IN THE COURT OF APPEAL OF BELIZE, A.D. 2006

CIVIL APPEAL NO. 2 OF 2006

BETWEEN:

ARTHUR HOY JR.
ARTHUR HOY SR. **Appellants**

AND

AURORA AWE
CIRA ANNA FLOR MORO
(Widow and Intended Administratrix of Estate of Floyd Moro Sr.)
JANINE MANIRA MORO
FLOYD ANGEL MORO JR.
(By their next friend Orlando Habet)
ORLANDO HABET **Respondents**

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BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Dean Barrow S.C. for appellants.
Mr. Fred Lumor S.C. with Mr. Michel Chebat for respondents.

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12 July AND 27 October 2006.

CAREY, JA

1. This is an appeal on the facts from a judgment of the Chief Justice in an action and counter action involving a motor vehicle collision which occurred on 20 August 2001. The mishap involved fatal

injuries to Floyd Moro Sr. and injuries to Aurora Awe and Cira Moro, respectively the mother and widow of the deceased who brought the action against Arthur Hoy, Jr. and his father Arthur Hoy, Sr., the driver and owner respectively of a Mazda mini-van. The minor children of Floyd Moro as appear in the title, joined in the action. Arthur Hoy, Sr. and Arthur Hoy, Jr. counter claimed for damage to the Mazda mini-van. The Chief Justice heard the matter between 23 March and 8 October 2004 but regrettably judgment was not delivered until 16 February 2006 (a fact which provoked a ground of appeal) when he found that the Hoys were more to blame for the accident, and apportioned liability at 75% to 25%.

2. Mr. Barrow, S.C. on behalf of the appellants, (the defendants in the actions) deployed with commendable subtlety and adroitness, submissions which essentially challenged the Chief Justice's analysis and evaluation of the evidence. Unfortunately, we did not agree with them and in the event, we dismissed the appeal with costs and promised to hand down our reasons therefor at a later date. My contribution to that decision is hereunder:

3. The grounds filed on behalf of the appellants were in the following form:

    (1) The learned trial judge failed to take proper advantage of having seen and heard the witnesses for the defendants/appellants in particular he failed to take into consideration the testimony of eye-witnesses.
    (2) The decision of the learned trial judge was unreasonable and against the weight of evidence, because of the learned judge's rejecting the

appellant's eye witness testimonies for reasons that are unsustainable in fact or law; and because of his having drawn inferences as to what was, and was not, possible for those eye witnesses to see, on bases that are not judicially supportable.

(3) The learned trial judge erred in law by drawing inferences adverse to the appellants from the fact that a passenger in the appellants' vehicle was not called as a witness for the appellants.

(4) The learned trial judge misdirected himself as to the evidence given by the first appellant. The learned trial judge said the first appellant admitted that he did not swerve (to try to avoid the collision), when the first appellant clearly said he had "tried to pull off the road…" to his right

(5) There was excessive delay (16 months) between the conclusion of the trial and the delivery of judgment, and that contributed to the learned trial judge's uncertainty and incompleteness in evaluating testimony, making his conclusions unsafe.

4. The approach of an appellate court to an appeal on the facts is not in doubt, and has been articulated in a number of cases, including *Watt (or Thomas) v. Thomas [1947] A.C. 484: Benmax v. Austin Motor Co. Ltd. [1955] 1 ALLER 326: Industrial Chemical Co. (Jamaica) Ltd. V. Ellis (1982) 35 WIR 363*. The principles to be derived from these cases counsel caution on the part of an appellate court in respect of findings of fact. Where the finding is based on the credibility of a witness, that is, on perception, then an appeal court ought not to interfere. Where, however, the finding is based on inferences drawn from proven facts or on the evaluation

of evidence then this court is at liberty to form its own view and act on it. Thus guided, I now examine the findings of fact to see which side of the line they fall viz., findings based on credibility or findings based on evaluation by the judge below.

