Cai Xiao Qing *v* Leow Fa Dong (by his next friend Leow Chye Huat) [2012] SGHC 67

Case Number : District Court Appeal No 24 of 2011

Decision Date : 29 March 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Patrick Yeo and Lim Hui Ying (KhattarWong) for the appellant; Adrian Heng and Subramaniam Sundaran (Bogaars & Din) for the respondent.

Parties : Cai Xiao Qing — Leow Fa Dong (by his next friend Leow Chye Huat)

Tort – Negligence – Contributory Negligence

29 March 2012 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This was an appeal against the decision of the District Court (see *Leow Fa Dong v Cai Xiao Qing* [2011] SGDC 285) by Cai Xiao Qing ("the appellant") where the District Judge ("DJ") found the appellant who was the driver of a car, liable for an accident involving Leow Fa Dong ("the respondent") who was a cyclist.

The facts

2 On 8 April 2009, at approximately 11 pm, the appellant was driving her vehicle on the slip road leading off from Tampines Avenue 9 to Tampines Avenue 7 when her car hit the respondent at a zebra crossing. The respondent, who was 16 years old at the time, collided into the right-hand wing mirror of the appellant's vehicle and suffered a fracture to his left collarbone.

3 Based on a map and pictures of the accident scene, it was noted that Tampines Avenue 9 and Tampines Avenue 7 run perpendicular to one another and intersect at a cross junction. The appellant was then driving along Tampines Avenue 9 in the direction of Tampines Avenue 2. She had been driving along the left-most lane so as to take the exit by the slip road to Tampines Avenue 7 and merge with traffic headed in the same direction. On the other hand, the respondent had been travelling along Tampines Avenue 7 on the side closer to Block 452. He had crossed Tampines Avenue 9 at the cross junction where it met Tampines Avenue 7, and mounted what parties termed "the island" to get to the side of Tampines Avenue 7 nearer Tampines Junior College. To do so he crossed the slip road at the zebra crossing and so collided with the appellant's vehicle.

4 The respondent's case before the District Court was that the collision was caused by the negligence of the appellant in her driving, control and management of her vehicle. In particular she had driven at an excessive speed, failed to come to a halt before the zebra crossing to give way to users and failed to keep a proper lookout. To establish his claim, the respondent called a witness one Mohd Nuruddin ("Nuruddin") who had allegedly witnessed the accident. The appellant also had a witness in Ms Song Hao ("Ms Song") who was one of two passengers in the appellant's vehicle at the material time. The appellant had a counterclaim against the respondent, alleging that the latter was

negligent in, *inter alia*, failing to keep a proper lookout for vehicles that could be reasonably be expected on the road, failing to yield to the appellant's car that had already crossed the first white line of the zebra crossing at the material time, and for abruptly dashing across the zebra crossing.

5 Nuruddin had in his affidavit of evidence-in-chief ("AEIC") deposed that the respondent had been (i) walking next to his bicycle at the material time and (ii) that the appellant's vehicle had knocked into the respondent whilst he was on the zebra crossing. However, Nuruddin subsequently changed his evidence. On 14 July 2010 before the DJ in the Subordinate Court's Primary Dispute Resolution Centre Nuruddin stated that: (i) the respondent had been *cycling* at the material time, and (ii) the respondent had not stopped prior to crossing the zebra crossing and this caused him to cycle into the appellant's vehicle that was already on the crossing. This change was recorded on 17 February 2011 as an amendment to Nuruddin's AEIC just before his cross-examination. Nuruddin's oral testimony was as follows:

> Q: Are there any changes or amendments you like [sic] to make to your affidavit or the statement at [Exhibit] MN1?
>
> A: I can't read.
>
> Q: You have no idea what you have signed here (referring to the statement)?
>
> A: At that time, my brother in law read for me.
>
> Yeo:Could the statement be read over in Malay to him?

