

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

SKBMCVAP2020/0004

BETWEEN:

**[1] Dwight Harris
[2] Asif McDonald**

Appellants

and

Edsel Procope

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Mario Michel
The Hon. Mde. Gertel Thom

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Imru Butler and Ms. Indira Butler for the Appellants
Ms. Jenise Carty for the Respondent

2022: March 24

Magisterial civil appeal – Liability for vehicular accident – Appellate interference with trial judge’s findings of fact and inferences drawn therefrom - Whether magistrate’s decision was unreasonable and cannot be supported having regard to the evidence – Whether magistrate misunderstood issues before him – Trial judge’s assessment of witness’ credibility – Whether contemporaneous documents did not support the magistrate’s finding as to witness’ credibility – Award of damages for loss of use and damage to vehicle – Evidence of loss and damage unchallenged - Whether magistrate erred in making award of damages

ORAL JUDGMENT

- [1] **BAPTISTE JA:** This is the judgment of the Court. Edsel Procope, the respondent to this appeal and plaintiff in the magistrate's court, sued the appellants/defendants for damages to his omnibus caused by the negligent driving of McDonald, the second appellant. The magistrate found that the accident was caused by McDonald and that Harris, the owner of the other vehicle involved in the accident, was vicariously liable, and awarded Procope damages of \$16,768.91 and costs of \$1,500.00. This appeal arises out of the appellants' dissatisfaction with the decision of the learned magistrate.
- [2] The grounds of the appeal are that the decision of the magistrate is unreasonable and cannot be supported having regard to the evidence; the magistrate misunderstood the issues in the case; and that the judgment passed was such that the magistrate viewing the circumstances reasonably, could not properly have so decided.
- [3] The appeal essentially challenges the factual findings of the magistrate and inferences drawn from the facts as he found them. It accordingly attracts and engages the well-known constraints attendant upon such a challenge. Critically, an appellate court is enjoined not to interfere with the findings of fact of a lower court unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.¹ In **Perry v Raleys Solicitors**,² at paragraph 52 of the judgment, the Supreme Court summarised the constraints on interfering with findings of fact as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached.

¹ See Lewison LJ in *Fage UK Ltd & Another v Chobani UK Ltd & Another* [2014] EWCA Civ 5.

² [2019] UKSC 5.

- [4] Where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account the assessment of many factors. The correctness of that evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach.³ I apply the above principles to the present case.
- [5] Mr. Procope's case before the magistrate was that his bus was at a standstill when the truck driven by McDonald, collided with it, more specifically, an iron rod three inches long, attached to the right side of the carriage of the truck, collided with his bus and pulled it sideways across the road. McDonald claimed that the truck was parked and that it was Procope who rushed through causing the accident.
- [6] The magistrate correctly crystallised the central issue in the case as whether Procope was at a standstill and McDonald collided with his bus or whether the McDonald's vehicle was stationary, and it was Procope who collided with McDonald. The answer obviously depended on the facts found by the magistrate; that is, the things which he chose to believe from the evidence and inferences drawn therefrom. From the facts found by the magistrate, he is entitled to draw inferences with respect to other facts and can rely upon these inferences in finding liability.
- [7] The magistrate accepted that traffic in the area of the accident was blocked that morning. A high roof Toyota bus was travelling in front of Procope's bus going in the same direction. A black jeep was parked on the seaside of the road. Procope passed the jeep and stopped, remaining stationary behind the high roof Toyota bus.
- [8] The magistrate also found that when the traffic started to clear, McDonald, driving a big Mack truck was travelling in an opposite direction to Procope. The truck passed a Mr. X's bus and then Procope's bus which was in a stationary position. As the

³ See *Langsam v Beachcroft LLP & Others* [2012] EWCA Civ 1230 at paragraph 72.

truck passed, a piece of iron or metal rod which was sticking from the right side of the truck came into contact with Procope's bus and ripped into the side glass and panel of the bus. The iron continued its intrusion until it reached the back glass. It pulled the bus over to hit the truck. The front tyre of the truck came into contact with the bumper and rear back light. It also came into contact with the inside of the bus just barely scratching the passenger seat.

