IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 2 of 1977

Between:

NATIONAL MARKETING AUTHORITY Appellant

\- and -

MOHAMMED YASIN (s/o Abdul) Respondent

R.I. Kapadia for the Appellant

A.H. Rasheed for the Respondent

Date of Hearing : 17th March, 1977

Delivery of Judgment: 25th March, 1977

JUDGMENT OF MARSACK J.A.

This is an appeal against the judgment of the Supreme Court entered at Suva on 5th November, 1976 awarding the respondent the sum of $900.29 by way of damages in respect of a motor collision which took place on the King's Road near Suva on the 1st March, 1974.

The relevant facts may be shortly stated. About midday on the 1st of March, 1974, a light van No. AM 443, the property of the appellant, was being driven by the appellant's servant Taitusi Kaunilagilagi along the main

thoroughfare known as King's Road, some 2½ miles from Suva in a northerly direction. The King's Road at this point is 24' wide and has a concrete kerb and a footpath on each side of the road. A heavy truck No. AB373, the property of the respondent, was at the same time being driven by the respondent along King's Road towards Suva. The two vehicles collided on the road, the impact being severe. The driver of the van, Taitusi Kainilagilagi, was thrown out on to the road and killed. Both vehicles were extensively damaged. The appellant brought action against the respondent, for damages on the ground of negligence; the negligence alleged being driving on the incorrect side of the road, passing a parked vehicle without making sure that the road was clear, and travelling at excessive speed. The respondent filed, not only a statement of defence, but also a counter-claim for damages; the acts of negligence alleged against appellant's driver being driving too fast, driving on the wrong side of the road and failing to keep a proper lookout. The learned judge in the Supreme Court held that the cause of the collision was negligent driving on the part of the appellant's driver. He accordingly dismissed the appellant's claim and gave judgment for the respondent on the counter-claim for $900.29 and costs.

The first ground of appeal is that the decision of the learned trial judge is against the weight of the evidence, is unreasonable and cannot be supported. Five other grounds of appeal were filed but they all referred to particular aspects of the evidence in which it is contended that the learned judge made findings which could not be justified on that evidence. There is no suggestion of error on the part of the learned judge on any question of law.

It is accordingly clear that this is an appeal on fact only and no question of law arises. In these circumstances the duty of an appeal tribunal has been well established by many authoritative decisions of the highest courts. Normally the appellate court will give full consideration to the fact that the trial judge had the great advantage of hearing the witnesses and assessing their credibility; and will therefore be most reluctant to differ from the trial judge on questions of fact. It is particularly in cases where the findings of fact in the Court below are based substantially on the trial judge's opinion of the credibility of the witnesses that an appellate court will be extremely reluctant to reverse those findings. But it is still the duty of the appellate court to do just that if, after giving full regard to the established principles, the Court considers it in the interest of justice to do so. One such case is Watt v. Thomas (1947) A.C. 484 in which Lord Thankerton says, at p.488, that if the appellate tribunal is

> " satisfied that (the trial judge) has not taken proper advantage of his having seen and heard the witnesses, the matter will then become at large for the appellate court."

In many cases the appeal court has acted on the principle set out by Lord Sumner in S.S. Hontestroom 1929 A.C. (HL) 37 at p.48, to the effect that where that court is of opinion that the trial judge did not proceed at all on manner or demeanour, but proceeded on inferences which the Court of Appeal could draw as well as he could, that Court could form its own view of the facts and decide accordingly.

In the present case four witnesses were called to give evidence that they had seen the collision happen. Three were called by the plaintiff - the appellant - and one for the defendant - the respondent. The three who gave evidence for the plaintiff could properly be described as independent; the first, Eliki Rauvosai, was an employee of the Post and Telegraph Department; the second, Apakuki Tuivatukalo, a driver employed by the Suva City Council, and the third, Paula Nawavakava, also an employee of that Council. The one witness for the defence was Mohammed Yasin, the defendant (respondent) himself. There was also a sketch plan which had been drawn on the spot by an inspector of Police and produced by the inspector, who was called as a witness for the plaintiff. It was conceded that this plan was not drawn to scale, but that the measurements given on it were accurate. The plan showed that when the vehicles came to rest after the collision the heavy truck was at an angle on its left side of the road, partly on the footpath but mainly out towards the centre of the road. The van was lying across the road some 52'6" to the north of the truck; one end of the van was 5' from the right-hand footpath looking north and the other 14' from the left-hand footpath. The body of Taitusi Kaunilagilagi was partly on the left hand footpath looking north and partly on the road some 35' from the front of the van. The respective positions of the truck, the van and the body of Taitusi Kaunilagilagi after the accident are important, in that they were largely the basis of the inferences drawn by the learned trial judge when preparing his judgment.

The evidence of Eliki was that at the material time he was driving on the King's Road some 25 yards behind the N.M.A. van; that the speed of both vehicles was 20 to 25 miles an hour and that the van was on the correct side of the road. When he passed the last bend before the accident he saw a big truck coming from the direction of Nabua. This truck - that is the respondent's vehicle - was on its incorrect side of the road as it was passing a car parked on the road. He also says :

> "There would have been no accident if the truck had stopped behind the parked car and the road would have been clear. The truck had a concrete mixer on it and this concrete mixer hit the NMA van on the driver's side."

He further deposed:

> "The van was turned round by the impact, rolled back and stopped at an angle. The driver fell out of the van door open and fell on the footpath. On my left hand side. Empty cases also fell on the road all over it."

In the course of his cross examination he stated that the driver of the NMA van was not driving at an excessive speed and he did not lose control of his vehicle.

Witness Apakuki Tuivatukalo deposed that on the day in question he was driving a Suva City Council tractor from Nabua; and the witness Paula Nawavakava was with him on the tractor. He said:

> "There was a crash. I looked backwards and saw that cement truck and green vehicle had collided. Stationary car was still there. Cement truck did not stop behind parked car. He overtook the parked car not on his correct side. There was a dividing line on the road but on that day it was not very clear - worn or washed out.

> Van was travelling on the right of the road facing me i.e. on his left or correct side."

In the course of his cross examination he stated:

> "I did see a parked car; I am not making it up."

Witness Paula Nawavakava stated that the respondent's vehicle - which he calls "the cement truck" tried to overtake the parked car and as it did so the van and the truck collided. The cement truck in moving forward dragged the van backwards. He further stated that he actually saw the collision occur.

The respondent Mohammed Yasin in his evidence stated that he was proceeding along King's Road in top gear at 15 to 20 miles an hour and the road was clear. Then he saw the van travelling very fast; it got out of control at a sharp bend and was on the wrong side of the road. The witness said that when the van was about to collide with his vehicle he swerved on to the footpath and the van hit the truck on the front mudguard, then the tray and the back wheel. At the time of the collision he stated that he was travelling at about 10 miles an hour having reduced speed when he saw the van coming fast.

In the course of his judgment the learned trial judge said, with regard to the three witnesses for the plaintiff:

> "Without the evidence of the sketch plan and the fact that the van did spin once or twice and the driver was thrown out I would have been impressed by these three witnesses."

In other words the learned trial judge does not hold that the demeanour of the witnesses concerned led him to disbelieve them, or that their evidence, upon the face of it, lacked credibility.

If he had so held this Court would, following the established rules, have been extremely reluctant to upset the learned judge's findings of fact. But in this case his rejection of the evidence of the witnesses for the plaintiff has been based substantially on his reasoning back from the sketch plan to what he considers must have happened prior to the situation disclosed by that plan. In the course of his judgment the learned trial judge says :

> "The van after impact which must have been a severe one spun completely around on one version twice. On impact the back of the van would spin clockwise, if the van's forward momentum was sufficiently fast. It could not have been carried backwards as three of the witnesses stated. The front would be stopped on impact and could move back with the forward movement of the heavy truck but the whole van could not on the evidence have been carried back. The forward momentum of the van would cause the van to pivot and if travelling at speed to spin. It did spin and the driver of the van was thrown out of the van to end up on the left hand footpath 20 feet from the back of the truck. The van ended up 52'6" from the back of the truck after spinning around once or twice. This could not have happened with two vehicles each travelling at 20-25 miles per hour and colliding. One vehicle must have been travelling considerably in excess of that speed."

> "As regards their allegation that the truck was overtaking or passing a parked car, there is a bend in the road where the accident occurred. On Paula's evidence the car was parked partly off the road. Even allowing the full width of the car as wide as the van which was 5'6" and the truck 6'6" there was ample room for the truck and the van to pass on a 24' road even if the truck was passing the parked car.

