[2021] UKPC 23
Privy Council Appeal No 0049 of 2019

JUDGMENT

Harvey and another (Appellants) *v* Brette and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Lloyd-Jones
Lady Arden
Lord Kitchin
Lord Hamblen
Lord Stephens

JUDGMENT GIVEN ON

16 August 2021

The panel met on 29 July 2021 to consider the appeal on the papers

Appellants
P Maxime Sauzier SC
Josephine Robert
(Instructed by AxiomStone Solicitors)

Respondents
Gavin Glover SC
Yanilla Moonshiram
(Instructed by Jean Christophe Ohsan Bellepeau Chambers)

LORD STEPHENS:

Introduction

1. Nigel Ryan Brette ("the first respondent"), then seven years and two months, now 18 years old, sustained catastrophic personal injuries in a road traffic collision which occurred at 4.15 pm on Monday 8 March 2010. He was a pedestrian who was either walking on the footpath adjacent to the Royal Road, Mon Loisir, Mauritius, or he was in the process of crossing that road, when he was struck by a Nissan van ("the van") owned and driven by Johann Lindsay Patrick Harvey ("the first appellant"). The first appellant's road traffic insurers were Cim Insurance Co Ltd whose obligations were subsequently taken over by Swan General Ltd ("the second appellant").

2. On 19 June 2012, the first respondent and his parents ("the second and third respondents"), who are his full-time carers, commenced proceedings before the Supreme Court claiming damages against the first and second appellants. The appellants' liability is said to arise, in particular, under article 1384, *alinéas* (paragraphs) 1, 5 and 6 of the Mauritius Civil Code (the "Civil Code"), which provide, so far as relevant:

> "1. On est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde. ('One is liable not only for the harm which one causes by one's own action, but also for the harm caused by the action of persons for whom one is responsible, or of things which one has in one's keeping.')
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> …
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> 5. Le gardien de la chose, du dommage causé par le fait de celle-ci. ('The keeper of a thing, [is liable] for harm caused by the thing.')
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> 6. La responsabilité ci-dessus a lieu, à moins que … le gardien de la chose ne prouve que le dommage a été causé par l'effet d'une force majeure ou de la faute exclusive de la victime. ('The above liability arises, unless … the keeper of

> the thing proves that the harm was caused by an event of force majeure or by the exclusive fault of the victim.')"

On this basis the respondents contended that the van was a thing in the keeping of the first appellant, so that he was liable for harm caused by the van unless, as the keeper of the thing, he proved that the harm was caused by the exclusive fault of the first respondent, the victim. In the alternative the respondents contended that the road traffic collision occurred due to the "*faute*", negligence and/or imprudence of the first appellant. In addition, the respondents contended that the second appellant, as the insurer of the van, was as such jointly liable for the damages sustained by them.

3. The appellants denied liability and averred that the accident occurred due to the "*faute*", negligence and/or imprudence of the first respondent. In the alternative, they contended that first respondent had been contributorily negligent and as such the damages should be apportioned.

4. On 25 March 2014 and 10 November 2015 the case was heard before A R Hajee Abdoula J, who unfortunately died before delivering his reserved judgment. This meant that the case was reheard on 17 November 2017 and 22 February 2018, before V Kwok Yin Siong Yen J ("the judge"). Various witnesses were called on behalf of the respondents, but the first appellant did not give evidence and no other evidence was called on behalf of the appellants.

5. On 15 March 2018, the judge delivered her judgment. She held that since article 1384 of the Civil Code creates a presumption of liability against the "*gardien*" of the van, and the appellants had admitted that the van was under "*la garde*" of the first appellant, and was insured with the second appellant, the respondents did not have to prove the "*faute*", negligence or imprudence of the "*gardien*". The judge also held that it was incumbent upon the appellants, in order to be exonerated, to adduce evidence during the trial to prove that the accident was caused "*par l'effet … de la faute exclusive de la victime*", which they had not done. On that basis it was not necessary to make any factual findings as to how the road traffic collision occurred because, as the appellants had adduced no evidence at the trial, they had not discharged the obligation which rested on them to establish that the harm caused to the first respondent was due to his exclusive fault. The judge found that the appellants were liable to the respondents and awarded damages of MUR 10,100,000 which included interest at the rate of 15% on the sum of MUR 600,000 (ie the material damages) from the date of the lodging of the plaint together with costs.