5. Shortly put, the case for the plaintiffs (the respondents before us) was that their vehicle, a Toyota Camry was travelling from Belmopan towards Belize City. It was being driven by Floyd Moro on the correct side of the road, that is, the right hand side of the road. It was raining at the time. A van approaching at speed from the opposite direction, and heading towards their right side, collided with the car. This evidence was given by Aurora Awe, who was seriously injured, while her son, the driver Floyd Moro, died as a result of the collision. The defence version was provided by Arthur Hoy, Jr. who was the driver of the van and other persons whom the Chief Justice found were not eyewitnesses but arrived on the scene after the collision. He included a witness Simeon Castillo who, he said, spoke as if he saw the collision. Arthur Hoy, Jr. said that he was travelling at between 35 to 40 miles per hour on the right hand side of the road towards Belmopan. As he described a left hand curve, he saw a car approaching. As the car neared him, it veered towards his vehicle and crashed into it while his vehicle was in the far right lane. He admitted that he was the holder of a driver's licence for two years, that he was not familiar with that stretch of road, and that he did not brake, stop or slow down. He said also that the had leant left into the curve.

6. It is in my view tolerably clear, that both versions cannot be true. The Chief Justice, in the result, found that both drivers had a shared blame in causing the accident, but he held that the appellants had the greater share. He accepted the clear and

unambiguous testimony of the plaintiff Aurora Awe as to how the Mazda van driven by the first appellant came in collision with the Camry car. Her evidence he found was supported by witnesses called on her behalf, viz., John Pinelo Jr. and Ralph Robertson and they all put the accident on the respondent's side of the road. The evidence of Sgt. Raymond Berry who investigated the accident was in line with the case for the respondents. He saw debris on the road from which he concluded that the point of impact was on the left hand side of the road towards Belmopan.

7. At this juncture, it is plain that the versions of the accident differed starkly and it is also plain that the judge preferred the respondent's version, in the first place because he believed the witnesses for the respondent: they were credible. In order to make that determination, he had, of necessity to pay heed to the testimony the particular witness gave. The most trenchant criticisms counsel advanced against the judgment delivered in the court below related to the judge's reasons for rejecting the defence witnesses. Those reasons he urged, were utterly unsatisfactory. The modus operandi of Mr. Barrow, S.C. as it appears to me, was to interpret the judgment as if he were construing terms in a contract or an Act of Parliament.

The Chief Justice having heard all the witnesses called to testify would have noted that each side claimed that the other vehicle had crossed to their side of the roadway. In addition to the say so, or assertions of the eyewitnesses, there was physical evidence of the finding of debris which suggested the point of impact. That evidence supported the respondents' case that the accident occurred on their side of the road. He rejected the appellants' witnesses for the reason that he did not believe their version. He

found that they were not, properly speaking, eyewitnesses: they had arrived after the collision, he found. He included the witness Simeon Castillo among them, although that witness testified to seeing the accident. The Chief Justice after reviewing Mr. Castillo's evidence, said – " I find it not easy to accept his testimony in its entirety as an eye witness. The evidence which led him to this view was that the witness stated that "the car (the respondent's) overtook him as he was traveling in the same direction from Cayo. He was going at 65 m.p.h. and saw the car go over to the side of the road the van was. After the collision, the car spun around twice and went off the road into the bushes". The Chief Justice then observed that Mr. Castillo said he saw all this while he was driving at 65 m.p.h. and was only 10 feet away. The reason for rejecting this evidence was not stated, but it is implicit. The story given was implausible and therefore not worthy of belief. If the accident had occurred in the manner described by the witness his vehicle could hardly have escaped unscathed. So far as Jeffrey Garcia and Anthony Pollard who also gave evidence for the appellants, the accident happened behind them. Mr. Garcia witnessed the accident by looking through a small rear window in the back of his vehicle while his colleague, Mr. Pollard said he viewed the collision through the rear-view mirror. That neither of these witnesses was in a favourable position to witness the accident, was a conclusion open to the judge, and he was entitled to regard such evidence as they recounted, as unreliable.

