

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CvA. No. 106 of 2001**

**BETWEEN**

**ALICE MOHAMMED**

**APPELLANT**

**AND**

**JEFFREY BACCHUS**

**RESPONDENT**

**CORAM:**

**S. Sharma, J.A.  
L. Jones, J.A.  
M. Warner, J.A.**

**APPEARANCES:**

**Mr. Ahmed for the Appellant  
Mr. S. Roopnarine for the Respondent**

**DATE DELIVERED: 26<sup>th</sup> June, 2002**

**Delivered by Warner, J.A.**

## **JUDGMENT**

This is an appeal against the judgment of Mendonca J in which he dismissed the plaintiff's claim in a running down action. The plaintiff, by her statement of claim, pleaded that on or about the 31<sup>st</sup> January 1996, she was lawfully standing on the island at the top of St. Clair Avenue, when the defendant, by himself, his servant and/or agent, negligently managed his vehicle causing it to collide with her. As a result she suffered injury.

The plaintiff testified in examination-in-chief that she was ***“about the centre of the island or meridian (sic)”*** when she was struck.

The defendant's case was that the accident occurred when the plaintiff crossed in front of his motor vehicle which had come to a standstill on the left-hand side of St. Clair Avenue, in the vicinity of the roundabout. So that the two versions are diametrically opposed. While the plaintiff alleges that she was standing on the island, the defendant maintains that he stopped to allow her to cross in front of his vehicle; she crossed and then jumped back and fell on to the bonnet of his car.

Much argument has been advanced on the plaintiff's behalf in respect of the facts which the trial judge found. In general terms, it is trite law that this court will be reluctant to disturb the trial judge's findings of fact, for the reason that he would have had the opportunity to observe the demeanour of the witnesses.

However, this court is not precluded, nor should it shirk from the opportunity to examine the material which was before the trial judge. Now, it seems to me, that the nub of the case is to be found in the evidence of the plaintiff herself, in that, what the trial judge was faced with was determining where this accident took place.

Now, in her evidence, and it seems to have been overlooked, the plaintiff in response to a question from her attorney, said this in examination-in-chief

***“I was standing there, cars were coming, I wanted to cross, a white car stopped and allowed me to pass over.”***

So that, in my respectful view, the trial judge was correct in coming to the conclusion that the defendant had stopped to allow her to “pass over” and that she did so, rather than concluding that the vehicle mounted the island and came into contact with her. As a result, she fell onto his bonnet and suffered injury. It is not clear why she jumped back or went back. The trial judge was therefore correct when he found that the plaintiff had not proven her case.

Much ado has also been made as to the trial judge’s finding to the effect that she could not see whether or not he was ***“pumping his brakes,”*** to use the words of the plaintiff. However, it is reasonable, in my view, for the trial judge to have come to the conclusion that she could not, in those

circumstances, have seen whether the defendant was “**pumping his brakes,**” or not.

As regards the failure to plead that she suffered injury to her knee, again, I am of the view that the trial judge was correct in commenting that it was significant to note that in the particulars of injuries in the statement of claim, no mention was made of any injury to the plaintiff’s knee.

For these reasons, I would uphold the decision of the trial judge to dismiss the plaintiff’s claim. The appeal is dismissed and we will hear argument on the question of costs.

Margot Warner,  
Justice of Appeal

I also agree with the judgment of Madam Justice Warner. I should just like to add a few words of my own to say that in matters of the kind, the fact-finding exercise is generally approached by the judge, by looking at the inherent probabilities of the various versions in order to assist him, together with all the viva voce evidence, in the case. But there is one compelling factor which is of tremendous help in the fact-finding exercise, and it is most acutely demonstrated in cases which are commonly called ‘**running down actions**’ - that is, facts pleaded are quite different from the evidence adduced.

Now, in this particular case, the judge made some observations with respect to what was said in evidence although not pleaded. The appellant's case, on the pleading was that she was standing on "**the island**" when she was struck by the respondent's vehicle. In her evidence however, she agreed, as the respondent had alleged, that he had stopped to allow her to cross. Another example of this was, when she said in evidence that her knee was injured, yet no particulars of this were pleaded, no amendment sought and no explanation given.

The trial judge in my view, was entitled in these circumstances not to rely on the appellant as a witness of truth. He was also entitled to conclude, if the evidence was truthful, why did they not find their way in the pleadings.

In my view this was a perfectly valid approach by the trial judge to assist him together with other matters to determine the matter on a balance of probabilities.

In point of fact, I find it a valuable approach, which other judges may adopt when assessing questions of fact, particularly in running down actions.

Satnarine Sharma,  
Justice of Appeal

I also agree with the decision of Madam Justice Warner and have nothing to add.

Lionel Jones,  
Justice of Appeal