6. On 26 March 2018, the appellants appealed to the Court of Civil Appeal (Balancy SPJ and Chan Kan Cheong J) (the "Court of Appeal") which heard the appeal on 22 October 2018 with the judgment being delivered on 29 October 2018. The Court of Appeal held that the trial judge had misdirected herself by holding that the exception of *"faute exclusive de la victim"* under article 1384 of the Civil Code could only be proved upon the appellants adducing their own evidence. Rather, the exception could be established on the basis of any evidence that was adduced at the trial, including evidence adduced on behalf of the respondents. The judge ought accordingly to have considered all the evidence in order to decide whether the exception had been proved by the appellants. However, the Court of Appeal did not remit the matter to the trial judge but rather proceeded to consider the evidence itself, which was largely documentary, given that the first respondent was not capable of giving evidence and the first appellant had not given evidence. The respondents had called an eyewitness to the road traffic collision, Mr Vengrasamy, at the trial who had given evidence that the road traffic collision occurred when the van had left the road and struck the first respondent when he was on the footpath. There were some weaknesses in the evidence of this witness, but the Court of Appeal considered that those weaknesses could not be relied upon by the appellants in their endeavour to prove the *"faute exclusive"* or contributory negligence of the first respondent. The Court of Appeal considered that the burden of proving the *"faute exclusive"* or contributory negligence of the first respondent could only be discharged upon reliable evidence that the accident occurred in accordance with the version given by the first appellant in his statement to the police. The appeal failed since upon the Court of Appeal considering all the evidence it held that the judge could not reasonably have come to a different conclusion on the issue of liability.

7. The appellants now bring this appeal on three grounds:

(i) Having found that the judge had clearly misdirected herself when refusing to look at the evidence on record, the Court of Appeal was wrong not to have remitted the case back to the judge on the issues of *faute exclusive de la victime* or contributory negligence.

(ii) Because the Court of Appeal, having decided to analyse the facts of the case, was wrong not to have found that the first respondent was exclusively responsible for the accident, or that he at least contributed to same.

(iii) Because the Court of Appeal was wrong to have discarded the real and sworn evidence on record, as it related to the rough sketch, police examiner's report and the statement of the first appellant.

8. It is not in issue that if the first appellant is liable, that so also is the second appellant.

9. The appeal was listed before the Board in 2020 but adjourned at the parties' request because of the Covid-19 pandemic. The parties subsequently agreed that the appeal should be dealt with on the basis of their written submissions and on the papers.

Factual background

10. The collision occurred on the Royal Road which is described as being "busy". The part of the Royal Road on which the collision occurred is flat and straight with clear visibility. The road surface was dry. There is a footpath on the left-hand side of the road as one travels from Rivière du Rempart in the direction of Gokhoola. The footpath is roughly 1.10 meters wide.

11. The foregoing description is made from the perspective of the direction of travel from Rivière du Rempart to Gokhoola. The Board also records that vehicles are driven on the left in Mauritius.

12. The respondents called Mr Bhantooa, a representative of the Traffic Management and Road Safety Unit, as a witness to prove that there was a bus stop on the left-hand side of the road in the vicinity of the point where the accident occurred. He produced a plan prepared on 18 May 2007 (before the collision) and another plan prepared in June 2017 (after the collision). Both plans recorded that there was a bus stop on the left-hand side of the road which is at the start of a sugar cane track. A person, such as the first named respondent, alighting from a bus at that stop would be on the footpath.

13. There is a bus stop on the right-hand side of the road in the vicinity of the point where the collision occurred.

14. On Monday 8 March 2010 the first respondent had been at school in Rivière du Rempart and it is agreed that, unaccompanied, he was on his way back home from school. It is also agreed that he had just alighted from a bus from Rivière du Rempart, which meant that it was driving in the direction of Gokhoola. The first respondent's home is on the left-hand side of the road, so in order for him to return to his home there would be no reason for the first respondent to cross the road or to be on the road itself, there being a footpath on his side of the road.

