IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No. 11 of 1993

ANDRE ESPARON — 1ST APPELLANT
SEYCHELLES PUBLIC TRASPORT CORPORATION — 2ND APPELLANT

V.

BERARD VIDOT — 1ST RESPONDENT
JOSLEY VIDOT — 2ND RESPONDENT

Before H. Goburdhun, P., A.M.Silungwe and E.O. Ayoola, JJA.

Mr. B. Georges for the Appellants
Mr. A. Juliette for the Respondents

Judgment of Silungwe, J.A.

On July 11, 1991 at about 14.30 hours, a traffic accident involving a pick-up and a bus occurred at a sharp bend on the Anse Boileau-Takamaka road. The pick-up belonged to the first respondent but was at the time being driven by the second respondent; while the bus belonged to the second appellant and was being driven by the first appellant. Subsequently, the first and second respondents, (then first and second plaintiffs) instituted an action against the first and second appellants (then first and second defendants) jointly and severally wherein the first and second respondents sought judgment in the sums of R.200,000.00 and R.80,000.00, respectively.

When the case came to trial, both sides adduced conflicting viva voce evidence as to the manner in which the accident had occurred and the relative positions of the vehicles at the time of the collision. In resolving the conflict between the oral evidence of both sides, the trial court's mind obviously leaned heavily on photographic

evidence produced by the respondents and marked as exhibits P2, P3 and P4.

Also taken into consideration by the trial court was the first appellant's alleged admission (in exhibit P5) of liability for the accident. But this, it was testified, had been done for the purpose of claiming from an insurance company, that is, on the understanding that the first respondent would pay R.18,000.00 in respect of the damage caused to the bus and that the value of the pick up could then be obtained from the State Insurance Corporation. Although exhibit D1 was meant to be a retraction of exhibit P5, Perera, J.S. came to the conclusion that the first appellant's "own admission of liability" in document P5 remained unaffected.

There is, in this case, no specific finding on the credibility of witnesses on both sides. The respondents obtained judgment against the appellants jointly and severally in a total sum of R.239,500/- together with interest and one set of costs.

As I see it, the crucial question raised by this appeal is whether it was competent for Perera, J.S. to place so much reliance, as he did, on photographic evidence in order to resolve the conflict in the two versions of oral evidence. If the answer is in the affirmative, then the decision in the matter cannot be challenged. But if the answer is in the negative, then the question should be whether the learned trial judge could have reached the same conclusion in the absence of the photographic evidence?

In his treatment of the photographic evidence, this is what the learned trial judge said:

> "The plaintiffs have produced three-photographs of the scene of the accident

marked as exhibits P2, P3 and P4. They show the positions of the two vehicles after the collision. Comparing the position of the bus in three photographs, it could be said that it had stopped well within the left side of the centre white line. There is however a left inner rear wheel brake mark of about 3 feet. Whether this mark was longer cannot be stated for certain. However P2 and P4 show that the tarmac portion of the road at the bend is smaller on the side. The pick up was travelling on the other side. The pick up is seen in an almost 90 degrees position to the right side of the bus. This is indicative of an impact and a pushing backwards. The position of the pick up, as appearing in the photographs, would in all probability, have been created by the bus which is the heavier of the two vehicles moving after the impact while the pick up was moving at a slower speed or was stationary. Another observation as to the point of impact is that the body of the bus had been hit, not in front, but near the driver's seat. This shows that the bus was not in a straight position, as is seen in photographs P2 and P4, but in an angular position negotiating the bend.

It is on the basis of these observations that I propose to consider the oral evidence in the case."