- [9] The magistrate also accepted as a fact that when the iron came into contact with Procope's bus, the bus was in a stationary position. When the collision occurred, Procope was on the left side of the road waiting to proceed but was unable to move because a bus had stopped in front of him and was also stationary.
- [10] The magistrate rejected the evidence of McDonald, particularly when he said that he made a sudden stop. The magistrate did not believe his evidence that Procope was overtaking the parked black vehicle and when he was going through, he touched the front wheel of the truck which was parked.
- [11] Mr. Butler for the appellants contend that the magistrate erred in finding as a fact that the truck's front tyre came into contact with Procope's bumper and back light and damaged the same. He submits that there is no evidence of any damage to the bumper and rear back light of the bus. Mr. Butler referred to page 7, line 31 of the Record of Appeal in cross-examination when Procope was asked "when your vehicle and the truck collided what vehicle stopped?" He answered, "Both vehicles stopped where the collision took place."
- [12] Mr. Butler argues that this answer put to rest whether Procope's bus was standing still or moving. Learned counsel submits that if they both stopped where the collision occurred, the obvious inference is that they were both moving before the collision occurred. Mr. Butler further submits that the magistrate totally ignored this piece of oral testimony and the inference to be drawn from it, which was crucial in deciding whether both vehicles were stationary when the collision occurred. Interestingly, Mr.

Butler also referred to Procope's evidence thereafter that the vehicle was standing still, and the truck collided with him when his vehicle was standing still. Mr. Butler contends that Procope is blowing hot and cold and contradicting himself, thus rendering his testimony suspect or incredible.

[13] This argument does not avail the appellants. It is well-established that, where a finding turns on a judge's assessment of the credibility of a witness, the appellate court will take into account that the judge had the advantage of seeing the witness give their oral evidence, which is not available to the appellate court. It is therefore rare for an appellate court to overturn a judge's finding as to a person's credibility.

[14] Further, the mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. As stated in **Henderson v Foxworth Investments Ltd & Another**,⁴ an appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration.

[15] Mr. Butler referred to the evidence of the police measurements at the scene of the accident as well as the photograph of the accident. He contends that the measurement showed that the bus had enough space on the seaside to avoid the accident. Further, there was no evidence of damage to the bumper of the bus. Essentially, Mr. Butler seeks to emphasise the evidential importance of the contemporaneous documents and contend that they do not support the magistrate's finding.

[16] Undoubtedly, the presence of contemporaneous documents can play an important role in a trial judge's assessment of credibility and veracity. The reliability of the evidence of a witness can be tested by reference to objective facts proved independently of their testimony, in particular, by reference to contemporary documentary evidence. It is open to a trial judge to prefer the testimony of certain

⁴ [2014] UKSC 41.

witnesses over others and to place more weight on some parts of the evidence than others, in particular, when the evidence is conflicting. When testing the evidence of a witness about what they said or what was said to them, or what they saw or heard, it is essential to test their veracity or reliability by reference to objective facts proved independently of their testimony, in particular, by reference to contemporary documentary evidence.

- [17] I am not satisfied that the appellants have identified an error of factual evaluation of a nature and extent that vitiates the magistrate's conclusion. The magistrate's conclusion was not contradicted by the contemporaneous documents. The magistrate rejected McDonald's claim that the truck was parked and that it was Procope who rushed through and collided with the wheel and metal rod. Looking at the totality of the evidence, the magistrate found that the appellants/defendants were liable and awarded damages and costs. The magistrate reasoned that it was obvious that Procope could not move forward because he stopped behind Mr. X's bus and could not be moving to any degree when the collision occurred.
- [18] In my judgment, the magistrate heard and took cognizance of all the evidence. The magistrate made very important factual findings which were clearly open to him on the evidence and found the appellants/defendants liable. It cannot be said that there was no evidence to support those findings or that they were ones which no reasonable magistrate could have made or that the magistrate was plainly wrong, either in his factual findings or inferences drawn from the facts. Neither can it be said that the decision of the magistrate was unreasonable and cannot be supported having regard to the evidence.
- [19] Mr. Butler seeks to challenge the amount awarded in damages, claiming that it lacked sufficiency and adequacy. Counsel also contends, among other things that, there is no evidence that Procope made \$400.00 a day, or that he lost that amount for 14 days.

- [20] With respect to the damage and loss to Procope's vehicle, the magistrate noted that the evidence before him was unchallenged. With respect to loss of use for which Procope claimed \$5,600.00 for 14 days, the magistrate noted that Procope gave unchallenged evidence that his bus was a profit earning chattel that he ran seven days a week, and he made EC\$400.00 per day, making 9 to 10 trips a day and his bus carries fourteen passengers. The magistrate stated that all the evidence was unchallenged. The magistrate found that the sums claimed for loss of use was reasonable in light of the fact that Procope was only claiming for the period the bus would be in the repair shop.
- [21] Ms. Carty, the respondent's counsel submitted that the evidence of loss and damage was unchallenged, and counsel could not at this stage seek to challenge the award. I agree. I see no reason to interfere with the magistrate's award. As has been put, a trial is not a dress rehearsal. It is the first and last night of the show.
- [22] The court finds no basis to interfere with the magistrate's decision. It is accordingly ordered that the appeal is dismissed, and the judgment of the magistrate is affirmed. The appellants are to pay the respondent's costs of \$1,000.00 on the appeal.

I concur.
Mario Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar