

TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cv. App. No. 135 of 2000

BETWEEN

**DEODATH BABOOLAL AND
LINCOLN BABOOLAL**

PLAINTIFFS/APPELLANTS

AND

**BHAGWANSINGH'S HARDWARE &
STEEL INDUSTRIES LIMITED AND
RAJKUMAR GUNNESS**

DEFENDANTS/RESPONDENTS

PANEL

J. Permanand, J.A.

M. Warner, J.A.

W.N. Kangaloo, J.A.

APPEARANCES

**Mr. H.R.M. Seunath S.C. and Mr. M. Persadsingh
for the Plaintiffs/Appellants**

Ms. J. Jones for the Defendants/Respondents

DATE DELIVERED: 26th April 2002

I have read the judgment of Kangaloo J.A. and I agree with it.

J. Permanand
Justice of Appeal

I too have read the judgment of Kangaloo J.A. and agree with it.

M. Warner
Justice of Appeal

JUDGMENT

Delivered by W.N. Kangaloo, J.A.

On the 16th December 1998 at about 11:30 a.m. a collision occurred between a mazda pickup owned by the first appellant and driven by the second appellant and a mazda four-ton truck owned by the first respondent and driven by the second respondent.

The collision occurred on the Naparima Mayaro Road in the vicinity of La Gloria Estates. At that point along the road which ran basically east to west, there was a bend or what was described in the evidence as “*a steep curve*”. The appellants’ vehicle was travelling east while the respondents’ vehicle was proceeding west.

At the trial the appellants called two witnesses namely the second appellant and one John Goonie a friend of the appellants, who happened to be travelling behind the respondents’ vehicle at the time of the accident. The respondent called three witnesses namely the second respondent, one Kamal Ramkissoon, the loader of the second respondent who was in the vehicle at the time of the collision and one P.C. Jerome, the investigating police officer.

The learned trial judge after criticising the eyewitness of each of the parties relied on the policeman’s evidence as the only independent evidence and accepted the respondents’ version of how the accident took place. The trial

judge dismissed the appellants' claim and it is against that order that this appeal lies.

The three grounds of appeal relied on by the appellant at the hearing are:

- (a) that the learned trial judge erred in treating the evidence of the police officer as independent evidence or evidence of an independent witness;
- (b) that there being evidence from the police officer that there was debris in or about the center of the road, the learned trial judge erred in failing to consider the issue of contributory negligence; and
- (c) that the trial judge's decision is against the weight of evidence.

I do not agree with the submission of the appellants on the first ground. The learned trial judge expressly indicated in his judgment that "*I considered P.C. Jerome to be the only independent witness in the case. There is no evidence to suggest he had an interest to serve, outside of his duty to investigate and to prosecute matters where necessary.*" The police officer was not shown to have known either of the parties. The same could not be said of either of the witnesses Goonie or Ramkissoon. They each had a relationship with the second appellant and second respondent respectively. In this sense P.C. Jerome was an independent witness. I disagree that the police officer had an interest to serve merely because he was the complainant in the matter before the Magistrates' Court. Police officers serve a most important function of investigating road traffic offences and they must be taken as coming to court to assist the Court in ascertaining where the truth lies in the contest between parties in a running down action. They must not be presumed to lack independence simply because they are the complainants in the connected

traffic matter in the Magistrates' Court or because they have been called to testify by one party or the other. If however there is some evidence which compromises their impartiality and independence then that is a matter to be taken into account by the trial judge in assessing the officer's evidence. Suffice it to say, there was no such evidence in the instant case.

I can find no merit in this ground of appeal but before leaving it I wish to say that evidence of how a police officer codes an accident and also of the charge laid in the Magistrates' Court ought not to be admitted in the civil proceedings arising out of the accident as these two pieces of evidence are of more prejudicial than probative value.

The second ground of appeal is really a subset of the third ground and they can be taken together. Senior Counsel for the appellants recognised at the outset that it was not an easy task to set aside a decision of a trial judge on findings of fact but submitted that when all the evidence is looked at, the Court should find that the accident happened in the middle of the road and not on the respondent's side as the judge found.

Counsel for the respondent in her skeleton argument which she adopted put it thus: *"If a Court of Appeal is satisfied however, that the trial judge did not take full advantage of the opportunity which he had of observing the demeanour of the witnesses or failed to weigh in the balance evidence which bears on the question of whether a particular witness was telling the truth a Court of Appeal will substitute its own decision for that of the trial judge even on an issue of fact."*

Both Counsel are obviously right as this is the proposition borne out of **Watt v Thomas (1947) AC 484** and later expanded in **Benmax v Austin Motors (1955) 1 ALLER 326** and recently by the Judicial Committee of the Privy Council in **Hoodan v Ramsarran PC No. 5 of 1997 (unreported)**. The onus

is on the appellants to demonstrate on the evidence that the learned trial judge did not come to the correct findings of fact or that he drew erroneous inferences from his findings. With some initial reluctance, I have eventually come to the conclusion that the learned trial judge's finding as to where the accident took place ought not to be disturbed. The initial reluctance was as a result of the police officer's admission in cross-examination that the debris he found was located "*near the white line*". This reluctance was dispelled because:

