IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Balapatabendige Piyadasa
No. 1081, Pannipitiya Road,
Battaramulla.

PLAINTIFF-APPELLANT

C.A 286/1998 (F)
D.C. Colombo 15204/MR

Vs.

B. A. Don Jayantha Hemakumara
No. 107/2, Talawathugoda Road,
Pitakotte.

DEFENDANT-RESPONDENT

BEFORE: Anil Gooneratne J.&

COUNSEL: S. A. D. S. Suraweera for the Plaintiff-Appellant

U. De. Z. Gunawardena with D. Jayathilleke
for the Defendant-Respondent

ARGUED ON: 17.01.2013

DECIDEDON: 31.01.2013

GOONERATNE J.

This was an action filed in the District Court of Colombo claiming a sum of Rs. 10,50,000/- due to injuries caused to the Plaintiff, according to matters raised in paragraph 4 of the plaint, and the Plaintiff allege more particularly that the Defendant negligently knocked him down whilst he was riding his bicycle. Parties proceeded to trial on 4 admissions and on 11 issues. This appeal has been preferred to this court by the Plaintiff-Appellant from the judgment of the learned District Judge dated 4.5.1998, dismissing Plaintiff's case.

In Plaintiff's evidence, he states that on 1.12.1993 he was riding his cycle on his way to his home and at about 7.00 p.m, was knocked down by the vehicle driven by the Defendant-Respondent from behind. It was Plaintiff's evidence that he never heard the noise of a horn or breaks being applied. Plaintiff also produced statement to the police marked P1 and documents P2 to P10, which includes certified copy of the Magistrate's Court case filed against the Defendant-Respondent where Defendant-Respondent pleaded guilty (P2) to the charges preferred in the Magistrate's Court and medical reports/diagnosis certificate and income particulars etc.

The Appellant inter alia urge the following points to demonstrate that the trial Judge had erred in his judgment.

(a) Trial Judge's view is that accident occurred due to unavoidable circumstances and the negligence of Plaintiff. Appellant urge that there was no evidence to support the view of the trial Judge.

(b) Attention of Court is drawn to the charge sheet before the Magistrate's Court where the Defendant had pleaded guilty unconditionally to the said charges. (document P2 at page 109 and paragraphs 1 and 2 of the said charge sheet discloses the fact that the Defendant had knocked down the Plaintiff from behind and in doing so, had driven the vehicle without control and at an unmanageable speed which was not appropriate under the circumstances.

(c) The Defendant had pleaded guilty unconditionally to the said charges and the admissibility of the said plea of guilt in the instant action had eluded the learned trial judge in arriving at his judgment in the instant action. There is no plausible comment by the learned trial judge on the said aspect of the case and it is well settled law that a plea of guilt before the Magistrate's court is admissible evidence in a civil suit. However the learned trial judge had rejected the said plea on the basis that the circumstances of the case establishes the fact that the Defendant had pleaded guilty to the charges in order to conclude the proceedings in short.

(d) The learned counsel for the Defendant-Respondent placed a heavy reliance upon the statement of the Plaintiff-Appellant, just after the accident and after he regained consciousness in hospital. In the said statement, the Plaintiff had stated that he fell in to a pot hole and was thrown off the bicycle which he was riding to the side of the road. However the learned trial Judge had concluded that the plaintiff had fallen to the middle of the road without any evidence to support the contention of the Defendant and this is a very vital aspect in the case which the learned trial judge had failed to consider.

(e) The plaintiff had made the said statement just after he regained consciousness in hospital and there was no reason to believe that he had made the said

statement with the intention of instituting action for damages against the Defendant in future. However the Defendant after a long time form the accident had ample time to adjust his version to suit his case and taken up the position that the Plaintiff had fell on to the road and there was only a distance of about 10 to 15 feet between his vehicle and the Plaintiff.

(f) A distance of about 10 to 15 feet is a reasonable distance for any driver to avert an accident by applying brakes if he had traveled at a reasonable speed. The learned counsel for the Respondent in the course of his reply submitted that the learned trial judge had to arrive at his judgment on the most probable case presented before him on the evidence but not on conjecture. There is no doubt that the learned trial judge had to consider the more probable case presented before him but the pertinent question is as to what was the more probable case presented before him.

The Appellant seeks to establish that the Defendant failed to act with caution and care towards the road users. Appellant state the Defendant failed to establish any speed of his vehicle and the reaction time to apply breaks and the minimum required distance to stop the vehicle. Another point stressed is that there was no defence of contributory negligence pleaded and no issue raised on same.

The trial Judge in his judgment has considered very many primary facts. Unless the judgment could be called a perverse judgment on the basis of the ruling on highly unacceptable facts, the Appellate Court is not bound to disturb primary facts. 1993(1) SLR 119; 20 NLR 332. The learned District Judge observes that the Plaintiff was riding his cycle which

had no lights or a lamp and the Plaintiff was holding a bottle and a torch in one hand. The place of point of impact was not under construction, according to Plaintiff but the trial court does not accept that position, having considered the material contained in the statement made to the police by Plaintiff on 16.2.1993.

