Privy Council Appeal No. 51 of 1992

Amrit Rajkomar and Others *Appellants*

v.

Robert Scheiber *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH NOVEMBER 1993

Present at the hearing:-

LORD KEITH OF KINKEL
LORD BROWNE-WILKINSON
LORD SLYNN OF HADLEY
LORD LLOYD OF BERWICK
SIR THOMAS EICHELBAUM

*[Delivered by **Lord Keith of Kinkel**]*

This appeal arises out of an action of damages for personal injuries brought as a result of a motor accident which occurred on the Quartier Militaire to Saint Julien road on 16th January 1983. The first plaintiff, a medical practitioner, was driving his Honda car westwards towards Saint Julien when it collided with a Mercedes car being driven in the opposite direction by the defendant. The first plaintiff sustained serious injuries and his wife and three minor children, who were with him in his car and are the remaining plaintiffs, were also injured, though less severely.

The plaintiffs in due course raised their action against the defendant alleging in their statement of claim that the defendant's car left its own side of the road at a curve and collided with the first plaintiff's car. Allegations of negligence of the type customary in this kind of action were made. In his defence the defendant alleged that it was the first plaintiff who was driving on the wrong side of the road and so caused the collision.

The action was tried before Proag J., evidence on the issue of liability being given by the first plaintiff and his wife, by the defendant and by police officers who had taken measurements and recorded them on a plan

produced. On 2nd May 1991 Proag J. gave judgment in favour of the plaintiffs, awarding damages which in the case of the first plaintiff were very substantial. In the course of his judgment Proag J. said:-

> "I believe plaintiff No. 1 that he was driving at a moderate speed, particularly because his wife who was travelling beside him was in an advanced stage of pregnancy. I find that the defendant in driving at a high speed from the opposite direction was unable to negotiate the curve with ease, left his side of the road, failed to exercise due care and was therefore entirely at fault. Moreover the glass debris, the road marks, the respective condition and position of the Honda Civic car and the Mercedes after the bang go to confirm the inconsiderate driving of the defendant."

The defendant appealed, and his appeal was allowed by the Court of Appeal (Sir Victor Glover C.J. and Ahnee J.) on 13th March 1992. In the course of the judgment delivered by the Chief Justice it was observed that the front offside tyre on the defendant's Mercedes was ruptured by the collision and that the defendant had indicated a point on the north side of the road (marked C on the plan of the locus produced by police officers) as being that where the collision took place, whereas the first plaintiff had indicated a point on the south side of the road (marked H on the plan) as being the place of collision. The judgment continued:-

> "It is clear that whatever point of impact was thus indicated by the respective drivers could only be approximate and that in a case where, because of the pleadings, the issue was made to depend on whether the point of impact was on one side of the imaginary dividing line of the road or the other, more weight should be attached to other features revealed by the plan such as the place where debris were found and, in this particular case, the clear scratch marks found on the road in the vicinity of the impact point, as shown by both drivers.
>
> Given the direction in which the two vehicles were proceeding before the impact and their respective positions after the accident, there can be no doubt that the scratch marks to which we have already referred could only have been left by the offside front wheel of the Mercedes car the tyre of which, as we have said earlier, did burst as a result of the impact.
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> If one accepts that obvious finding the inescapable conclusion is that the impact could not possibly have taken place at point H as indicated by the first respondent, whose evidence on the question was accepted by the trial court. The impact must have been taken place somewhere before the scratch marks start. To hold otherwise would be tantamount to accepting that the tyre of the Mercedes did burst before the impact.

> Although it is impossible to say with absolute precision where the impact actually took place, point H must be discarded. On the other hand, the plan shows that the oblique scratch marks left after the front tyre of the Mercedes burst start at point which is almost in the middle of the 22 ft 6 inches road. Strict logic compels us to conclude that the impact between the two cars must have taken place a few feet or possibly only a few inches from the starting point of the scratch marks at a point which, of course, cannot be determined with precision but which must necessarily have been on the other half of the road, namely that of the appellant."

The plaintiffs now appeal to the Board, their primary contention being that the Court of Appeal was not entitled to interfere with the conclusions of the trial judge who had seen and heard the witnesses.

The reason why the Court of Appeal overturned the trial judge was that, in their view what might be called the silent or real evidence, in the shape of the position of scratch marks and of debris on the road surface, pointed unequivocally to the conclusion that when the collision occurred the defendant's Mercedes must have been wholly on its own side of the road and the plaintiffs' Honda must have been at least to some extent on its wrong side. A close examination of the evidence does not, however, bear this out. The scratch marks to which the Court of Appeal appears to be referring in its judgment extended diagonally for a distance of some four or five feet, the western end being nearer the north side of the road and the eastern end being nearer the south side. The north side was the defendant's proper side of the road, since traffic in Mauritius drives on the left. According to the evidence of Chief Inspector Marcel, which the Court of Appeal appears to have overlooked, the western end of the scratch marks was 14 feet from the north side of the road and 9 feet from the southern side. The road at that point was 23 feet wide, so the scratch marks started 2 ft 6 inches south of the midline of the road. If the scratch marks were indeed made by the front offside wheel of the Mercedes, this suggests that that wheel was south of the centre line of the road when the collision occurred. It is, however, pure speculation to assume that the scratch marks in question were made by the front offside wheel of the Mercedes with its ruptured tyre. The Honda car's front offside tyre was also ruptured and there were further less extensive scratch marks on the road a short distance to the south and east of the others. The Mercedes came to rest close to the south side of the road and the Honda was flung into the sugar cane on the south side. A large quantity of glass debris lay entirely on the south side of the road around the point H indicated by the first plaintiff. There was none around the point C indicated by the defendant. Oddly enough, there was also a quantity of glass debris in the sugar cane over 10 feet to the west of the Honda. In all the circumstances

there are no grounds for the view that the position of the scratch marks and of the debris was more consistent with the Honda having been to some extent on its wrong side of the road when the collision occurred than with the Mercedes having been on its wrong side. If anything, the contrary is the case.

Accordingly, the grounds upon which the Court of Appeal reversed the decision of the trial judge have been shown not to be tenable. Their Lordships allow the appeal and restore the judgment in favour of the plaintiffs. The respondent must pay the appellants' costs before the Board and in the Court of Appeal.