15. The van was being driven by the first appellant along the Royal Road in the direction of Gokhoola.

16. The van, which could be described as a compact van, has a flat front design.

17. There are two competing versions as to how this road traffic collision occurred.

18. On behalf of the respondents, based on the evidence of Mr Vengrasamy, an eye-witness, the first respondent was on the footpath on the left-hand side of the road when the first appellant's van mounted the footpath and struck him.

19. On behalf of the first appellant and relying on his police statement, it was suggested that the first respondent was crossing the road from the right-hand side and that the first respondent emerged into the path of the van in circumstances in which, it is to be inferred, the first appellant's view was obscured by three buses which were also on the right-hand side of the road. The police statement records the first appellant asserting that the right-hand side of the van struck the first respondent. A subsequent inspection of the van revealed damage to the right-hand side (though there are other parts of the van which have also been damaged.) The first appellant also relies on brake marks on the road, but not on the pavement, recorded by the police on a sketch map, which he asserts in his police statement were caused by his braking immediately after the collision occurred.

20. After the collision occurred the first appellant took the first respondent to hospital in the van.

21. The first respondent's injuries are catastrophic, and he has been unable to give any account of how the road traffic collision occurred.

22. The first appellant, having taken the first respondent to hospital, then contacted the police and reported the road traffic collision. Police officers arrived at Royal Road at 5.00 pm but at this time neither the first appellant nor anyone else relevant to their investigation was at the scene. The police officers and the first appellant subsequently met at the scene at 6.10 pm. The first appellant pointed out brake marks to the police officers which he asserted were caused by his braking after the collision occurred and he identified a point on the road as being the point of impact.

23. The police prepared a sketch plan which included the point of impact identified by the first appellant as point "A". It also included the brake marks and a point marked "C" where the police found blood on the road (as opposed to on the pavement).

24. At 8.35 pm the first appellant made an oral statement after caution to the police which was reduced to writing by PS Jaitoo. The statement was then read over to the first appellant who then stated that he had nothing to add, correct or withdraw. He also affirmed that the statement was true and that he had given it voluntarily. The first appellant then signed the statement. Despite the first appellant not being called as a witness at the trial the appellants rely on the statement, which seeks to exculpate the first appellant, in order to support their case that the harm to the first respondent was *"la faute exclusive de la victime"* or in the alternative that he was guilty of contributory negligence.

25. At 9 pm on 8 March 2010 the police inspected the van and found a loose offside light and that the number plate was bent on the offside. The appellant seeks to establish that this damage to the offside lends some support to his account in his police statement. However, the fact that he did not give evidence meant that he could not be questioned as to whether this damage was already there prior to the collision. The police also found a dent in the centre of the front panel, which was attributed, by the first appellant, to an attack which took place immediately after the collision from persons in the vicinity. However, again the fact that the first appellant did not give evidence meant that he could not be cross-examined as to whether this damage came from the collision or as to whether its location in the centre of the van was also consistent with the respondents' version as to how the collision occurred.

The evidence at the trial

26. There was oral evidence at the trial from medical practitioners in relation to the injuries sustained by the first respondent.

27. In relation to the issue of liability the respondents called

(a) PS Jaitoo, who drew up the sketch plan and who interviewed the first appellant;

(b) PC Calkee, a police officer who took photographs of the van;

(c) Mr J Vengrasamy, an eye witness; and

(d) Mr Luviraj Bhantooa, a representative of the Traffic Management and Road Safety Unit, to give evidence as to the location of bus stops in the region where the accident occurred.

All the other liability evidence was documentary and included the police sketch map, the first appellant's police statement, photographs of the van and the report of the police vehicle examiner.

28. The appellants called no evidence.

The Court of Appeal's decision

29. As the Board has indicated, at para 6 above, the Court of Appeal was of the view, after anxious consideration of the evidence, that upon a proper direction, the judge could not reasonably have reached the conclusion that the appellants had proved the *faute exclusive* of the first respondent or even contributory negligence on his part.

30. In arriving at that conclusion, the Court of Appeal first considered the weight to attach to the first appellant's police statement, concluding that it could *hardly carry any weight* given "the [first appellant] who was on the list of witnesses for the [appellants] … was not called to depone."

31. Next the Court of Appeal considered the brake marks and concluded that:

> "No reliance could be placed, in the circumstances, on the brake impressions found on the road by the police and indicated to the police by [the first appellant] to be the impressions left by the tyres of his van in the course of that accident as per his version. Indeed those brake impressions could only be meaningful when considered in conjunction with evidence of the truth of that version. And there was no such evidence."

