[2016] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 14/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

BETWEEN	**RAYON SINCLAIR**	**APPELLANT**
AND	**EDWIN BROMFIELD**	**RESPONDENT**

Yushaine Morgan and Ian Stephenson for the appellant

Ms Kareem Reid instructed by Brown, Godfrey & Morgan for the respondent

14 January and 5 February 2016

MORRISON P

[1] I have read, in draft, the judgment of Brooks JA. I agree that it accurately reflects our reasons for dismissing the appeal.

BROOKS JA

[2] We heard this appeal on 14 January 2016. After hearing counsel on both sides and considering the material we made the following orders:

1. Appeal dismissed.
2. Costs to the respondent in the sum of $50,000.00.

At that time we promised to put, in writing, our reasons for our decision. We now fulfil that promise.

[3] A collision occurred between two motor vehicles on 9 December 2009 along the Quarry Road, Nain District in the parish of Saint Elizabeth. The vehicles were travelling in opposite directions. The road was wet, as it had been raining. One of the vehicles, a Ford Ranger motor pick-up truck, being driven by the appellant, Mr Rayon Sinclair, skidded and collided with a Toyota Corolla motor car being driven by the respondent, Mr Edwin Bromfield. Both vehicles were damaged.

[4] Mr Bromfield filed a claim in the Resident Magistrate's Court for that parish in order to recover damages for negligence from Mr Sinclair, and the owner of the vehicle, Mr Dameon Fagan. The cause of the skid was the nub of the issue joined between the parties. Mr Sinclair asserted that the skid was caused when he had to brake suddenly as a result of Mr Bromfield's negligence in driving onto the incorrect side of the roadway and into his path. Mr Bromfield admitted tohaving overtaken a parked motor car, which wason his side of the roadway, but testified that he had returned to his side of the roadway before Mr Sinclair's vehicle skidded. The police officer who visited the scene testified that there was no evidence to be derived from an observation of the road surface as to the point of impact.

[5] Upon the trial of the claim, the learned Resident Magistrate for the parish of Saint Elizabeth, Mrs Sonya Wint-Blair, ruled in favour of Mr Bromfield. She rejected Mr Sinclair's evidence that Mr Bromfield's vehicle was in his path. She found that Mr Sinclair had failed to discharge the evidential burden, which the fact of the skid had placed on him. She, therefore, found Mr Sinclair liable for Mr Bromfield's loss. She

however ruled in favour of Mr Fagan, having found that he was not vicariously liable for Mr Sinclair's actions.

[6] Mr Sinclair has appealed from the learned Resident Magistrate's decision. He contended on appeal that it was not in accordance with the evidence before her. The issues raised by him mainly concern the findings of fact.

The law relating to findings of fact

[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in**Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:

> "...It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson*[1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first**

> **instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.** Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo KokBeng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis supplied)

[8] A comprehensive review of the various principles involved in this court's assessment of findings of fact, was made in two separate decisions of this court, which were handed down on 3 November 2005. The cases are **Clarence Royes v Carlton Campbell and Another** SCCA No 133/2002 and **Eurtis Morrison v Erald Wiggan and Another** SCCA No 56/2000.

[9] In the former case, Smith JA set out the principles that should guide an appellate court in considering findings of fact by the court at first instance. The other members of the panel agreed with the principles which he set out at pages 21-23 of his judgment:

> "...The authorities seem to establish the following principles:
>
> 1. The approach which an appellate court must adopt when dealing with an appeal where the issues involved findings of fact based on the oral evidence of witnesses is not in doubt. The appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong". - See **Watt v Thomas** (supra), **Industrial Chemical Company (Jamaica) Limited** (supra); **Clifton Carnegie v Ivy Foster** SCCA

No. 133/98 delivered December 20, 1999 among others.

2. In **Chin v Chin** [Privy Council Appeal No. 61/1999 delivered 12 February 2001] para. 14 their Lordships advised that an appellate court, in exercising its function of review, can 'within well recognized parameters, correct factual findings made below. But, where the necessary factual findings have not been made below and the material on which to make these findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a re-hearing below.'

3. In an appeal where the issues involve findings of primary facts based mainly on documentary evidence the trial judge will have little if any advantage over the appellate court. Accordingly, the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with the finding of the trial judge- See Rule 1. 16(4)

4. Where the issues on appeal involve findings of primary facts based partly on the view the trial judge formed of the oral evidence and partly on an analysis of documents, the approach of the appellate court will depend upon the extent to which the trial judge has an advantage over the appellate court. The greater the advantage of the trial judge the more reluctant the appellate court should be to interfere.

5. Where the trial judge's acceptance of the evidence of A over the contrasted evidence of B is due to inferences from other conclusions reached by the judge rather than from an unfavourable view of B's veracity, an appellate court may examine the grounds of these other conclusions and the inferences drawn from them. If the appellate court is convinced that

> these inferences are erroneous and that the rejection of B's evidence was due to an error, it may interfere with the trial judge's decision – See Viscount Simon's speech in **Watt v Thomas** (supra)."

[10] In the latter case, K Harrison JA, with whom the rest of the panel agreed, set out, at page 15, the following guiding principles:

> "The principles derived from the [previously decided cases on the point of findings of fact] can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make."

It is with that considerable amount of guidance that Mr Sinclair's complaints on appeal were considered.

Mr Sinclair's complaints about the findings of fact

[11] Mr Morgan, on behalf of Mr Sinclair, submitted that the learned Resident Magistrate made errors in her assessment of the facts. Those errors, learned counsel submitted, permitted this court, in accordance with the guidance of the Privy Council, to overturn the findings at first instance and to substitute its own. Mr Morgan argued that on the evidence, the parties agreed that Mr Bromfield was the party who had caused the collision.

[12] Mr Morgan's first point was that the learned Resident Magistrate wrongly rejected Mr Sinclair's evidence that the skid occurred when he had to apply his brake in attempting to avoid his vehicle colliding with Mr Bromfield's, which was in his path. Learned counsel pointed, in support of his submissions, to evidence in which Mr Bromfield, on Mr Morgan's submissions, admitted that his vehicle had been on the incorrect side of the road when the crash occurred. He argued that the learned Resident Magistrate misled herself on that point when she misquoted the evidence with regard to that crucial issue.

[13] Ms Reid, on behalf of Mr Bromfield, countered Mr Morgan's submissions by asserting that the evidence did not support an interference with the findings of the learned Resident Magistrate. Learned counsel argued that Mr Bromfield had consistently maintained that his vehicle was on its correct side of the roadway at the time of the impact. Ms Reid pointed out that Mr Bromfield's testimony was supported by an independent witness, Mr John Cameron, who had been travelling in a vehicle behind Mr Bromfield's. Learned counsel initially did not agree that the learned Resident Magistrate had misquoted the evidence, as Mr Morgan had argued. She eventually, after some exchanges with the court, conceded that it was a misquoting of the evidence, but asserted that the error was not material to the decision.

[14] An examination of the record shows that Mr Bromfield insisted that he was stationary at the time of the impact. The portion of the cross examination, to which Mr Morgan refers for support, must be examined to determine if it undermines the learned

Resident Magistrate's findings. Pages 11-12 of the record reveals the following exchanges:

"Question: You were speeding?

Answer: I was stopped at the time.

Question: You were travelling opposite direction to Mr. Sinclair?

Answer: Yes.

Question: Left Hand Side?

Answer: Extreme left.

Question: Car on your side of the road?

Answer: Yes, facing me.

Question: You overtook that car?

Answer: Yes.

Question: Mr. Sinclair was coming in opposite direction at that time?

Answer: Yes, from a distance.

Question: You were then overtaking the car?

Answer: Yes, I didn't see Mr. Sinclair then car parked on soft shoulder, car was on extreme left side of the road.

Question: You went around car?

Answer: I had to.

Suggestion: In order to go around and avoid Mr. Sinclair you sped up.

Answer: No, I saw van out of control coming.

Question: You increased your speed and were on right side?