- (a) the evidence was that the width of the respondents' truck was about 7 feet and the road was 6.30 metres wide. It is reasonable to expect that someone driving a four-ton truck would leave about a foot to the extreme left which would mean he was driving approximately 1 foot away from the white line, so that if a collision occurs while the truck is being so driven one would expect debris to be near the white line;
- (b) it was not asked of the police officer in cross-examination how near to the white line the debris was;
- (c) the police officer had earlier given evidence that there was no debris on the northern (the appellants') side of the road, so that even if there was debris near the white line it could only be on the southern (or respondents') side of the road which would tend to indicate that the accident occurred on the respondents' side of the road making their version of the accident more likely than the appellants';
- (d) it was never put to the police officer that there was debris on the northern (or appellants') side of the road at all. Senior Counsel for the appellant explained at length that he could have no such instructions, so he could not put them as the second appellant was

taken from the scene to go to the hospital. However it should be noted that Goonie's evidence is that he witnessed the accident and apparently stayed on the scene for enough time to assist the second appellant. Goonie had the opportunity to observe where the debris lay immediately after the accident. He could have given evidence of this and did not. Because the police officer came to the scene sometime after, albeit on the same day, it could have been suggested to him in light of his evidence and from Goonie's presumed and only natural observations that there was debris on the northern side of the road immediately after the collision, but this was never done. It must be that it was never the appellants' case that there was debris on the northern side of the road but only near the centre which begs the question why the second appellant was driving in the middle of the road. But this is not the evidence led by the second defendant or his witness Goonie.

For these reasons therefore I am of the view that the learned trial judge's assessment of the evidence with respect to the debris ought not to be faulted. It is my view that a lot more could have been done at the trial to probe the police officer in an attempt to discredit his evidence. For example it is not clear what length of time elapsed between the accident and the visit to the scene by the officer which would determine the opportunity for the debris to be displaced from its initial position, similarly what was the camber of the road, again to judge the likelihood of the debris moving from one spot to another, also whether the police officer made notes in his diary, and where was the truck in relation to the debris. The respondents called the police officer and he gave evidence in answer to the questions asked of him which essentially went to establish the presence of debris on the respondents' side of the road. The onus was on the appellants to discredit or neutralise his testimony, this they failed to do.

The learned judge was critical of the witness Goonie, for the appellant and Ramkissoon for the respondent. I find that his criticisms were well founded. It must be remembered that the trial judge is the individual who sees first hand the witnesses and forms an impression of them. Quite apart from Goonie appearing hesitant when asked why he wanted to overtake the respondents' vehicle if it were going fast, the judge was entitled to find that Goonie really did not see the accident because he was 300 feet behind the respondents' truck and the road was winding and similarly he was entitled to believe that Goonie was simply trying to assist his good friend, the second appellant by his evidence, in much the same manner as the witness Ramkissoon attempted to gild the respondents' lily by exaggerating the antics of the second respondent in attempting to avoid the collision. Having disregarded Goonie's and Ramkissoon's evidence, the learned judge was left with that of the two drivers. The learned judge recited their evidence and apparently could find no fault with either, for he made no adverse or critical comments in respect of them. It must be, as so often happens, that the drivers were equally convincing in the tale they told as to how the accident happened, particularly when the cross-examination of them was far from searching. They each essentially recited that they were driving on their proper side of the road when the other came over to that side and struck him. It was in this scenario, having rejected the eyewitness' evidence and apparently being equally convinced of each driver's version, that the learned judge understandably sought refuge in what he rightly considered the only independent evidence of the police officer leaving the judge to conclude as follows: *"It seems to me that the significant bit of evidence given by the officer is the presence of debris on the Defendant's side of the road, and the absence of debris on the Plaintiff's side. In my view, this bit of evidence swung the balance inexorably in the second Defendant's favour, since of course, it is consistent with the second Defendant's version of the accident."*

I am of the view however that the trial judge erred in his inference of speed of the appellants' vehicle. As Counsel for the respondents with commendable candour agreed, there was no evidence that the appellants' vehicle came to a stop 35' - 45' off the road. The second appellant had said that he travelled 35' - 45' after the collision and then stopped. Similarly there was no evidence from any of the witnesses that the appellants' vehicle broke or damaged a telephone pole. The judge used these factors together with the damage to the appellants' vehicle and the striking of a teak tree by it to infer that the second appellant was driving fast and as a result lost control of the vehicle as it was proceeding around the bend, thereby going over onto the respondents' side of the road. The evidence of the second appellant was that as a result of the collision and his injury he lost control of his vehicle which ran off the road and stopped, so that the damage to the appellants' vehicle and the striking of the teak tree could equally have been as a result of the second appellants' loss of control not because of speed but as a result of the blown tyre and his injury.

However I do not find that the judge's error as set out above is enough to bring this matter within the principles outlined in **Watt v Thomas**, **Benmax v Austin Motors** or **Hoodan v Ramsarran**. It is my view that the learned judge was correct in relying on the police officer's evidence to find that the collision took place on the respondents' side of the road which would have made the respondents' version the more probable one as to the cause of the accident. For these reasons set out herein I would dismiss this appeal with costs.

W.N. Kangaloo
Justice of Appeal