32. In relation to the damage to the front offside of the van the Court of Appeal stated:

> "The damages to the front offside part of the van as per the report of the Police Vehicle Examiner produced in the criminal proceedings instituted against [the first appellant] have been relied upon by counsel for the [appellants] as tallying with the version of [the first appellant]. Such reliance could not however be placed by the learned judge on those damages in the absence of evidence that the accident occurred in accordance with the version of the [first appellant] in his statement to the police to which *no real weight* could be attached as indicated … above." (Emphasis added)

33. Finally, in relation to the weaknesses in the evidence of Mr Vengrasamy the Court of Appeal stated:

> "The weaknesses in the evidence of witness Vengrasamy tendered as an eye witness by the plaintiffs could not be relied upon by the [appellants] in their endeavour to prove the *faute exclusive* or contributory negligence of [the first respondent]. Indeed, even if the evidence of witness Vengrasamy had to be totally discarded as unreliable, the burden of proving the *faute exclusive* or contributory negligence of the [first respondent] could only be discharged upon reliable evidence that the accident occurred as per the version of the [first appellant] as opposed to mere evidence of what his version was."

The first ground of appeal

34. The appellants contend that the Court of Appeal, having decided that the judge had misdirected herself, was wrong to have considered and decided issues of fact as opposed to remitting the case back to the judge on the issues of *faute exclusive de la victime* or contributory negligence.

35. The powers of the Court of Appeal are contained in the Court of Civil Appeal Act 1963 (the "1963 Act") which in so far as relevant to this ground of appeal provides that:

> "9. On the hearing of an appeal under this Act, the Court of Civil Appeal may draw any inferences of fact and give any judgment and make any order which ought to have been made, and make such further or other order as the case may require.
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> …
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> 11(2). A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Civil Appeal some substantial wrong or miscarriage of justice has been thereby occasioned, and if it appears to the Court of Civil Appeal that such wrong or miscarriage of justice affects part only of the matters in controversy, or some or one only of the parties, the Court of Civil Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties."

36. The appellants acknowledge that the Court of Appeal has broad powers on appeal under the 1963 Act, including the power to draw inferences of fact, make any order which ought to have been made by the courts below, remitting the case to the lower court (section 9) or ordering a new trial (section 11). On this basis the appellants do not dispute that the Court of Appeal has the power to consider and decide issues of fact. The appellants submit only that the power should not have been exercised in the circumstances of this case, given in particular that the trial judge had made no factual findings. Furthermore, it was submitted that she would be best placed to judge issues of credibility having seen and heard the witnesses.

37. The respondents submit that it was appropriate for the Court of Appeal to have exercised the power in this case. They rely on the following points:

(a) counsel for the appellants requested the Court of Appeal to assess the evidence on the record (including the police sketch map, the first appellant's police statement, and the photographs of the van) so as to make findings of fact supporting the appellants' case of *faute exclusive* (exclusive fault) on the part of the first respondent. It is therefore inappropriate, the respondents contend, for the appellants to mount a challenge to the course of action which they invited the Court of Appeal to take merely because the Court of Appeal arrived at a

different conclusion in relation to the facts than the one advanced on behalf of the respondents;

(b) the appellants' request, advanced on their behalf by experienced counsel, to the Court of Appeal to assess the evidence was a highly significant factor to be taken into account by the Court of Appeal in exercising discretion as to whether to exercise the power to consider and decide issues of fact;

(c) there was no suggestion that any further evidence was to be called if the matter was remitted to the trial judge;

(d) the evidence upon which the appellants relied was almost entirely documentary; and

(e) remitting the case would have incurred additional costs and further delay.

38. There is a broad discretion as to when it is appropriate for the Court of Appeal to exercise the power to consider and decide issues of fact, as illustrated by *Rose Belle S E Board v Chateauneuf Ltd* (1990) SCJ 30. The appellants invited the Court of Appeal to exercise the power to consider and decide the issues of fact. The Board considers that this invitation was a highly pertinent factor in the exercise of discretion by the Court of Appeal as to whether to exercise the power. Furthermore, the essential documentary nature of the evidence in relation to liability was another compelling factor in the circumstances of this case. The Board considers that this ground of appeal should be dismissed as the Court of Appeal was correct to exercise its broad discretionary power to consider and decide the issues of fact in this case.