> The truck would have had to pull very wide indeed right onto the right hand side to hit the van travelling on its extreme left. The sketch plan indicates that this did not happen."

Although the learned trial judge finds that the defendant, under cross-examination, was not a good witness the judge accepts the statement that the van was travelling at a high speed and was out of control. He goes on to say:

> "Also as appears from the sketch plan the accident did not happen on the right hand side of the road facing Suva as alleged by the plaintiff."

It is clear that the learned trial judge has based his judgment largely on inferences drawn from what is shown on the sketch plan. But the reconstruction of the facts leading to a collision from a sketch of the position of the vehicles after that collision is by no means an easy matter. As is said in Cross on Evidence, 4th Edition at page 386 citing Nickisson v. R (1963) W.A.R. 114 :

> "Nor does a Police Officer's experience in investigating traffic accidents make him an expert for the purpose of reconstructing a particular traffic accident."

This is an illustration of the principle which has been enunciated in a number of cases, to the effect that it is almost impossible to forecast with any degree of accuracy what will happen to two vehicles immediately after a violent collision in which they are involved. So many mechanical factors may come into play that results in one such collision may be totally different from those in another.

The evidence of witnesses whom the trial judge found, on the face of it, reliable, was that the collision was caused by the negligence of the respondent in swinging over to his wrong side of the road to avoid a parked car while the road ahead of him was not clear. Although the three independent witnesses all stated that there was a car parked on the side of the road and that the respondent, in his truck, swerved to avoid this obstacle, respondent in his evidence denied that there was any such parked car; and therefore he did not swerve as stated by the witnesses for the plaintiff. As has been stated, the learned trial judge found that in some respects the defendant was not a good witness; but he also held that on the main facts he was not shaken. On consideration of all the evidence the Judge was of the view that the accident happened substantially in the manner described by the defendant. It is difficult to follow on what basis the learned trial judge came to this conclusion, as it was of the very essence of the defendant's evidence that there was no parked car; while it must be held to be proved, on the evidence of Eliki, Apakuki and Paula, that the parked car was there at the place stated.

Be that as it may, it is clear that the trial judge's findings of fact are very largely inferences from the sketch plan, and in accordance with the authorities already cited, this Court has "full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly": Benmax v. Austin (1955) A.C.370 at p.373. An examination of the sketch plan in my opinion, can well lead to conclusions perfectly consistent with the evidence of the three main witnesses for the appellant. The skid mark made by the right-hand wheel of the heavy truck shows that some time after the driver applied his

brakes - allowing for the inevitable reaction period - the right-hand side of the vehicle was approximately in the middle of the road, and the vehicle was heading towards its left side of the road. The assumption may well be drawn from this that the respondent's truck was, very shortly before the collision, on its wrong side of the road. The learned trial judge finds that after the impact, the van did spin once or twice; and the result of this spinning with the momentum then in reverse could well account for the position in which the van finally came to rest. In other words, the sketch plan does not, in my view, conclusively establish that the collision took place as deposed to by the respondent, but is equally consistent that the evidence of the appellant's witnesses that the point of collision was on the respondent's wrong side of the road.

For the reasons I have endeavoured to set out, I am of the opinion that the judge's finding cannot be upheld by this Court. In my view the evidence establishes that the collision was caused solely by the negligence of the respondent, in driving on his wrong side of the road to pass a parked car when the way was not clear. Accordingly, I would allow the appeal and remit the case to the Supreme Court to enter judgment in favour of the appellant for such sum by way of damages as that Court shall find proper, and to dismiss the counter-claim. The appellant should have his costs here and below, to be taxed if not agreed upon.

(Sgd.) C.C. Marsack
JUDGE OF APPEAL

Suva,
25th March, 1977.

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Between:

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- and -

MOHAMMED YASIN s/o Abdul — Respondent

R.I. Kapadia for the Appellant
A.H. Rasheed for the Respondent

Date of Hearing : 17th March, 1977
Delivery of Judgment: 25th March, 1977

JUDGMENT OF HENRY J.A.

As we are differing from the learned trial judge I wish to state shortly the main factors which bring me to a different view. I will not repeat the unquestioned matters set out in the judgment of Marsack J.A. concerning the collision but will proceed directly to some salient features. The first is what were the circumstances in which the van approached the scene of the collision. Respondent said that the van got out of control because it was travelling very fast on a sharp bend. The inspector of police when referring to the bend said it was not sharp and the view was clear. He also said there was a slight decline going towards Nabua and the bend was not blind.