Having briefly reviewed the evidence of the second plaintiff (now second respondent), the learned trial judge

said:

> "The photographs confirm the evidence of the 2nd plaintiff that as he entered the bend he saw about half the bus obstructing him, and then he applied the brakes and swerved to the left. The pick up was therefore in a straight position just before entering the bend, when the right side frontal part of the bus obstructed its course and caused the collision.
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> Andrea Michel (P.W.3) who was a passenger in the pick up testified that the bus hit the pick up and pushed it about 8 feet back. He also stated that the 2nd plaintiff applied the brakes and slowed the vehicle. This evidence is consistent with the 90 degrees position of the pick up as depicted in the photographs.
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> The defendant testified that as he came to the bend where the accident occurred he saw the pick up coming at a fast speed. He was still negotiating the bend when the pick up hit the bus sideways. The defendant then stated that half of the pick up was on the lane the bus was on and hence although the pick up driver tried to swerve to the left, the collision could not be averted. This evidence is inconsistent with the point of impact depicted in the photographs -----
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> On a consideration of the oral evidence in the case in the light of the photographs produced, I have come to the irresistible conclusion that the accident occurred due to the negligence of the first defendant."

The emphasis is mine.

From the extracts above, it is as clear as daylight that it was "on the basis" of the learned trial judge's "observations" that he considered "the oral evidence in the case." Hence, the conclusion: "On a consideration of the oral evidence in the case in the light of the photographs

produced, I have come to the irresistible conclusion that ....." The obvious suggestion here is that the photographic evidence played a dominant and decisive role in leading the learned trial judge to "come to the irresistible conclusion that the accident (had) occurred due to the negligence of the first defendant (now first appellant)." This would mean that the finding that the first appellant had admitted liability with regard to exhibits P5 and D1, was either innocuous or at best, of secondary importance only.

But, as highted at the hearing of the appeal, the photographs (exhibits P2, P3 and P4) though produced by the respondents (plaintiffs), had been taken by a tourist who had not even been called to give evidence, let alone to produce the photographs. The fact that those photographs had been admitted in evidence without objection does not per se render them impeccable in so far as their probative value is concerned. As it so happened in this case, the photographs needed to be explained by the photographer in order to aid the learned trial judge to interpret and evaluate them meaningfully.

In the absence of the photographer's evidence and as the photographs were not in themselves capable of telling a determinate story, a proper evaluation of the photographic evidence was, in my opinion, not possible. Consequently, I would hold that the learned trial judge was in error to place so much reliance on the photographic evidence as to be led to his "irresistible conclusion" in the matter.

Since I am not in a position to say whether the learned trial judge would have come to the same conclusion as he did had he not been improperly influenced by the photographic evidence, I would allow the appeal and set aside the judgment. I would, however, order that a new trial be

held before the Supreme Court, in terms of Rule 73(1) of the Court of Appeal Rules. The costs of this appeal would, as a matter of course, be given to the appellants.

Annel M. Silungwe
Judge of Appeal

Dated .....

Read over in open court.
on 24-04-94

Judge

IN THE SEYCHELLES COURT OF APPEAL

BEFORE:

H. GOBURDHUN	-	PRESIDENT
A. M. SILUNGWE	-	JUSTICE OF APPEAL
E. O. AYOOLA	-	JUSTICE OF APPEAL

BETWEEN:

ANDRE ESPARON .... (1st Appellant)

SEYCHELLES PUBLIC TRANSPORT CORPORATION .... (2nd Appellant)

AND

BERARD VIDOT .... (1st Respondent)

JOSELY VIDOT .... (2nd Respondent)

C.A No. 11/93

JUDGMENT DELIVERED BY E. O. AYOOLA
JUSTICE OF APPEAL

The accident which gave rise to the claim, subject matter of this appeal, occurred on 11th July 1991 at a sharp bend on Anse Boileau - Takamaka Road when a pick-up vehicle owned by Berard Vidot (the 1st Respondent) and driven by Josely Vidot (the 2nd Respondent) and a bus driven by Andre Esparon (the 1st Appellant) and owned by the Seychelles Public Transport Corporation (SPTC) (the 2nd Appellant) were in collision.