The second ground of appeal

39. This ground of appeal seeks to establish that the factual conclusions reached by the Court of Appeal were wrong and that the Court of Appeal ought to have found that the first respondent was exclusively responsible for the accident, or that he at least contributed to it. Accordingly, this is an appeal against a factual determination by the Court of Appeal.

40. There were no findings of fact by the judge. The only factual conclusions were those made by the Court of Appeal. Accordingly, there have been no concurrent findings of fact reached in the courts below so that this case does not fall within the Board's normal practice, which is that it is inappropriate to go behind the concurrent findings of fact of two lower courts: see *Devi v Roy* [1946] AC 508*; Central Bank of Ecuador v Conticorp SA* [2016] 1 BCLC 26, para 4*; Juman v Attorney General of Trinidad and Tobago* [2017] 2 LRC 610, para 15*; Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, paras 43–44. The factual findings by the Court of Appeal were made after consideration of the documents all of which are available to the Board. There was no oral evidence before the Court of Appeal and there is none before the Board. On one view the Board is in the same position as the Court of Appeal but there is still resonance in the vivid expression in *Anderson v City of Bessemer* (1985) 470 US 564, 574–575 that the fact finding trial, which in this case was in the Court of Appeal, should be seen as the "main event" rather than a "tryout on the road", see *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, para 80. The Board will exercise considerable reticence before overturning any factual finding made by the Court of Appeal.

41. The first appellant did not give evidence at the trial and there was no application for him to give evidence before the Court of Appeal. This meant that his evidence was not tested by cross-examination and the court was unable to form an accurate assessment of his credibility. In those circumstances the Board considers that it was appropriate for the Court of Appeal to attach *no real weight* to the matters contained in his statement. The appellants' case relies on the proposition that the first respondent emerged from behind a bus into the first appellant's path providing him with no opportunity to brake or to avoid a collision. The evidence supporting that case is contained in his police statement to which no real weight can be attached. This means that absent any reliable evidence from the first appellant there is no basis for concluding that there were buses on the right-hand side of the road or that the first respondent emerged from behind a bus. The presence of brake marks on the road surface do not establish that the first respondent emerged from behind a bus into the path of the first appellant's van. The Board agrees with the Court of Appeal that, in the circumstances of this case, the brake marks "could only be meaningful when considered in conjunction with evidence of the truth of [the first appellant's] version." Similarly, the damage to the van could only be meaningful when considered in conjunction with evidence of the truth of the first appellant's version of the collision. Finally, the Board agrees with the Court of Appeal that even if the evidence of witness Mr Vengrasamy had to be totally discarded as unreliable, the burden of proving the *faute exclusive* or contributory negligence of the first respondent could only be discharged upon reliable evidence that the accident occurred as per the version of the first appellant as opposed to mere evidence of what his version was. Once it has been established that no real weight could be attached to the first appellant's police statement then the appellants had not discharged the onus of establishing that the

harm was the *faute exclusive* of the first respondent or that the first respondent was guilty of contributory negligence (even if a child of seven years and two months can be guilty of contributory negligence. In relation to which debate see, for instance, the discussion in para 1077 of volume one of The Royal Commission on Civil Liability and Compensation for Personal Injury Report, Cmnd 7054 - I (1978)).

42. The Board considers that this ground of appeal should be dismissed.

The third ground of appeal

43. Under this ground the appellants assert that the Court of Appeal "was wrong to have discarded the real and sworn evidence on record, as it related to the rough sketch, police examiner's report and the statement of the first appellant."

44. The Board has already concluded that the Court of Appeal was correct in deciding that no real weight could attach to the first appellant's police statement. The Board considers that the police vehicle examiner's report shows that the van had been damaged in a variety of ways, none of which are consistent only with the appellant's account. As the Board has indicated, the brake marks and other matters recorded on the police sketch map "could only be meaningful when considered in conjunction with evidence of the truth of [the first appellant's] version."

45. The Board considers that this ground of appeal should be dismissed.

Conclusion

46. For the reasons given above, the Board dismisses this appeal with costs to the respondents.