

IN THE COURT OF APPEAL, FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0064 OF 2006S  
(High Court Civil Action No. 54 of 2004L)

BETWEEN:            RATNESH CHAND

*Appellant*

AND:                GYANENDRA KUMAR

*First Respondent*

AND:                WAIQELE BUSES LIMITED

*Second Respondent*

Coram:            Randall Powell, JA  
                         Chandra Datt, JA  
                         Andrew Bruce, JA

Hearing:           Tuesday, 8<sup>th</sup> July 2008, Suva

Counsel:           A. Sen for the Appellant  
                         K . Narayan for the Respondents

Date of Judgment: Friday 11<sup>th</sup> July 2008, Suva

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JUDGMENT OF THE COURT

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1. On 14 November 2001 shortly before 6 a.m. Ratnesh Chand (“the appellant”) was driving a bakery van (“the Van”) towards Labasa. Ramesh Chand was in the passenger seat. Coming in the opposite direction was a large bus (“the Bus”) being driven by the first respondent, Gyanendra Kumar, and owned by the second respondent, Waiqele Buses. The road was wide enough for the vehicles to pass comfortably but they collided.

2. The issue before the High Court was who was on the wrong side of the road. On 23 February 2006, following a hearing on 21 and 22 February 2006, Coventry J determined that the Bus was on the correct side of the road at the time of the collision and that the Van was substantially on the wrong side of the road. He dismissed the appellant's action against the respondents with costs.
3. The appellant appeals on the grounds that the finding by the trial judge that the appellant was on the wrong side of the road was wrong, unfair, unreasonable and could not be supported by the evidence.
4. The policewoman who attended the scene of the accident drew a plan of the scene which came to be known as the Rough Sketch Plan. Later, at the police station, she drew another plan which became known as the Fair Sketch Plan.
5. The appellant was charged with careless or negligent driving and this charge was heard by a Magistrate. At this hearing the policewoman gave evidence in chief, relying on the Rough Sketch Plan, that the Van was on the incorrect side of the road. However, in cross-examination on the Fair Sketch Plan, the policewoman: answered "Yes" to the following question: *"Looking at the (Fair Sketch) Plan the Bus would be travelling on (the) wrong side of the road."*
6. The Court has been shown copies of the policewoman's Rough Sketch Plan and the Fair Sketch Plan. The Rough Sketch Plan clearly shows that the point of collision is on the Bus's side of the road. The Fair Sketch Plan does the same.
7. It is trite law that an appellant cannot appeal against findings of fact unless the evidence is preponderant that the trial judge's finding of fact is unreasonable, so that no reasonable person acting judicially could make such a finding.

8. The trial judge, in coming to his finding that the Bus was on the correct side of the road, relied on the following matters:
  1. The evidence of the second respondent that he saw the Van on his side of the road, that he saw the driver of the Van with one hand on the steering wheel and the other shading his eyes against the sun, and that he saw that the passenger in the Van was asleep.
  2. That the position and length of the skid mark was consistent with the Bus braking on its correct side. The trial judge found that *"unless the bus was on its wrong side, had the collision, swerved back to its own side and then braked in a straight line, then this evidence is not consistent with the plaintiff's version of events."*
  3. That he preferred the evidence of the first respondent to the evidence of the appellant, who gave consistent evidence under vigorous cross-examination, and whose description of the appellant with his hands up to shade his eyes and with a sleeping passenger, was convincing;
  4. That in contrast he was able to place no reliance on the evidence of the appellant who damaged his own credibility by the symptoms of pain he claimed to have had over the following years, which was contradicted by the medical evidence.
  5. The evidence of the policewoman who attended the scene. The trial judge found that her evidence was given honestly and he accepted much of, but not all of, her evidence.

9. The appellant's main appeal point is that the Fair Sketch Plan is internally inconsistent in that it shows the point of collision on the Bus's side of the road but also shows the front of the Bus at rest on the Van's side of the road. The appellant contends that this was not physically possible.
10. Assuming that the Fair Sketch Plan is internally inconsistent, it does not follow that that inconsistency ought to have been resolved in the appellant's favour.
11. In any event the trial judge, as it can be seen, made his finding based in significant part on the credibility of the competing witnesses. As was held in **Benmax v Austin Motor Co Ltd** (1955) AC 370, where a trial judge has seen and heard the witnesses, *"it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness"*.  
(per Lord Reid at 328)
12. This is not that rare case. There was more than sufficient evidence before the trial judge to support the principal finding of fact that he made.
13. The appeal must be dismissed with costs.
14. The orders of the Court are:
  1. Appeal dismissed;
  2. The appellant to pay the respondent's costs as taxed or agreed

*Caral Powell*

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Powell, JA

*[Signature]*

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Datt, JA



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Bruce, JA

Solicitors:

Maqbool and Company, Labasa for the Appellant  
A K Lawyers, Ba for the Respondents