Chua Kee Lam (next friend to Chua Peck Seng) v Moksha and Another [2009] SGHC 110

Case Number : DA 44/2008

Decision Date : 06 May 2009

Tribunal/Court : High Court

Coram : Chao Hick Tin JA

Counsel Name(s) : Namasivayam Srinivasan and K Subramanian (Hoh Law Corporation) for the appellant; M P Rai (Cooma & Rai) for the respondents

Parties : Chua Kee Lam (next friend to Chua Peck Seng) — Moksha; Big-Foot Logistic Pte Ltd

Evidence – Admissibility of evidence – Hearsay – Documentary evidence – Public or official documents – Admissions – Police report, photographs and sketch plan of accident scene – Accident victim not fit to testify – No witnesses called – No case to answer – Whether makers of police documents had to testify – Whether police report, photographs and sketch plan might form evidence of accident

Tort – Negligence – Breach of duty – Contributory negligence – Head injuries from road traffic accident – Whether driver had taken sufficient precautionary measures

6 May 2009

Chao Hick Tin JA:

Introduction

1 The action below was instituted by one Chua Kee Lam ("CKL") as the next friend of Chua Peck Seng ("CPS") who was injured in a motor accident. CKL is the son of CPS. This was an appeal against the decision of the district judge ("the DJ") who dismissed CPS's claim against the defendants in respect of the head injuries he suffered on account of that motor accident which was allegedly due to the negligence of the first defendant (see *Chua Kee Lam v Moksha* [2008] SGDC 366).

2 On 6 January 2004 at about 10.15am, the appellant, then 84 years of age, was riding a bicycle along Bedok South Avenue 1 when he collided with a lorry driven by the first defendant. The second defendant was the employer of the first defendant. Hereinafter, CPS will be referred to as "the appellant" and the defendants as "the respondents". As a result of the accident, the appellant suffered partial mental disability and was thus unable to testify in court as to how the accident happened. The DJ dismissed the appellant's claim on the ground that there was no evidence adduced which showed negligence on the part of the first respondent.

3 The appellant's case was essentially that the first respondent had not exercised due care in driving the lorry and had thereby failed to avoid the collision. At the trial, counsel for the appellant called only one witness, CKL. However, as CKL did not witness the accident, his affidavit of evidence-in-chief merely exhibited various pieces of documentary evidence including, *inter alia*:

(a) police photographs of the accident scene;

(b) a police sketch plan of the accident scene; and

(c) a police report made by the first respondent.

During the cross-examination, CKL had to admit that he had no personal knowledge of the accident or of the documents exhibited. Counsel for the respondents elected not to call any evidence and submitted that there was no case to answer.

4 The DJ found that there was no evidence to support the alleged claim that the first respondent was negligent for the accident for three reasons. First, since CKL was not a witness to the accident, he could not furnish any direct evidence as to how the accident happened. Second, the truth of the contents of the documents exhibited in CKL's affidavit of evidence-in-chief could not be proved because the appellant had not called any of the makers of the various documents. Finally, the DJ held that the doctrine of *res ipsa loquitur* did not apply because it was not self-evident that the accident must have occurred as a result of the first respondent's negligence.

5 There were two issues in this appeal. First, whether the DJ was wrong in not admitting any of the documents into evidence; and second, whether, if any of the documentary evidence were admitted, it would show that the first respondent was in breach of his duty of care to the appellant.

The evidence issue

6 As indicated above, the primary difficulty in the appellant's case, as found by the DJ, was the lack of evidence to establish how the accident happened and in what way the first respondent was negligent. At the hearing of the appeal, counsel for the appellant informed me that, on the first day of the trial, both parties had agreed to the authenticity of the first respondent's police report, the police photographs and the police sketch plan, although the truth of the contents of these documents was not necessarily admitted by the respondents. This agreement was confirmed by counsel for the respondents. Notwithstanding this agreement, the DJ rejected these documents as evidence because the makers of the documents, namely the police officers investigating the accident and the first respondent himself, were not called as witnesses.