8. In this regard, I must deal with the point strongly urged upon us that the reasons given by the judge were not sustainable. Mr. Barrow suggested that a reason given by the judge for the rejection of the evidence of Mr. Castillo was that he had "encountered" the accident, that is, he arrived on the scene after the accident. In

actuality, the witness had not himself used the word, but had adopted that word which was used by counsel. Counsel contended that the Chief Justice has seized upon the use of that word as proof positive that Mr. Castillo was not an eyewitness. I cannot however agree. The Chief Justice wrote:- "after careful analysis I find it not easy to accept…" The reason for the rejection appears in what followed, and which I suggested above was the implausibility of the story. It was not rejected because the witness was not on the scene. There was no basis for such a finding. Mr. Barrow, S.C. strongly urged that the four eyewitnesses called on behalf of the appellants were independent eyewitnesses in that they had no connection to either of the appellants and he seemed very put out by the fact that the Chief Justice had found that they were not in fact eye witnesses. I have so far endeavoured to show, the Chief Justice, no where in his judgment, stated that the witnesses were not at the scene of the accident and may not have seen the accident unfold. But, in my opinion, his definitive finding was that he rejected them because he did not believe their story. In the case of Jeffrey Garcia, he said that this witness did not impress him as a witness of truth. Where that is the case, this court has no warrant to interfere. It is right to note that there were conflicts between these witnesses called on behalf of the appellants and internal conflicts in the evidence of particular witnesses which the Chief Justice identified. Mr. Barrow, S.C. was dismissive of the respondents' evidence. He summed it up by a query – "what is the evidence of the plaintiff? And he supplied the answer – "one single eyewitness who was extremely laconic…" But the judge, as he was entitled, to do, having had the advantage denied this court of seeing and hearing the witness, accepted 'the clear and unambiguous evidence of the (plaintiff)". Against that was the evidence for the defence which was not accepted. Accordingly, I

am quite unable to accept that the judge failed to take proper advantage of having seen and heard the witnesses for the appellants or that the decision was unreasonable and against the weight of evidence.

9. In ground 3, the appellants challenged a finding by the judge in which he drew an unwarranted inference adverse to the appellants from the fact that a passenger in the appellants' vehicle was not called as a witness. Mr. Barrow, S.C. argued that the Chief Justice had set this out as one of the central reasons for finding that the appellants should bear a greater share of the causative negligence and in this he erred in law.

10. The bare facts which the judge had, was that there was a passenger in the appellants' vehicle at the time of the accident. That person would, no doubt, be a potential witness but he was not called. It is not known whether he was or was not available. The Chief Justice expressed himself as finding that the unavailability of that witness' testimony was a major flaw in the appellants' case. No one knows what that witness saw or what he would have said. Nor was it known if he was available. No inference is capable of being drawn from those skeletal facts. That is, I say with respect to the judge, to stand common sense on its head. At the same time it must be said that the error into which the judge fell, cannot alter the essential findings of the judge that he accepted the respondent's version of the events and, on the other hand, rejected the version of the appellants.

11. I pass then to ground 4 which complained that the judge misdirected himself as to evidence given by the first appellant which was that he had tried to pull off the road when the judge had

said – that the witness admitted that he did not swerve. Mr. Barrow, S.C. characterized this 'reason', as a flaw which would justify our interference.

12. It is important in considering this submission to see precisely what the witness said in evidence. The record shows at p. 131, that the witness' response in examination in chief in this regard –

> "And when I saw this, my immediate response was to try to go to the right more off the road to avoid the accident.

He continued:-

> "As I pulled off to the right off – more off to the shoulder, that's when the impact occurred.

and

> "I was in my lane, the right lane but I was in the far right corner in my right lane."

From the above, it is plain, the witness never used the word 'swerve' in describing his evasive action. This term was introduced by a leading question, which in my view, did not represent what the witness had actually said, in this form:-

> "Apart from seeking to swerve off to the right side of road, can you say whether you made or attempted to do any other manoeuvre?"