Three witnesses, whose honesty was not doubted, swore that the van was not out of control. There were no circumstances proved which might cause the deceased driver, engaged on his ordinary duties about midday with two passengers, to indulge in that type of driving. If there were no sharp bend - and it is a well used and well-known highway - it may be asked what could cause the van to go out of control? The probabilities lie heavily against all three witnesses being wrong, the inspector being wrong and the respondent, who ran away after the accident, and was held not to be a good witness, being right. The plan is of no assistance on this point.

A crucial question was whether or not there was a parked car, the presence of which created a hazard because it narrowed the roadway for the passing of two cars travelling in opposite directions. Again the three witnesses accepted as honest said there was such a parked car. Respondent said there was not. There was no express finding on this. Either respondent was correct or the three witnesses are correct. The only finding made in the judgment was on an assumption that there was a parked car. This does not determine the question. The probabilities appear to me to weigh heavily in favour of the presence of the parked car.

The learned judge founded his version of the collision on matters appearing on the sketch plan and from this plan he rejected the evidence of the three independent eye-witnesses. In my view an important point is that, after turning to its left, the right back wheel of the truck was only one foot on its correct side of the road. The position and direction of the tyre mark must here be taken into account. The mark is 8 feet long and was shown as coming at an angle which can only mean from the truck

driver's right to left. Such a mark would not commence until after re-action time and the hard application of the back tyre to the surface of the road. A fairer inference, and I think the only one, is that this wheel was further over and incorrect side for the truck and is therefore consistent with the testimony of the three eye-witnesses and inconsistent with that of respondent.

There is next the evidence of the same three witnesses who testify to a dragging of the van, of its being pushed to the left and later rolling to where it stopped. In my respectful view these observations are consistent with the plan and with the fact that the vehicles collided substantially in the manner they stated. The forward movement of the front of the van would be arrested at some point when it spun round. The front might have been dragged in the manner stated or it may have given that appearance to bystanders in the agony of a collision and the violent change of direction involved in the van being turned in a pivotal movement in which two moving vehicles were involved. For myself I can see no safe basis for drawing the inference that these witnesses must be wrong merely because they have described the accident in the manner stated. At least those descriptions are not inconsistent. With respect, the front of the van would not be stopped on impact. There would be a change of movement involved in the turn. At best, if the van itself was stopped completely in its forward movement, it would still be pulled by the truck unless the truck had stopped but I cannot see how it can be held the van ceased moving at any time before it finally came to rest.

It was said that the spinning movement observed could not have happened with two vehicles travelling at 20-25 miles per hour and colliding. I am unable to draw this inference and there is not, to my knowledge, any scientific or factual basis for it. Reference was made to the statement of one witness who placed the van only 5 to 6 inches from the extreme left of its half of the roadway. This is an observation of a kind notoriously found to be inaccurate. A lot depends upon the point of observation and a faculty to judge distances with little time to get any worthwhile accuracy. However, if there was a parked car and the truck moved out onto its incorrect side it might well appear from some points of observation that the van was closer to the left than was the fact. Whilst this piece of evidence may be important it is dangerous to treat it as a fact. It is only an estimate made under difficult conditions. This is never a safe basis for discrediting a witness otherwise found honest.

It was further stated that it was highly unlikely that the van, under power and damaged, would roll down the road. It is assumption to say it was then under power. The damage and loss of the driver may create a situation in which the term "roll down the road" was not inappropriate to describe the final movement of a vehicle in a collision such as this. In any event it is a matter of language. I can find no weight in this criticism of the evidence. It was then said that it was the forward momentum of the van which carried it to where it came to rest. That must be so but it does not, in my respectful view, prove any ground upon which speed at the point of impact can be assessed. It proves no more than that the momentum was

sufficient to have that result. There are too many unknown factors to hazard an estimate of the speed required to produce that momentum.

The only finding which touched on the possible presence of a parked car was in the following passage in the judgment:-

> "Even allowing the full width of the car as wide as the van which was 5'6" and the truck 6'6" there was ample room for the truck and the van to pass on a 24' road even if the truck was passing the parked car. The truck would have had to pull very wide indeed right onto the right hand side to hit the van travelling on its extreme left. The sketch plan indicates that this did not happen."