There was conflict of evidence as to how the accident occurred. One version as given in evidence by the 2nd respondent who was driving the pick-up at the material time is that when he reached the bend where the accident occurred

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almost half the body of the bus was on the wrong side of the road, as a result of which he applied the brakes and reduced his speed, but the bus, nevertheless, collided with the pick-up'. Another version of the accident, given by the 1st appellant, was that as he came to the bend where the accident occurred, he saw the pick-up coming at a fast speed. He was still negotiating the bend when the pick-up hit the bus "side ways" although the pick-up which was partially on the lane of the bus had swerved to the left to avoid the collision.

The two versions were placed before the Supreme Court at the hearing of the action instituted by the respondents against the appellants in which the respondents had claimed damages for loss and personal injury resulting from the accident. There was also a counter-claim by the appellants. Perera J. who tried the action gave judgment for the 1st respondent in the sum of R159,500 and for the 2nd respondent in the sum of R80,000 which was the full sum claimed by him. The counter-claim by the appellants was dismissed. This appeal is from the decision of Perera J.

In preferring the respondents' version of the accident the learned Judge considered the oral evidence in the case in the light of the photographs of the venue of accident tendered in evidence - Exhibit P2, P3 and P4. His observations from the photographs related to:

(i) the relative resultant positions of the vehicles;

(ii) whether the pick-up was stationary or moving at a slower speed after the impact;

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(iii) the position of the bus before the impact;

(iv) the length of the brakemark on the road and which of the wheels of the bus made the mark and

(v) the part of the bus that had been hit.

It is evident that it was on the basis of these observations that the learned Judge considered the oral evidence.

On this appeal, Mr. George, learned Counsel for the appellants subjected the learned Judge's assessment of the photographic evidence to close and microscopic scrutiny and invited this court to evaluate the photographic evidence and reach a different conclusion. We were also addressed on the weight, if any, to be attached to an alleged admission made by the 1st appellant. It was further urged that an inference favourable to the appellant should be drawn from the part of the bus damaged as a result of the collision.

It is clear that the learned Judge's evaluation of the oral evidence was considerably influenced by his examination of the photographs. The question is whether it was proper for the learned Judge to have embarked, or for us on this appeal to embark, on an interpretation of the photographs unassisted by any evidence.

Photographs when received in evidence may be as much part of the evidence as any documentary evidence and when properly explained and understood may perhaps perform a function similar to that which a view by the Judge would. However, in this case, the photographs relied on by the Judge were taken by a tourist who was not called to testify and apart from tendering the photographs, neither the respondents nor any other witness said anything about the photographs.

The learned Judge was thus left unaided in his interpretation of the photographs. The photographs themselves are not explicit enough to justify the use made by the Judge of them without evidence explaining their contents. By merely looking at the photographs, for instance, it is difficult to know which is the "centre white line" which the learned Judge had referred to in relation to the stopping position of the bus, or to determine which mark depicts "a left inner rear wheel brake mark" or its length The inference which the learned Judge had drawn from the position of the pick-up, as it appeared in the photographs, as showing that the pick-up was moving at a slower speed or was stationary, unaided by expert evidence, is difficult to accept. These are just but a few of the observations made by the learned Judge on his view of the photographs which, in my opinion, cannot properly be made on a mere view. It is not necessary to point out several others. It suffices to say that without evidence to explain the photographs no weight ought to have been attached to them and that the evaluation of the oral evidence should not have been so heavily influenced by the observations made by the learned Judge of the photographs.

Apart from the photographs and the oral evidence the learned Judge relied on evidence of admission by the 1st appellant in finding the appellants liable. By the document (Exh. P5) the 1st appellant accepted "being at fault" in the accident. The 1st appellant gave evidence of the circumstances in which he wrote the document - Exh. P5. He said that the admission was made on an agreement that the respondents would pay "excess" and R18000 for the damages caused bo the bus.

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The 1st respondent admitted that the agreement was that he would pay to repair the bus and that the 1st appellant would accept that he was liable and the insurance company would pay back the insured value of the pick-up. The 1st appellant resiled from the arrangement because the 2nd appellant would have none of it. On the uncontroverted evidence, there is no doubt that had the learned Judge adverted to the circumstances of the so called admission, he would not have attributed any weight to it. The facts that the 1st respondent undertook to repair the bus and did pay for its repair as a consideration of the 1st appellant admitting liability make the admission appear to be a mere sham put up merely for the purpose of getting the insurance to pay for the pick-up. The weight of an admission depends on the circumstances under which it was made. Admission, though prima facie evidence of the fact admitted, can be rebutted or controverted. When it is controverted it is for the court to assess the weight of the admission in the light of the circumstances under which it was made. An admission made by the 1st appellant upon an hypothesis that it was merely made as a ruse to obtain insurance money will not bind him upon a different hypothesis, put up by the other party, that he had agreed that he was at fault.

The question of liability in this case therefore turned on the oral evidence. In regard thereto, the conclusion of the learned Judge had been considerably influenced by the use made by him of the photographs. It is not possible to say what conclusions he would have arrived at on the facts if he had not made use of the photographs. In the result, the judgment of the Supreme Court should be set aside and the case reheard <u>de novo</u> by the Supreme Court. Since at such

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rehearing the question of the quantum of damages will follow the question of liability, it is not necessary to consider the ground of appeal that the award of R80,000 to the 2nd respondent is excessive.

In sum, I would allow the appeal. I would set aside the judgment of the Supreme Court (Perera J.) entered in the respondents on their claim, and dismissing the appellants' counter-claim, I would order that the case be reheard by the Supreme Court. The appellants' are entitled to costs of this appeal to be assessed.

(E. O. AYOOLA)
JUSTICE OF APPEAL

B. George Esq for the Appellant

A. Juliette Esq. for the Respondents

Read over and delivered on 24-06-94

Judge.

In the Seychelles Court of Appeal

1. Andre Esparon
2. S.P.T.C. — Appellants

v

1. Berard Vidot
2. Joseley Vidot — Respondents

CA 11/93

Mr Georges for the Appellants
Mr Juliette for the Respondents

Judgement of Goburdhun P

This claim before the Supreme Court arose out of a road accident in which two motor vehicles - a jeep and a bus - were involved. The jeep belonged to the 1st respondent and was driven by the second respondent and the bus belonged to the second appellant and was driven by the 1st appellant.

The plaint alleges that " the bus was in operation and it was as a result of its operation by the first appellant that the collision occured." The respondents claimed R 360,000 damages from the appellants for the prejudice they alleged to have suffered as a result of the accident. The defence plea was that "the collision was solely caused by the negligence of the driver of the jeep and in the alternative there was contributory negligence."

Evidence was heard and the learned trial judge rejected the defence version of the accident and opted for that of the respondents. He gave judgment in favour of the respondents in the sum of Rs 239,500.

The judgment of the learned judge is being challenged mainly on the following ground:" The learned trial judge erred in finding that the accident occured due to the negligence of the first appellant in that he wrongly assessed the photographic evidence and that of the damage caused to each vehicle ."

Apart from the evidence of the two drivers (who gave conflicting versions) and two passengers in the jeep, the respondents also produced two writings from the first appellant (Documents P5,D1) and three photographs allegedly of the scene of the accident (P2,P3,P4). The photographs were taken by a tourist who was not called to give evidence as to the photographs. In my view though the production of the photographs were not objected to they are per se of no evidentiary value in the absence of the evidence of the person who took them and they should not have been relied upon in support of either version of the accident. The learned trial judge considered the evidence on record in the light of the photographs. With respect, in my view, he was in error in doing so.

I am unable to say what conclusion he would have reached without taking into account the photographs. As this is a matter for his consideration I would remit the case back to him for a new hearing. The judgment of the trial judge is set aside. I would make no order as to costs.

Delivered on 24.05.94.....

H GOBURDHUN
President Court of Appeal

Judge.