The response

> "No, sir"

In the course of cross examination these were the questions and answers given by the first appellant:-

"Q. You did not stop to try (for try to stop) and avoid that accident. Did you?"
A. I tried to pull off the road as –
Q. My question, Mr. Hoy –
A. No sir, I did not stop.
Q. Neither did you slow down, Mr. Hoy?
A. No, sir"

Beyond any doubt, the first appellant did not swerve at the material time, he pulled off the road to the right. There is, I would suggest, a world of difference between pulling off a road and a swerve, albeit a matter of degree. A swerve implies an abrupt movement, not so, a pulling off which does not. One of the averments pleaded in the particulars of negligence alleged against the first appellant was –

> "(d) failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle so as to avoid the accident…"

It seems to me that the effect of Mr. Hoy's evidence was that he did not stop, slow down, or swerve to avoid the accident. I am not therefore persuaded that the trial judge misdirected himself as to the evidence given by this witness.

13. The final challenge to the judgment of the Chief Justice was on the ground that there was a 16 month delay between the conclusion of the hearing and the delivery of judgment. This delay, it was said contributed to the judge's uncertainty and incompleteness in his evaluation of the testimony, thus making his conclusions unsafe. Mr. Barrow plainly accepted that delay in rendering the decision,

would not guarantee success. He said that the flaws he had identified in the earlier grounds of appeal provided material for saying that the delay had caused prejudice to the appellants.

14. But for one instance, I am not able to say that the complaints made about the judgment in this case, were well founded. It follows that I can have no reason to doubt the correctness of the conclusions arrived at by the Chief Justice, and it has not been shown that he had forgotten or overlooked any material. See *Cobbham v. Frett [2001] 1 WLR 1775*. That one instance of error, is not in my judgment so fundamental as to incline me to disagree with the judge.

CAREY JA

MORRISON, JA

15. At the conclusion of the hearing of this appeal on 12 July 2006, this court dismissed the appeal, with costs to the respondents to be taxed, if not agreed. At that time, the Court promised to put its reasons in writing at a later date. I have since had the advantage of considering in draft the judgment prepared by Carey JA and find myself so fully in agreement with his reasoning and conclusions on the issues of liability as found by the learned Chief Justice in the court below, that there is nothing that I can usefully add in that regard.

16. However, I do wish to add a few brief words of my own with regard to ground 5 of the amended grounds of appeal filed on behalf of the appellants, which was as follows:

> "There was excessive delay (16 months) between the conclusion of the trial and the delivery of the judgment, and that contributed to the Learned Trial Judge's uncertainty and incompleteness in evaluating testimony, making his conclusions unsafe".

17. This ground arises from the fact that after a trial lasting four days (22 and 23 March, 7 and 8 October 2004), the learned Chief Justice's reserved judgment was not delivered until 16 February 2006. In support of the ground, Mr. Dean Barrow S.C. submitted that:

> "The delay of 16 months between the conclusion of the trial and the delivery of the judgement is clearly a reason for the Court of Appeal to scrutinize with extra care the Chief Justice's findings on the evidence in this case. But Cobham v. Frett makes clear that the fact of the delay is not, by itself, enough for an appeal to succeed. The judgement must be shown to contain errors, probably, or possibly, attributable to the delay. This is, however, more easily done where the record, or judge's notes, is not shown to have been completely available at the time the judgement was written.
>
> The Appellants contend that the instant appeal is just such a case. The reasons for the Chief Justice's conclusions in rejecting the eyewitness testimonies for the Defendants are quite possibly attributable to the excessive delay.

> Recollections as to demeanour and body language must have dimmed. That is why the Chief Justice resorted to so-called "objective" criteria (such as the impossibility of seeing through a rear view mirror or a rear window) to support his preferences. His mis-recollection of the evidence of the First Defendant and his making so much of the absence of testimony from the passenger in the Defendants' Mazda van, worsens matters. In the result, the long delay deprived the Chief Justice of an ability to take advantage of the impression of witnesses' credibility he ought to have formed from having seen and heard them. He was driven instead to rely on artificial or misconstrued inferences from the printed record."

