JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 35/74

BEFORE: The Hon. Mr. Justice Luckhoo, J.A., Ag. P.
The Hon. Mr. Justice Graham-Perkins, J.A.
The Hon. Mr. Justice Robinson, J.A.

B E T W E E N JAMAICA TELEPHONE CO. LTD.
and
CASWELL NUNES - DEFENDANTS/APPELLANTS

A N D LAUREL B. FRANCIS - PLAINTIFF/RESPONDENT

Mr. E.P. DeLisser for the Defendants/Appellants.

Mr. J. Leo-Rhynie for the Plaintiff/Respondent.

18th October, 1974
13th December, 1974

ROBINSON, J.A.:

On the 18th October, 1974, by a majority, this appeal was allowed, the order of the resident magistrate set aside; judgment entered for the defendants/appellants with costs of appeal $50.00 and appropriate costs in the Court below. We promised to put our reasons in writing. This we now do.

The cardinal point in issue in this matter is what was the cause of this accident. In this regard the plaintiff's driver, Phillipa Thomas, puts the defendant's van in the middle of the road and encroaching on her side of the road meanwhile the 2nd defendant's evidence is to the effect that his van was on its left side of the road and was not in her path at all; that she was wholly responsible for what took place on the brow of that hill; indeed he said the plaintiff's car ran upon a rock on her left side of the road and overturned, touching his right back fender in the spill, "the car touched the rock before it touched my vehicle."

Helen Roper, who apparently came on the scene shortly after the accident gave evidence for the defendant. She said, inter alia, that she saw the drivers of both vehicles, the vehicles themselves and that there was a slight graze on the right back fender of defendant's van; she spoke to the plaintiff's driver asking her what had happened and she replied that she had seen the car late, she had been flustered,

the car hit the rock on the bank and turned over. Helen Roper said she knew that road very well and that that corner is fairly dangerous "as one cannot see any vehicle coming up."

It is to be noted that whatever words were used by Phillipa Thomas in her reply to Helen Roper, she did not tell Helen Roper that the defendant's manner of driving was the cause of the accident or that his van was in the middle of the road.

The learned resident magistrate, in her reasons for judgment, made no definite finding or pronouncement as to the effect of the evidence of Helen Roper on the question of blameworthiness or liability for the accident. In short, the resident magistrate concluded that the conversation as reported by Helen Roper "even if accepted is equivocal". In my opinion this is not a proper assessment of the evidence because that evidence, if accepted supports the defendant's account as to how the accident occurred, that he was without blame.

LUCKHOO, J.A., Ag. P.:

I agree.

GRAHAM-PERKINS, J.A.:

I regret that I am quite unable to join in the conclusion arrived at by my brothers Luckhoo, P. (Ag.), and Robinson, J.A.

Once again the question is posed: In what circumstances can this Court interfere with findings of a fact made by a resident magistrate where those findings depend entirely on the credibility or otherwise of the testimony of witnesses? Before giving my answer to this question it is necessary to deal briefly with the evidence that was led before the learned resident magistrate. The respondent's witness, Thomas, described a situation in which, as the result of the appellant Nunes' manner of driving his employer's van, she was forced to so manoeuvre her car in order to avoid a head-on collision with that van that it collided with a rock on the near-side bank of the road, and with the van. She described the fore-going situation as follows. She reached the brow of the hill and "saw the van facing me driving in the middle of the road". Beyond the brow the road curved to the left and sloped downwards. When she saw the van it was about 10 feet from her car. She steered to her left in an attempt to avoid a collision. "If the van was to its left both vehicles could have passed." To her left at the point of collision were a rock and stones. In cross-examination she was asked: "Did you ever tell anyone after the accident that you saw the van when it was very near to you and became 'flustered'?" She replied:"I do not know that word and did not say that." It should be noted that Thomas was Spanish and spoke with an accent. She also said: "I did not tell any woman that I became nervous." She said further: "My car hit the stone and at the same time the back of the van hit my car."

Nunes' version of the circumstances culminating in the damage to the respondent's car did not materially differ, except in one important respect, from Thomas' version. He said he was about to pass two pedestrians when he saw Thomas' car come around the curve ahead of him. He brought his van to an immediate stop about two inches from the near-side edge of the road. "On right of road was high rock and the car ran away up the rock. It collided with the rock. It run straight into the rock and overturned... The car touched the rock before it touched my vehicle." Up to this point it will be seen that the only difference between Thomas and Nunes was that whereas the latter claimed that the car hit the rock before "it touched" his van, the former said that her car had hit the stone at the same time that the back of the van hit the front of the car. I will attempt to show that this difference can hardly be said to be material. Nunes proceeded, however, to deny that he was travelling in the middle of the road when Thomas' car came into view. But for this denial there would have been no real issue to be resolved by the resident magistrate.

A third witness, a Mrs. Roper, came upon the scene sometime after the accident. Mrs. Roper said that she asked Thomas what had happened. Thomas replied that "she had seen the car late she had been flustered and the car hit the rock on the bank and turned over". Mrs. Roper said that she was not quoting Thomas verbatim but she was certain that Thomas had used the word "flustered". She saw marks on a rock about 9 to 10 feet ahead of the van. The car was to the rear of the van.

Here was an utterly simple issue which the learned resident magistrate was called upon to resolve, namely; What was the effective cause of the accident? In resolving that issue in favour of the respondent she expressed herself thus:-

> "I had an opportunity of observing the witnesses in this case. I was impressed with the demeanour and the evidence of the (respondent's) driver and I preferred her evidence to the evidence of the defendant and his witness and came to the conclusion that her story was more probable. I found that the road was a narrow road, that the defendant was encroaching on the (respondent's) driver's side of the road, that he swerved to the left, that the driver of the car steered to the left to avoid a head-on collision with the ... van, and collided with the right rear tip of the van, struck the rock and turned over. I found that the defendant was negligent and the sole cause of the accident and I gave judgment accordingly."

The principal complaint of the appellant is that the magistrate "did not properly analyse the evidence in that she failed to consider the significance of the evidence of the independent witness, Mrs. Helen Roper, on the point that if a rock was above where the accident occured that this was in keeping with the account of the accident as given by (Nunes)."

For myself I find it somewhat difficult to understand why Mrs. Ropers' evidence as to the position of the rock in relation to the van should be regarded as significant. Of what is it significant? Mr. DeLisser argued that this evidence was important because it was consistent with the version advanced by Nunes. So it may be. But the matter neither begins nor ends there. The real questions to which the learned resident magistrate was required to find answers were: (i) Was Nunes driving his van in the middle of a narrow road approaching the brow of a hill beyond which he could not see? (ii) Would this manner of driving make it impossible or at least difficult for an approaching car to pass his van without real risk of a collision? (iii) Ought Nunes as a prudent and reasonable driver to have foreseen that his manner of driving would produce that result? (iv) Was Thomas in fact forced to steer to her left to avoid a head-on collision? The learned resident magistrate answered these questions in favour of the

respondent. Mr. DeLisser was unable to demonstrate that the magistrate had in fact failed to consider Mrs. Roper's evidence as to the relative positions of the rock and the van. That evidence could not, however, provide any clue, in the circumstances of this case, as to the effective cause of the accident. Conceding it to be consistent with Nunes' version it affords no assistance in answering the crucial questions noted above. To regard it as "significant" is to becloud the real issue.

It is said, further, that when Mrs. Roper asked Thomas what had happened Thomas did not, according to Mrs. Roper, say that she had steered to the right because of the presence of the van in the middle of the road. As observed earlier, her reply to Mrs. Roper's query, according to Mrs. Roper, was that "she had seen the car late she had been flustered and the car hit the rock on the back and turned over". The clear implication here, it is suggested, was that Thomas was guilty of a serious inconsistency. In that circumstances, it is said, the magistrate should not have regarded her evidence as to the cause of the accident as acceptable. From this proposition I desire to record my most emphatic dissent. It clearly ignores an important finding of the resident magistrate which she expressed in the following terms:

> "The remarks attributed to (Thomas) by defendant and his witness, even if accepted, are equivocal."

Whether the remarks attributed to Thomas are, or are not, equivocal - it is unnecessary to decide this - there cannot be the least doubt, if language means anything, that the learned resident magistrate did not accept the evidence of Mrs. Roper, or of Nunes, as to the remarks alleged. As already noticed the magistrate was quite clear in her reasons for judgment that she preferred the reasons given by Thomas to that given by Mrs. Roper and Nunes. Thomas denied that she had told Mrs. Roper or anyone that she had become flustered or [illegible] nervous.

On what principle can it be open to this Court, in the circumstances of this case, to say that the magistrate was wrong in reaching the conclusion at which she arrived? In Caldeira v. Gray (1936) 1 All E. R. 540 Lord Alness said, at p. 541:

> "The appellant is exercising a right of appeal which is his by right, and their Lordships recognize that they cannot, merely because the question is one of fact, and because it has been decided in one way by the learned trial judge, abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a question of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope. This is familiar law. It has received many illustrations -

and, in particular, in the House of Lords - the most recent of these cases being the case of Powell and Wife v. Streatham Manor Nursing Home (1935) A.C. 243. In that case it was held:

> 'where the judge at the trial has come to a conclusion upon the question of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be; and the appellate tribunal will generally defer to the conclusion which the trial judge has formed.'

Lord Wright, in the course of his speech at p. 265, said:

> 'two principles are beyond controversy. First it is clear that, in an appeal of this character, that is from the decision of a trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'
>
> That view is in strict accord with previous authoritative expositions of the law in the same sense ..."

There was no ground advanced by this Court by which, in my view, it could be led to the conviction that the learned resident magistrate was wrong in preferring the evidence of Thomas and rejecting that of Mrs. Roper and Nunes in so far as the latter was material to the issues she had to determine. For the foregoing reasons I was of the firm view that the appeal should be dismissed.

Before parting with this case I think it should be brought to the attention of the parties and of the Registrar of this Court that this appeal was not in any event properly constituted. There were two appellants and each was required, in accordance with previous decisions of this Court, to deposit the sum of One Dollar as security for the due prosecution of the appeal and the sum of Twenty-Four Dollars as security for the payment of costs. It seems to have escaped all concerned, and undoubtedly the members of this Court, that only one sum in respect of the prosecution of the appeal and one sum in respect of security for costs were paid on behalf of both appellants.