passed the intersection, mounted the sidewalk to the left where it hit a cable box and utility pole and remained in that position.

[9] The evidence of Miss Vassell and Miss Maxwell substantially supports and is similar to that of Mr Listz.

[10] The 2nd appellant, Miss Chang, called an expert, Mr Gary Ferguson, who prepared a 3D crash test simulation video which was viewed by the court during the trial.

[11] The respondents also called an expert, Major Owen James, an Accident Reconstruction Expert.

[12] In claim HCV 02466/2008, it was the finding of the learned trial judge that the Changs had not, on a balance of probabilities, proved negligence against the 1st and the 2nd respondents Rookwood and Listz. In claim HCV 04059/2009, the learned trial judge found that the respondents proved, on a balance of probabilities, that the 2nd appellant failed to keep any or any proper lookout or to observe or heed the presence of other vehicles on the road. The court also found that the 2nd appellant drove without due care and consideration for other users of the road and was liable for the injuries suffered and loss sustained by the respondents. Judgment was therefore granted for the respondents against the appellants.

[13] Damages were assessed and awarded to the respondents Miss Vassell, Miss Maxwell and Miss Rookwood. However, it is to be noted that the appellants' grounds of appeal deal only with liability and the assessment of damages has not been challenged.

[14] Miss Vassell was awarded special damages of $95,000.00 with interest of 3% from 22 September 2007 to 16 August 2010. General damages of $2,000,000.00 were awarded for pain and suffering and loss of amenities with 3% interest from 17 May 2008 to 16 August 2010.

[15] Miss Maxwell was awarded special damages of $269,250.00 with interest at 3% from 22 September 2007 to 16 August 2010 and general damages of $3,000,000.00 for pain and suffering and loss of amenities with interest at 3% from 17 May 2008 to 16 August 2010.

[16] Miss Rookwood was awarded the sum of $528,819.00 with interest at 3% from 22 September 2007 to 16 August 2010.

Grounds of Appeal

[17] Mr Gammon, for the appellants, sought and was granted leave to argue amended grounds of appeal which are as follows:

1. The finding of fact by the learned judge that the 2nd appellant failed to keep any or any proper lookout and was 100 percent negligent for the accident was erroneous.

2. The learned judge failed to find and properly consider that the 2nd appellant's vehicle (Getz) had damage assessed to the right front bumper, right headlight and right front fender.

3. The learned judge failed to properly consider the evidence of the witnesses for the 1st and 2nd appellants.

4. The learned judge erred in rejecting the evidence of the expert for the 1st and 2nd appellants, Mr Gary Ferguson, because it did not comply with section 31G of the Evidence Act.

5. The learned judge erred in not finding the 1st and 2nd respondents 100% negligent for the accident, but even if she did not find 100% then she failed to find that there was at least contributory negligence for the accident.

[18] Mr Gammon argued grounds 1 to 5 together for convenience. He submitted that the learned trial judge failed to properly assess the evidence when she found that the evidence of the 2nd appellant lacked credibility. He further submitted that the learned trial judge failed to assess the evidence given by the appellants' expert, Mr Ferguson while rejecting his evidence.

[19] Mr Gammon further submitted that the learned trial judge failed to properly assess the evidence that the vehicle driven by the 2nd appellant was properly positioned in the correct left lane and that there was damage to the right side of the 1st appellant's vehicle caused by the 1st respondent's vehicle. It was further submitted that based on the evidence given by Major James as to the measurement of the road, it was impossible for the learned judge to have found as she did.

[20] It was further submitted by counsel that damage to the 1st respondent's vehicle was so extensive that it suggested that it was going at over 50 mph. The learned trial judge, he said, failed to even consider contributory negligence on the part of the 2nd respondent. He asked this court to overturn the finding of negligence against the 2nd appellant and find the 2nd respondent negligent with liability on both the 1st and 2nd respondents, or if not wholly negligent at least contributory negligence against the 2nd respondent.

[21] Mr Senior-Smith, in his oral and written submissions, submitted that this court ought not to disturb the findings of the learned trial judge. The court, he said, should only interfere with a judgment of the court below if the learned trial judge had been guilty of some error of law or so misdirected herself on the facts. He submitted that the learned trial judge properly found that the 2nd appellant was solely responsible for the accident, taking into account the evidence elicited and the physical damage done to the motor vehicles.

[22] Mr Senior-Smith further submitted that the learned trial judge had two different accounts of the accident and it was a question of fact for her alone as to who was to be believed. It was clear, he submitted, that the learned trial judge heard and saw the witnesses for the appellants and the respondents and rejected the evidence of the appellants and their witnesses and in no way misdirected herself in so doing.

[23] Counsel submitted that the learned judge properly considered and weighed the inconsistencies in the evidence of all the witnesses. He argued that the learned judge

was quite justified in refusing to accept a photograph of a Getz and another vehicle travelling in the left lane. The evidence, he said, given by the 2nd appellant did not warrant such an admission. There was no pleading or evidence given that both the Getz and the RAV 4 were ever travelling side by side in the left lane. Counsel referred to the cases of **Clarke v Edwards** (1970) 12 JLR 133, **Green v Green** [2003] UKPC 39 (20 May 2003) and **Gordon and Douglas v Jamaica Railway Corporation et al** SCCA No 20/2002 delivered on 11 March 2005.

[24] Mr Hines, for the 3rd and 4th respondents, indicated to the court that he was not adopting any position and made no submissions.

Analysis

[25] It is quite clear that this court will only interfere with a judgment of the court below if the trial judge had been guilty of some error of law or misdirected herself on the facts. In the instant case, it was a question of fact and the credibility of the witnesses that the learned trial judge had to decide. There is a line of cases which shows the court's reluctance to interfere with the findings of fact of a trial judge, merely because it is of the view that if it had tried the case, it would have come to a different view on the facts from that of the trial judge. The principle was authoritatively framed by the Privy Council in its decision in **Caldeira v Gray** [1936] 1 All ER 540. In that case their Lordships approvingly cited the speech of Lord Wright at page 265 in **Powell and Wife v Streatham Manor Nursing Home** [1935] AC 243:

> "Two principles are beyond controversy. First, it is clear that in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must in order to reverse, not merely entertain doubt whether the decision below is right, but must be convinced that it is wrong. … and secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses …"

[26] These principles were followed with approval in **Watt v Thomas** [1947] AC 484. Lord Thankerton said at page 487 that, where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses. Lord MacMillan developed the same point at page 490. He said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He said at page 491:

> "So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or

> bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

[27] It is clear that the learned trial judge heard and saw the witnesses for the appellants and the respondents and rejected the evidence of the appellants and their witnesses as she was entitled to do. The learned trial judge found that the 2nd appellant was solely responsible for the accident, taking into account the evidence elicited and the physical damage done to the motor vehicles.

[28] This was a question of fact and the credibility of the witnesses which are matters for the determination of the learned trial judge. At page 13 of the judgment she had this to say:

> "It is the opinion of this court that Miss Chang's version of the accident lacks credibility. She places herself in the left lane safely ahead of the RAV 4 before putting on her indicator to turn left onto Ardenne Road. There should have been no impediment to her left turn unless Mr. Listz deliberately came down upon her … The turn onto Ardenne Road is neither a sharp nor narrow bend. One would therefore have to question why she placed the vehicle in such a position in order to take the left turn."

[29] At page 14 the learned trial judge continued:

> "The court also rejects the evidence of Miss Chang and Mr Miret as to the position of both vehicles after the impact. The court accepts the testimony of Listz, Vassell, Maxwell and Thomas, that the RAV 4 had mounted the sidewalk to the left where it hit a cable box and a utility box."

[30] It can been seen from the above that the learned trial judge gave a careful analysis of the evidence and came to a determination as to whom she believed. She

reviewed the evidence of the appellant and her witnesses, and in relation to Mr Miret, found him to be a witness of convenience. She said at page 14:

> "It is somewhat incredible that he is able to clearly recall the position of both vehicles one year after the accident. He was not involved in the accident and gave no statement to anyone immediately after. He has given the court no reason for his ability to recollect that particular point."

[31] The learned trial judge said that the photograph and the assessment report in relation to the Getz motor car clearly spoke to a major impact to its left front. This, she said, supported the evidence of Mr Listz in relation to the point of initial impact. The learned trial judge assessed the evidence of Major James particularly in relation to the major point of impact and found that his testimony assisted the court in understanding the damage sustained to the entire left side of the Getz motor car.

[32] The learned trial judge dealt with the discrepancies and inconsistencies in the evidence of the witnesses. The court found that the discrepancies were not material and did not affect the finding of liability.

[33] In an important finding of fact, the learned trial judge said:

> "… the court accepts the evidence that Miss Chang was in the right lane and suddenly swerved into the left lane in order to turn on to Ardenne Road and collided with the right front of the RAV 4 in the process. The court accepts that the RAV 4 was proceeding in the left lane at the time and that as a result of the collision, the RAV 4 mounted the sidewalk on its left and collided with the utility pole and cable box and remained in that position."

[34] There is no doubt that the learned trial judge had the advantage in this case of seeing and hearing the witnesses. She made full use of that advantage and gave a carefully reasoned analysis of the evidence. We see no reason to disturb those findings.

[35] Accordingly, we dismissed the appeal with costs to the respondents to be taxed if not agreed.