18. **Cobham v. Frett [2001] 1 WLR 1775** to which we were very helpfully referred by Mr. Barrow S.C., is a decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of the British Virgin Islands. In that case the learned trial judge delivered his judgment some 12 months after the completion of the trial and the Privy Council held that, although a lapse of 12 months between the conclusion of a trial and the giving of judgment would normally constitute excessive delay, the judge's notes had been of high quality and it was impossible to conclude merely from the delay that he had had difficulty remembering the demeanour of witnesses. Further, that the actual complaints made about his judgment were unfounded and there was no reason to doubt the correctness of the conclusions or for supposing that he had forgotten or overlooked any material.

19. Lord Scott, who delivered the judgment of the Board, said this (at page 1783):

"It can be easily accepted that excessive delay in delivery of a judgment may require a very careful perusal of the judge's findings of fact and of his reasons for his conclusions in order to ensure that the delay has not caused injustice to the losing party. It will be important to consider the quality of the judge's notes, not only of the evidence but also of the advocates' submissions. In the present case the judge's notes were comprehensive and of a high quality. As to demeanour, two things can be said. First, in their Lordships' collective experience, a judge rereading his notes of evidence after the elapse of a considerable period of time can expect, if the notes are of the requisite quality, his impressions of the witnesses to be revived by the rereading. Second, every experienced judge, and Georges J was certainly that, is likely to make notes as a trial progresses recording the impressions being made on him by the witnesses. Notes of the character would not, without the judge's permission or special request being made to him, form part of the record on an appeal. They might be couched in language quite unsuitable for public record…

In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant."

20. As Lord Scott went on to demonstrate by reference to three judgments from the Civil Division of the Court of Appeal of England, the vital issue in cases in which complaint is made of excessive delay in delivering a reserved judgment is not so much the length of the period of delay. Rather, it is the demonstrable impact, if any, of the period of delay on the trial judge's recollection of the evidence, his process of reasoning and therefore his conclusions, which may in a proper case entitle an appellate court "to substitute its own evaluation of the evidence and the witnesses for that which the judge had made" (see per Lord Scott, at page 1784, and compare two of the cases cited by him, in one of which an appeal was allowed after a 20 month delay where material factual errors on the part of the judge were identified, while in another the appeal was dismissed after a 22 month delay, which was severely criticized, but where only a relatively minor error on the judge's part was identified).

21. While a 16 month delay in the instant case in what was essentially a running down action of no great complexity might therefore be described as excessive, the fact of the delay is not, as Mr. Barrow S.C. in his submissions on the point quite properly accepted, by itself enough for an appeal to succeed and the judgment must be shown to contain errors "probably, or possibly, attributable to the delay" (for my own part, I prefer "probably" to "possibly" in this context). In my view, as the judgment of Carey JA amply demonstrates, no such errors are to be found in the clear and, if I may say so with respect, quite convincing judgment of the learned Chief Justice. His assessment of the credibility of the various witnesses whose evidence he heard and saw on the main point in the case was, significantly in my view, supported by, as Carey JA

points out, “physical evidence of the finding of debris which supported the point of impact”.

22. While there are often good and compelling reasons for sometimes protracted delays in the delivery of reserved judgments – and I do not doubt that there must have been such reasons in the instant case – I do not think that anyone would challenge the suggestion that prompt delivery of such judgments is an essential component in the efficient and expeditious administration of justice, which the new Civil Procedure Rules are explicitly designed to promote. To the extent that the responsible and admirably restrained submissions on this point by Mr. Barrow S.C. on behalf of the appellants in this appeal provide a salutary reminder in this regard, they can only help the judges both here and below to strive to achieve the desired objective.

MORRISON JA

MOTTLEY, P

23. I have read the judgments of Carey and Morrison JJA. I do not wish to add anything except to say I agree with their reasons.

MOTTLEY P