6 It is also worth mentioning at this stage that counsel for the respondent, in anticipation of Nuruddin changing his testimony, orally applied at the start of the trial to amend para 3 of the Statement of Claim in the following manner:

> 3. On 8 April 2011, the Plaintiff was walking next to his bicycle or riding his bicycle across a zebra crossing near the junction of Tampines Avenue 7 and Tampines Avenue 9. [emphasis original]

The DJ noted that the application was premature because it was not clear (at that point) whether Nuruddin would amend his evidence. Nevertheless, he granted the Plaintiff leave to amend *prospectively*.

7 In the course of trial, Nuruddin gave further oral evidence to the effect that the appellant's vehicle had "sped by" and that the appellant had "further said she was in a hurry". In contrast, the appellant and Song averred that the appellant's car was "going slowly" and that the respondent had been travelling "at a very fast speed".

The decision below

8 After considering all the evidence presented before him, the DJ assessed Nuruddin to be an "independent witness of truth" who had witnessed the collision in its entirety. This was notwithstanding the changes he had made to his AEIC. The DJ then inferred from the language used by Nuruddin in his oral testimony (see [7] above) that the appellant had been speeding. It was on this premise that the DJ found the appellant negligent. At para 25 of his judgment, he said:

> It was not disputed that the accident before me took place on a clear night when the view of the

zebra crossing and its environs were clear. The plaintiff was riding slowly, according to [Nuruddin], at walking pace, which I accept. The collision occurred because the defendant, who was travelling at some speed, had completely failed to see the plaintiff approach the zebra crossing. Had the defendant spotted the plaintiff, which I find she should have done but failed to do, she would and should have slowed down and come to a stop.

9 The DJ then proceeded to find in favour of the respondent, although he held the respondent 10% contributorily negligent. He did so because "there is a corresponding duty on the part of pedestrians as road users" to take "reasonable care for [their] own safety". In his view, the respondent was blameworthy for not checking for oncoming traffic before crossing the road.

10 In the light of his decision, the DJ also dismissed the appellant's counterclaim in its entirety.

Summary of the parties' submissions

11 Counsel for the appellant, Patrick Yeo ("Mr Yeo") argued that the DJ should not have relied on Nuruddin's evidence to make his findings of fact. This is because Nuruddin *had not witnessed the actual collision*, as his testimony in cross-examination would imply:

Q: How far were you away from the zebra crossing when you saw all these things happening?

A: There were four traffic lights. The zebra crossing was at the school, near the school. And I was at the block. And I was walking near the block. *I heard something collided [sic]. When my friend saw, he called me.* Then he told me to help. Then both of us went over to the boy and asked him what happened. [emphasis added]

The above extracts from the notes of evidence Mr Yeo contended, would explain why Nuruddin's account of the accident was inconsistent with other objective and circumstantial evidence. For instance, Mr Yeo surmised that the injuries the respondent sustained would have been far more severe if the appellant had been speeding at the material time. The respondent also testified that the appellant's vehicle was not travelling too fast, *even though it was detrimental to his case to say as such.*

12 Next, Mr Yeo demonstrated how the respondent would have to cycle quite a distance to get to the zebra crossing: at the very least he would have to cycle past 8 lanes (across Tampines Avenue 9) at the traffic light and mount the traffic island. One can thereby conclude that he would have built up enough momentum to be travelling at a speed rather than at walking pace, as Nuruddin testified. Even more significant was the fact that the respondent had left his wallet at the 7-11 Store he was returning to. It was thus more likely than not that the respondent was in a rush to retrieve his wallet, despite his denial to the contrary. This was also more consistent with the testimony of Ms Song and the appellant that the respondent "came at a fast speed".

13 Finally, casting even more doubt on the reliability of Nuruddin's testimony was the fact that he stated he "arranged for [an] ambulance to take the [respondent] to the hospital". This contradicted both parties' evidence that the respondent was sent to hospital in the appellant's car.