I have carefully considered all measurements and in my respectful view there would not be ample room. This finding overlooks the tyre mark and its direction of travel as well as the movement to the left combined with earlier re-action time. It begs the question as to where the truck was when it commenced its movement to the left. The plan is entirely consistent with the eye-witnesses and is not necessarily in contradiction of their testimony on any point. It is true there was no sign of heavy braking on the part of the van driver but the only sign from the truck driver was minimal and was visible over only the last 8 feet when the truck was coming to a stop after mounting the kerb and footpath.

The following finding was made in respect of respondent's evidence:

> The defendant under cross-examination was not a good witness. His story that he had deviated from his usual route along Kings Road into Grantham Road and then Raiwasa Road to join Kings Road did not ring true and he had a tendency to endeavour to put himself in a better light but on the main facts he was not shaken.

> It is clear however that he did apply his brakes and swing left onto the footpath and came to rest 8' from where the brake mark first appears on the road. The kerb would would have little effect on slowing down a 12½ ton vehicle. Had the van driver turned to his left the accident may have been avoided. I believe the defendant's statement that the van was travelling at a high speed and was out of control which in my view is borne out by the facts. Also as appears from the sketch plan the accident did not happen on the right hand side of the road facing Suva as alleged by the plaintiff.

One of the main facts, indeed it was the basis of appellant's case, was the presence of the parked car. If the parked car were not there then, without more, the evidence of the eye-witnesses was worthless. But it was not so held. If the parked car were there then respondent ought to be disbelieved. His application of the brakes I have already dealt with and it does not assist him. The question of the van driver losing control is not, in my respectful opinion, borne out by any proved facts or by reasonable inference drawn from proved circumstances. Whether or not it happened depends solely on the evidence of respondent on the one hand and the three eye-witnesses and the police inspector on the other hand. Respondent was stated to be "not a good witness" and reasons were given which clearly support this. I am unable to find any evidence, either of fact or by inference, which makes his evidence more reliable than the testimony of witnesses for the appellant. In truth the reverse is the position. It is not clear what "main facts" are included in the finding above cited. No doubt one ought to be whether there was a parked car but this was not resolved unless by inference from the finding on the "main facts".

If the three eye-witnesses are disbelieved on this then appellant's case ipso facto falls, but that is not how it was dealt with. There seems to be no room for all three honestly to make the same mistake.

In my judgment the proper finding was that respondent was negligent. If his evidence is disbelieved, as I think it must be, once it has no support from the plan or reasonable inferences to be drawn from it, then there seems to be no satisfactory proof of contributory negligence. The driver of the van is dead so exactly what situation was presented to him, is, unless the driver of the truck is believed, uncertain. The evidence of the other witnesses tends to place full responsibility on the truck driver. In my view the claim for contribution fails.

I would allow the appeal with costs and set aside the judgment for respondent and dismiss the counter-claim and remit the case to the Supreme Court for judgment and costs to be entered in favour of appellant for such sum as may be found to be proved.

(Sgd.) T. Henry
JUDGE OF APPEAL.

Suva,
25th March, 1977

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Date of Hearing : 17th March, 1977
Date of Judgment : 25th March, 1977

JUDGMENT OF GOULD V.P.

I have had the advantage of reading the judgments of Marsack J.A. and Henry J.A. I agree with them and with the orders proposed.

I would add only that I have given serious consideration to whether there was evidence which should lead this court to the conclusion that the respondent was entitled to any contribution on the basis of an apportionment of negligence. I have come to the conclusion that there is not. Once the respondent's explanation of the accident is rejected, as it must be on the view taken by this court, there is no evidence upon which

it could be said with safety that the driver of the van had an opportunity, of which he should have taken advantage, of avoiding the accident. Apart from the evidence of the respondent, there was no evidence of excessive speed on the part of the van driver, and, even allowing for the accepted evidence that the respondent was not travelling fast, inferences as to the speed of the van from the sketch plan are, to my mind, very unsafe.

In accordance with the unanimous opinion of the court, the appeal is allowed with costs and the judgment of the Supreme Court set aside. The case is remitted to the Supreme Court for dismissal of the counterclaim with costs, and for judgment with costs to be entered in favour of the appellant for such sum by way of damages as that court finds to be proved.

(Sgd.) T.J. Gould
VICE-PRESIDENT.