On very vital points of the accident the learned District Judge accepts the defendant's version to be more probable, especially that the Defendant drove the vehicle at a reasonable speed, Plaintiff could not control the cycle since he was holding the torch/bottle on one hand and the Plaintiff had at the time steared the cycle suddenly to the middle of the road and fallen. As such the Defendant met with an unavoidable accident. Though the Plaintiff tried to prove negligence of Defendant, the trial judge having correctly annalysed the evidence on the aspect of unavoidable accident, had accepted the more probable version on a balance of probability. The Plaintiff-Appellant had not been able to convince me that the trial judge had erred in his assessment on the question of negligence of the Defendant in his oral or written submissions. Let me refer to an extract from the judgment, which this court does not wish to disturb.

මේ අනුව තදබල ඝට්ටනයක් සිදුව ඇති බවට නිගමනය කල නොහැක. එයින් ඔප්පු වන්නේ විත්තිකරු වාහනය සාමාන්‍ය වේගයෙන් ධවනය කර ඇති බවත්, වාහනය පාර මැදට කපා තිරිංග තදකර ඇති බවටය. මේ අනුව විත්තිකරු මෙම අනතුර වැළැක්වීමට සෑම උත්සාහයක් ගෙන ඇති බවට නිගමනය කළ හැක. අනිත් අතට බලන විට පැමිණිලිකරු පාපැදියෙන් ගමන් කර ඇත්තේ දකුණු අතේ විදුලි පන්දමක් ඇතිවය. තවත් බෙහෙත් බෝතලයක් ද එල්ලා ගෙනය. මේ අනුව පැමිණිලිකරු එකි පාපැදිය සැළකිල්ලෙන් පදවා ඇති බවට නිගමනය කළ නොහැක. එම තත්ත්වයෙන් පැමිණිලිකරු මෙම පාපැදිය පදවමින් සිටින විට සංවර්ධනය කරමින් තිබූ එකි පාරේ වලක ගමන් කරමින් පාපැදිය පාලනය කර ගැනීමට නොහැකිව පාර දෙසට වැටී, ඉහත කී වාහනය කකුල උඩින් ගොස් ඇති බවට නිගමනය කරමි.

Another important observation of the trial judge is that injuries had been caused based on medical evidence, to the Plaintiff's right leg which fortify the version of Defendant. If the Plaintiff's position that he was knocked down from behind, the injuries would have been caused in a different manner. These are vital factual positions best left to the judgment and observations, of the trial court.

I would also deal with the plea of guilt by the Defendant-Respondent in the Magistrate's Court. The appellant's position was that the plea of guilt in the Magistrate's Court is admissible evidence in a civil suit. I had the benefit of perusing the submissions of the learned counsel for the Defendant-Respondent on this aspect of the case and on which I am fully convinced of his views, having looked at the dicta in Nadarajah vs. Ceylon

Transport Board 79 NLR 49, which states that guilt tendered is relevant as an admission, and ought to be taken into consideration, in the civil suit. The above dicta cannot be looked at in isolation with Section 41 of the Evidence Amendment Act No. 33 of 1998, which was introduced into our law very much subsequently to the above decided case. The learned counsel for the Defendant-Respondent has also in the light of the above provisions of the said Evidence Amendment Act, thought it fit to refer to Section 11 of the Civil Evidence Act of the United Kingdom.

The gist of the argument placed before this court by learned counsel was that the relevant provisions of the U.K. Amendment Act create a presumption of guilt, and not the provisions of Section 41 of our Statute. Section 41 A(1) & 41(2) of Amendment Act No. 33 of 1998 reads thus:

41.A (1) Where in an action for defamation, the question whether any person committed a criminal offence is a fact in issue, a judgment of any court in Sri Lanka recording a conviction of that person for that criminal offence, being a judgment against which no appeal has been preferred within the appealable period or which has been finally affirmed on appeal, shall be relevant for the purpose of proving that such person committed such offence, and shall be conclusive proof of that fact.

(2) Without prejudice to the provisions of section (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a judgment or order of such court or court martial recording a conviction of such person for such offence, being a

judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purpose of proving that such person committed such offence or committed the acts constituting such offence.

Illustration (a) referred to therein is as follows:

(a) B injures C while driving A's car in the course of B's employment with A.

B is convicted for careless driving

In an action for damages instituted by C against A and B, B's conviction is relevant.

I agree that the above provisions of our law more particularly Section 41(2) does not give the conviction the force of a presumption of guilt but only makes the conviction relevant in civil cases. Even a presumption of guilt could be disproved by evidence to the contrary in the civil case. In the circumstances of the case in hand I cannot take the view that the conviction in the Magistrate's Court is an admission of guilt, but it is only a relevant fact, which on evidence that surfaced in the civil court has disproved Plaintiff's case and has been off set by the evidence led at the trial. The conviction in this case cannot be treated as a relevant fact since it does not meet the requirement of relevance and reliability.

The evidence very plainly and clearly demonstrate that the accident took place at 7.00 p.m, and the point of impact would be dark at the given time. Plaintiff could not have had a proper balance on the handle of the cycle with a bottle and a torch in one hand. Plaintiff could not have maintained a steady forward approach in his cycle. No doubt the cycle fell into the pothole. Therefore the case of the Defendant-Respondent is more probable. I am convinced and more inclined to accept and adopt the version of the Defendant-Respondent and the views of the learned District Judge, Since evidence disproved the Plaintiff's case and as observed above the relevant fact could be disproved by the evidence which surface at the trial.

In all the above circumstances I am inclined to affirm the judgment of the learned District Judge. As such I dismiss this appeal with out costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL