



At page 584 Viscount Simon made it clear that the judge of first instance cannot be treated as infallible in determining which side is telling the truth or is refraining from exaggeration - "like other tribunals, he may go wrong on a question of fact."

Then, as Lord Thankerton put it on page 587 "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen or heard the witnesses, and the matter will then become at large for the appellate court."

Further at page 590 Lord Macmillan said that "the judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong."

In the light of this authority and the evidence in the case, Mr. George asked this Court to consider the facts at large and to disturb the conclusion of the learned trial judge thereon.

The evidence was common ground up to a point. It disclosed that the deceased Justin Thompson was a passenger in a Prefect car being driven from Kingston to Bogwalk on 25th May, 1966. The driver of the Prefect car, Linval Gordon, said that after he crossed over Flat Bridge there was a line of traffic behind. Baker's red Pontiac car which was about 4th or 5th in the line commenced overtaking the line of traffic, so Linval Gordon pulled up his Prefect and parked on his left, but the truck, driven by Harold Gibson in the opposite direction towards Spanish Town, collided with Baker's Pontiac car near a corner. There was evidence that the Pontiac car was at that stage attempting to overtake a Volkswagen van. The truck ended up by overturning on the Prefect car and killing Thompson.

The parting of the ways in the evidence emerged at this point. Was the accident caused through the negligence of the truck driver Gibson or the negligence of the driver of the Pontiac car?

Gibson, the driver of the truck said the Pontiac car was doing 55 miles per hour and he never saw it on its correct side. The truck sideman, Miller said that the Pontiac was in the middle of the road doing

45 miles per hour overtaking the Volkswagen van - before overtaking the Volkswagen, the Pontiac was in the middle of the road and hit the truck. Some further support for the truck driver came from the driver of the Prefect, Linval Gordon, who said that the Pontiac was doing 40 - 50 miles per hour and that the collision took place before it could get back on its left side. Quite true he said that he didn't know if the truck was on its correct side but it was coming at a moderate speed.

As against that evidence in support of the truck driver, there was the evidence of the Pontiac driver, Baker, who claimed that the truck had come over on his side of the road. But this seemed very unlikely on his own showing, since he also stated under cross-examination that when he saw the truck it was on its left side in the elbow of the corner and again, according to him, the accident took place about  $\frac{1}{2}$  chain from the corner. The only other witness in the case was one William McCarthy who confessed bright and early in his evidence that he didn't see what happened, he merely heard a sound. He purported to describe the manoeuvre of the truck after the accident and this no doubt induced the learned trial judge to find total negligence in the truck driver. But in making every effort to avoid going into all the details of the evidence, it was quite apparent that McCarthy not only discredited himself but ended up a totally discreditable witness.

Yet there is a finding by the learned trial judge at pages

94/95 of the record:-

"ON LIABILITY:-

(1) Court accepts account of accident as related by first defendant Baker and as supported by his witnesses McCarthy and Linval Gordon called by Plaintiff." This finding is also to be found at page 26 of the record as follows:-

"I accept the story of the First Defendant Baker and his witness McCarthy as borne out by Linval Gordon, as to how the accident happened. I find that the truck came around the corner on its incorrect side .....

It is quite clear that Linval Gordon's evidence does not support the evidence of Baker, such support as it gives can be readily credited to the truck driver Gibson. That finding therefore constitutes a material inaccuracy on the part of the learned trial judge on the

critical question as to where lay the balance of probabilities or the preponderance of evidence. Moreover, on the record, the learned trial judge misdirected himself in holding that McCarthy's evidence was really capable of supporting anything germane to the issue under consideration.

In my view the learned trial judge had no evidence on which he could reasonably rely in all the circumstances to hold either that the truck came around the corner on its incorrect side or that the Pontiac car was on its correct side. There was however a preponderance of evidence to the contrary i.e., that the truck came around on its correct side and the Pontiac car was on its incorrect side. The latter was obviously in a hurry to get to Montego Bay for an evening show and the evidence showed that Pontiac car driver to be the blow and go type. The facts were at large and it seemed irresistible that he should have been found solely to blame for the accident. I would therefore allow the appellants' appeal. I would vary the order made by the learned trial judge by the substitution of a reference to the first named defendant for a reference to the second and third named defendants wherever the same appears therein and of a reference to the second and third named defendants for a reference to the first named defendant wherever the same appears therein. The costs of Defendants/Appellants in respect of this appeal to be agreed or taxed are to be paid by the Defendant/Respondent Baker.

LUCKHOO, J.A.:

I agree.

SMABY, J.A.:

I agree.