14 In reply to this submission, counsel for the respondent, Adrian Heng ("Mr Heng") reiterated that the DJ carefully considered all aspects of Nuruddin's evidence (including the fact that he said he had *heard* a collision) before assessing him to be a reliable witness. This could be seen from [3] of the DJ's oral judgment:

> The plaintiff has invited me to hold that [Nuruddin] did not in fact see the accident as it happened and that his change of evidence was really a change of inference on his part in effect. *I do accept that [Nuruddin] also did say that he heard a collision and that he was told by a friend to go help out.* While the last point appeared to contradict his other point that he saw the plaintiff riding his bicycle, I think it behoved Mr Heng to clarify these perceived inconsistencies with [Nuruddin], particularly since it was his own witness who had changed his evidence in a way that would damage the plaintiff's case. As this was not done, I find that [Nuruddin's] testimony about the plaintiff's riding his bicycle was unchallenged by the plaintiff. [emphasis added]

15 Next, Mr Yeo mounted his second argument that the DJ in his finding that Rule 5 of the Road Traffic (Pedestrian Crossings) Rules ("rule 5") applied, by extension, to give the respondent a right of way. Rule 5 states:

> **Vehicle approaching crossing to slow down**
>
> **5**. The driver of every vehicle approaching a pedestrian crossing shall, *unless he can see that there is no pedestrian thereon*, proceed at such speed as will enable him to stop his vehicle before reaching the crossing. [emphasis added]

Mr Yeo's point was that the respondent as a cyclist was a "driver" within the meaning of s 2 of the Road Traffic Act (Cap 276, 2008 Rev Ed). As such, the respondent had no business being on the zebra crossing designated for pedestrians and it was this failure to adhere to the rules that led to the accident. The DJ, however, disagreed. In his view, the strict interpretation of rule 5 as advocated by Mr Yeo was not "in the spirit" of the wording of the rule. In his words:

> 23. It is an everyday occurrence that cyclists cross at zebra crossings and other pedestrian crossings. Indeed, they even, and also wrongly, share pedestrian walkways, but really this is another story were a pedestrian to come to harm on account of a cyclist's negligence. In the same way, the common sense, experience and decency of a reasonable motorist is to stop to give way to a cyclist crossing or about to cross a zebra crossing. With respect, to say, by extension from rule 5 of the Pedestrian Crossing Rules, that the plaintiff, *qua* cyclist, had no right of way is overly pedantic. This was the most appropriate place for the plaintiff to cross to the other side...

16 If this Court were minded to agree with the DJ that the respondent should be given right of way pursuant to rule 5, Mr Yeo then made the alternative argument that rule 5 came with an important qualification: that the driver must *see* the pedestrian. Given that the respondent was travelling at a speed, the appellant's inability to notice his approach was completely reasonable in the circumstances.

17 Finally, Mr Yeo submitted that even if this Court were to find the appellant liable in negligence, the respondent should also be found to have contributed significantly to the accident. As for what appeared to be the DJ's "policy reasons" for reducing the respondent's liability by a mere 10% for contributory negligence, Mr Yeo argued that the reasoning was flawed. For completeness the DJ's reasoning (at [18]) is set out below:

> As His Honour, VK Rajah JC noted in *Cheong Ghim Fah*, as cited at [95] in *Khoo Bee Keong* (above), the burden of trying to weigh an accident victim's contribution and give it a numerical percentage cannot be weighed on fine, mathematical scales. In my humble view, given the presence of insurance - that cushion designed for motorists to communally bear the load of damages when things go wrong on the roads - one should be slow to pare away a victim's

> recovery of his indubitable damages on account of his perceived contribution, which really is his failure to take care of himself, as it were. Other things being equal, that is to say (even) where both a motorist and a cyclist such as the plaintiff before me, have both supposedly acted in contravention of a traffic law, and where issues of negligence and contribution are in question owing to such breaches of traffic laws or more, the motorist should be made to bear the greater blame.

Accordingly, Mr Yeo submitted, contributory negligence on the part of the respondent should be in the region of 30-50%.

The decision

18 As the parties had rightly identified, much of this appeal turned on the treatment of Nuruddin's evidence by the DJ. Mr Yeo alleged that Nuruddin did not witness the accident. However, this position was not "put" to Nuruiddin in cross-examination as required under the rule of *Browne v Dunn* [1893] 6 R 67. Rather, it was Mr Heng who invited the DJ to find that Nuruddin did not in fact see the accident (see [14] above). In the absence of giving Nuruddin an opportunity to provide an explanation for his story, the consensus was that the court is free to regard his evidence as undisputed, regardless of the nature of the cross-examiner's case: Pinsler, *Evidence and the litigation process*, 3rd Student Edition (Lexis Nexis, 2010) at [20.98].