Answer: No, collision on left hand side.

Question: **Going around car at increased speed and on side on which Mr. Sinclair was driving you collided with Mr. Sinclair?**

Answer: **Yes.**

Question: After collision officer came?

Answer: Three hours later and told us to move cars at the collision Mr. Sinclair admitted he was wrong." (Emphasis supplied)

The emphasised portion is the aspect of the evidence to which Mr Morgan specifically referred, as being an admission by Mr Bromfield as to the point at which the collision occurred.

[15] Later in the cross examination,Mr Bromfield admitted that the police had charged him. He repeated, however, that he "had come to a stop when vehicle collided with [his]" (page 13 of the record).

[16] The portion of the learned Resident Magistrate's judgment, to which Mr Morgan referred, is at page 49 of the record. There, the learned Resident Magistrate reviewed the evidence adduced during cross-examination. She said at paragraph 8:

> "In cross-examination the plaintiff admitted overtaking the parked car and that he had had to do so. He went on to agree that while he was overtaking the parked car he could see Mr. Sinclair approaching from the opposite direction at a distance, he also said when he made his manoeuvre he had not seen Mr. Sinclair then. He denied speeding to pass the parked car asserting that it was the van which got out of control. He had come to a stop when the van collided with

> his vehicle. He went further to state that the collision took place on his left side of the road. **He disagreed that he was going around the car at increased speed on Mr. Sinclair's side of the road and collided with Mr. Sinclair.** The road was wet, rain had fallen that morning. He testified that Mr. Sinclair accepted liability at the site of the collision. The police officer arrived 3 hours late [sic] and both drivers went to the police station where he was charged." (Emphasis supplied)

The emphasised portion is the aspect of the summation to which Mr Morgan referred as being a misquoting of the evidence by the learned Resident Magistrate.

[17] The learned Resident Magistrate accepted Mr Bromfield's evidence and that of his witnesses that both Mr Bromfield's car and Mr Cameron's car had passed the parked motor vehicle before the crash occurred. She was entitled to do so despite Mr Bromfield's answer in evidence to which Mr Morgan refers. The impugned testimony was inconsistent with the rest of the testimony on Mr Bromfield's case. She would have been entitled to reject it.

[18] Mr Morgan is also correct in his submission that the learned Resident Magistrate did misquote the evidence in respect to that bit of testimony. Ms Reid is correct, however, in her submission that the error was not material. The overall picture given in Mr Bromfield's case would have allowed the learned Resident Magistrate to have rejected the impugned bit of evidence in favour of Mr Bromfield's testimony to the contrary. She also rejected Mr Sinclair's testimony as to the point of impact.There was evidence to support her findings. She particularly found Mr Cameron to be "a cogent witness whose veracity was unshaken". She found that he "gave the clearest account

of the events that morning". The learned Resident Magistrate recounted the import of Mr Cameron's testimony. She said at page 56 of the record:

> "…[Mr Cameron] had been driving behind the plaintiff's vehicle that day. He witnessed the plaintiff pass the stationary vehicle, he passed also and both himself and the plaintiff returned to the left side of the road, then Mr. Sinclair happened upon them. His evidence was untarnished by cross-examination. He was the only witness who actually observed the the [sic] accident that day...His observation of the collision was from a vantage point some 20 feet behind the plaintiff."

It cannot be said that the learned Resident Magistrate was "plainly wrong" in her findings.

Summary and Conclusion

[19] The complaints concerning the learned Resident Magistrate's decision turned on her findings of fact. They heavily depended on the credibility of the witnesses. There was evidence to support those findings. The findings were not unreasonable. Despite the fact that she did, at one point, misquote the evidence, the error was not fatal to the decision. It could not have skewed the overall picture provided in the case before her. There is no reason to disturb her findings. It cannot be said that she was "plainly wrong" in her findings. It is for those reasons that Mr Sinclair's appeal was dismissed.

F WILLIAMS JA (AG)

[20] I too have read in draft the judgment of my brother Brooks JA and agree that it accurately reflects our reasons for dismissing the appeal.