7 Counsel for the appellant also explained that they had tried to subpoena the investigating officer from the Traffic Police Department, but were advised that there was no necessity to subpoena the investigating officer as public documents relating to the traffic accident, including the police photographs, reports of traffic accidents and police sketch plans could be admitted via s 79 of the Evidence Act (Cap 97, 1997 Rev Ed) ("EA").

8 The effect of this agreement was that the parties had agreed to admit those documents into evidence without formal proof although both parties reserved the right to challenge the truth of the contents therein. Accordingly, the documents would form part of the evidence before the court (see *Press Automation Technology Pte Ltd v Trans-Link Exhibition Forwarding Pte Ltd* [2003] 1 SLR 712 at [22], *Goh Ya Tian v Tan Song Gou* [1980-1981] SLR 578 at 581, [12] and *Tan Song Gou v Goh Ya Tian* [1982-1983] SLR 107 at 109, [11]). The relevancy of the facts contained in the documents must also be established, that is to say, hearsay must be rejected (*Abdul Khoder bin Shafie v Low Yam Chai* [1989] 2 MLJ 483). There can be no question whatsoever that the documents were relevant to the action. The police report made by the first respondent contained his account of the accident and nothing therein was hearsay as the first respondent would have stated in the report what he

personally witnessed. The position with regard to the police photographs and the sketch plan would be the same. Moreover, under s 37 of the EA, the documents produced by the police officers that relate to the sequence of events leading up to and after the collision were relevant. In the absence of any challenge to the truth of the contents of the documents by the respondents, the documents would constitute evidence of how the accident had occurred (*Ng Bee Lian v Fernandez* [1994] 2 SLR 633). Accordingly, I held that the DJ was wrong to have come to the conclusion that he could not take those documents into account in determining whether a *prima facie* case of negligence had been made out.

9 I had noted that counsel for the respondents had pointed out that there was a discrepancy between the police sketch plan and the police photographs with regard to the exact spot on the road where the blood stain marks were found. I recognised that there was indeed such a discrepancy. This would not, however, affect the admissibility into evidence of the police photographs and the sketch plan but only the weight to be given to them. Admittedly, if this point were raised at the trial, some explanation from the police officers, especially from those who prepared the sketch plan, would be called for. I had no doubt that, if it were raised, there would have been a simple explanation such as that there was a mistake on this in the sketch plan. Generally, photographs of the scene of accident would likely be an accurate reflection of the position at the relevant point of time unless there was tampering with the photographs.

10 Be that as it may, even without the benefit of the police sketch plan and the police photographs, the facts of the accident were set out in the first respondent's police report. This being a civil case, the first respondent's statement to the police would also be admissible as constituting an admission under s 18 of the EA as it was a statement made by him giving his account of how the accident occurred (see *Tan Song Gou v Goh Ya Tian* at 109, [11]). Counsel for the respondents argued that the first respondent's police report should not be admitted into evidence because it violated the hearsay rule: The appellant did not call either the police officer who recorded the statement or the first respondent himself to give evidence. However, as indicated earlier at [7] above, the police report of the first respondent was admissible by virtue of the agreement to admit it as regards its authenticity, although its contents could still be challenged. By the respondents electing not call evidence in their defence at the trial, the police report of the first respondent stood uncontroverted. For example, the first respondent could have explained that there was a mistake in the police report. But that was not done. I should further add that, to the extent that the police report constituted an admission as to liability, admissions are an exception to the hearsay rule. Section 21 of the EA provides that admissions are "relevant and may be proved as against the person who makes them or his representative in interest".

11 In this regard, I would refer to the case of *McBride v Stitt* [1944] NI 7, which was germane to the present case. In that case, which was factually very similar to the present case, the plaintiff's daughter was killed by a lorry driven by one defendant and owned by the other defendant. There were no other eye-witnesses to the accident. The only evidence consisted of statements the defendants had made to a police constable. According to those statements, two boys had dashed across the road in front of the lorry driver, who, in his attempt to swerve the lorry to avoid the two boys, knocked down and killed the plaintiff's daughter. On the basis of the facts contained in those statements, the court, on appeal, found that a *prima facie* case of negligence had been made out.

12 As the respondents had elected not to adduce other evidence to show how the accident had occurred or to explain the facts as contained in the first respondent's police report, the only evidence that was before the court as to how the accident had occurred were the facts as recorded in the first respondent's police report to which I now turn.

Whether the first respondent had breached his duty of care

13 The first respondent stated in his police report that:

> On 06/01/2004 at about 10.15 am, I was travelling along the centre lane (3 lanes) of Bedok South Ave 1 ([towards East Coast Parkway] direction) just after the junction of Upp East Coast Rd. There was a [motor car] in front of me at that [point] of time. Suddenly, a male cyclist which [*sic*] was all along cycling on the extreme left lane (near to kerb) start to cycle diagonally across the road to the extreme right lane. This had caused the [motor car] in front of me to swerve to the left lane, and I have to swerve my vehicle [to] the extreme right lane to avoid collision with the said cyclist. Along the way, while avoiding the cyclist, I kept honking at the cyclist to alert him. As I had swerve[d] to the extreme right lane, the cyclist came along and collided onto the left side of my vehicle and fell onto the road, sustain[ing] head injuries, abrasion on the right elbow as a result of the accident. There were some scratches on my front left passenger's door. That's all.

14 On the facts of this case as disclosed in the police report, it appeared to me that primary responsibility for the accident rested with the appellant for cycling diagonally across the road without regard to the safety of other road users and his own safety. He was obviously negligent. The remaining question was whether the first respondent was liable for contributory negligence. Counsel for the respondents argued that the first respondent should not be faulted for choosing to move from the centre lane to the right lane after the motor car in front of him had swerved to the left. I did not find that there was any fault in the first respondent making that move. It was what he failed to do after swerving to the right lane that was to attach liability onto him. He said that he horned which I accepted. But in circumstances such as these, the motorist's duties do not end there. He must also ensure that the cyclist is aware of his approach on the right lane. Having noticed that the appellant did not respond to his warning, the first respondent should have taken all necessary precautionary measures to avoid a collision, such as by slowing down and keeping a safe distance from the appellant or even stopping and letting the appellant pass. By continuing to drive forward without regard as to whether or not the appellant was aware of his approach, the first respondent was guilty of negligence.

15 It was my view that the first respondent should have done more than just press the horn of the lorry to warn the appellant. The fact of the matter was that, as the respondent's police report indicated, the appellant did not react to the horning. At the minimum, the first respondent should have kept a safe distance from the appellant. The appellant was an elderly man; as he was not able to testify we would never know why he did not pay heed to the first respondent's horning. I accepted that the first respondent would not have known if the appellant suffered any disabilities. But that did not excuse him from taking due care to all users of the road. This was not a case where the appellant suddenly dashed across the road in front of the first respondent leaving him with no time to respond or react. The first respondent saw the appellant riding diagonally across the road and had ample time to react. He should have taken all reasonable measures to avoid a collision with the appellant. It was in this respect that he had fallen short of the duty of care expected of him as the driver of a vehicle.

16 Having said that, the bulk of responsibility for the accident must still lie on the appellant. He was certainly more blameworthy than the first respondent. He was cycling diagonally across the road in a manner without regard to other road users and he did not respond to the horn sounded by the first respondent. There was no evidence before me on whether the appellant was hard of hearing.

Conclusion

17 In the premises, I held that the first respondent had contributed to the accident. Having considered all the circumstances of the case, I found that the appropriate apportionment of liability between the appellant and the first respondent would be two-thirds and one-third respectively. To that extent the appeal was allowed. Costs were to follow the event here and below.