19 Fortunately, this failure to cross-examine Nuruddin was not fatal. As observed by Pinsler at [20.100]:

> ...although the general proposition is that testimony not subjected to contradiction in cross-examination may be treated as unchallenged and thus accepted by the opposing party, *the court is nevertheless entitled to reject such testimony. A careful evaluation of the totality of the evidence must still be undertaken to determine the cogency and weight of such testimony.* [emphasis added]

This position was applied in the case *Liza bte Ismail v Public Prosecutor* [1997] 1 SLR(R) 555 where the court found that the accused person's story in relation to one of the charges was "obviously fanciful" and "wholly unsupported by the documentary evidence". In my view, this position also neatly aligns itself with the appellate court's test for overturning a judge's finding of fact in both civil and criminal cases. Per *Seah Ting Soon t/a Sing Meng Co Wooden Cases Factory v Indonesian Tractors Co Pte Ltd* [2001] 1 SLR(R) 53 at [22], the judge's evaluation must be "plainly wrong" *i.e.* his finding must go against the weight of the evidence.

20 Returning now to the case before me, the crux of the matter was whether Nuruddin's testimony went against the weight of the evidence (both circumstantial and objective). I was inclined to answer this question in the positive. The points raised by Mr Yeo as set out in [11]-[13] above although not conclusive when considered separately, did cumulatively shed great doubt on whether Nuruddin actually witnessed the collision. As for Mr Heng's submission that the DJ had taken this factor into account in his analysis of the evidence, the context in which he considered it was quite different. The DJ was more concerned with whether the respondent bore the burden of proof of clarifying inconsistencies in Nuruddin's evidence by way of re-examination. Accordingly, I would disregard Nuruddin's evidence in its entirety. It is trite law that an appellate court, not being in a position to see witnesses to observe their veracity and credibility should be slow in overturning a lower court's assessment of witnesses in the absence of good reason. However, I was of the view there was good reason in this case.

21 I should state that I did not find Nuruddin's act of amending his AEIC to be material. The exercise I was more concerned with was whether his final testimony was corroborative with the rest of the evidence. Furthermore, as the DJ noted, Nuruddin had supplied a plausible reason for the change, namely, that his brother-in-law had read the statement on his behalf and he had signed it without any further questions.

22 Unfortunately, the rejection of the only independent witness' testimony left this Court in the invidious position of having to choose one party's word over that of another. Nevertheless, some reasonable inferences may still be drawn from the evidence before this Court. The inferences, albeit grounded in circumstantial evidence, are arguably more reliable than the allegations of Ms Song and the parties since they were motivated to help either their own or their friend's respective cases.

23 It was clear to me that the respondent was cycling at the material time, and not walking beside his bicycle as he claimed. My reasons for this finding are threefold:

(a) In a medical report of Dr Faizal bin Kassim attached to the statement of claim, it stated that "Mr Leow was allegedly involved in a road traffic accident earlier the same day where he was a cyclist that was *cycling* past a zebra crossing..." (emphasis added); and

(b) In a stern warning issued by the traffic police to the respondent, it was recorded that "the cyclist has been given a warning letter for *riding* other than in an orderly manner and without due regard to the safety of others" (emphasis added).

(c) The respondent applied to amend his pleadings in the midst of trial (see [6] above). This seemed to be a concession on his part.

24 On (a), I noted that during cross-examination, the respondent averred that he had never told Dr Faizal how he got injured. When asked how Dr Faizal formed the impression that he had been cycling, he attributed the brief to his mother, who he claimed was mistaken. I find this explanation suspect. If the respondent did not agree with Dr Faizal's medical report, it was his prerogative to write to the doctor to correct the report to support his statement of claim. Instead, he submitted a report that contradicted his case.

25 On (b), in the police reports by the appellant and respondent the latter was classified as a "cyclist". When cross-examined on this point, the respondent was evasive:

Q: First page of this report—type of informant—you told the policeman that you were a cyclist when you were injured in the accident?

A: I don't remember.

Q: Agree your report states that you are a cyclist?

A: Yeah.

[...]

Q: Can you explain to the court how the policeman would know these details.

A: Maybe I told him. But I really can't remember.

Q: Suggest that you did tell him on that day.

A: Yeah, perhaps I did tell him.

[...]

Q: Agree that when you made this report, you did not tell the policeman that you were walking across pushing your bicycle.

A: I did tell the policeman that I was pushing my bicycle.

Even taking the respondent's position at its highest, *i.e.* that the policeman had recorded his statement wrongly, by the time the stern warning was issued by the traffic police stating that the respondent was cycling at the material time, he should have written to the traffic police to clarify his position. The fact that he did not constitutes, in a way, an admission to liability.

26 I move on next to examine the conduct of the parties. I note that in cross-examination the respondent insisted that he had stopped to check for traffic. The transcript states:

Q: You saying you stopped to check for traffic?

A: Yeah.

Q: You checked and didn't see the bit [sic] white car approaching?

A: I did see the big white car but it was a distance.

Q: How far was this car from the pedestrian crossing?

A: Can I point out or something like that? [Looking at the photos]

Ct: What photo are you looking at?

A: Picture M, PBD, The car was between the second arrow and the yellow box. Behind the second arrow.

[...]

Q: Estimate this to be between 50 to 100 m away?

A: I am not too sure.

Q: You said that you were standing and you saw this car in this position, and next moment you started to cross the zebra crossing.

A: Yeah. Next moment. I looked around. I thought the car would stop and let me cross the crossing.

This account however, did not explain why the site of impact was the right-hand side of the appellant's vehicle, rather than the front. If the appellant truly had been at a distance, she would have had to accelerate very quickly as she exited the slip road to hit the respondent. This would be counter-intuitive to most drivers, since one would have to stop at the end of the slip road to check

for merging traffic.

27 Conversely, the more plausible explanation was that the appellant was much closer to the zebra crossing than the respondent claimed, and the respondent, noticing her as he cycled to the edge of the crossing due to her headlights, miscalculated that there would be enough time for him to clear the short distance. As such, instead of waiting for the car to come to a halt, he had proceeded with cycling and collided with her vehicle. Admittedly this situation is, to some extent based on a hypothesis. However, this was in part due to the paucity of objective evidence before me. I note in particular that no evidence was led to confirm that the damage appraisal of the appellant's car dealt only with damage *as a result of the accident*, and not a result of other day to day causes. As such, I would accept the evidence at its face value.

28 In summary, I prefer the evidence of Ms Song and the appellant to that of the respondent's. In my view, their account was consistent with the objective evidence before me. I would thus overturn the DJ's findings of fact and hold that:

(a) The respondent was cycling at a speed at the material time;

(b) The appellant was not driving at an excessive speed at the material time; and

(c) The respondent noticed the appellant's presence, due to her headlights, but proceeded nevertheless to cross before her vehicle came to a halt;

(d) The appellant was not aware of the respondent's presence until the collision occurred. This was partly because he was travelling quite fast (see [12] above); and

As for the DJ's decision in respect of rule 5, I would agree with Mr Yeo's submission at [16] above.

Conclusion

29 Consequently, I allow the appeal with costs. The appellant's share of blame for the accident is reduced by 20% to 70%, while the respondent's contributory negligence is increased by 20% to 30% to reflect the fact that he collided into her vehicle, notwithstanding the fact that appellant should have but failed to notice the respondent's approach and stop in time. I further award judgment to the appellant on her counterclaim with costs, based on 30% of $1,521.13. The assessment of damages for the respondent's claim will therefore proceed on the basis of the appellant's 70% liability. The appellant's solicitors are discharged from the undertaking dated 19 July 2011 that they provided as security for costs of the appeal.

Copyright © Government of Singapore.