JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 30/85

COR: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN

NORMAN SAMUELS — APPELLANT

AND

OLIVE ROSE JOHNSON-HENRY — 1st RESPONDENT

AND

EDWIN HENRY — 2nd RESPONDENT

AND

LLOYD JOHNSON — 3rd RESPONDENT

Mr. R. Carl Rattray, Q.C., for appellant

Mr. K.C. Burke & Miss Sharon Evans for respondents

16th March & 10th April, 1987

CAREY, J.A.:

The appellant is an attorney-at-law. He was the plaintiff in the Court below. The respondents, the defendants in the Court below, were, with respect to the first respondent, a business partner and social friend of the appellant, and the others are respectively, the husband and brother of the first respondent. In an action against these parties, the appellant claimed damages for assault and battery, detinue, conversion and trespass to goods to wit, a Volkswagon motor

car AW 516. The statement of claim was not conspicuous for its brevity and occupied some 31 paragraphs. Defences were put in and the appellant's reply comprised some 24 paragraphs. The action came on for hearing before McKain, J., on the 24th - 28th January and 24th - 26th May, 1983 when judgment was reserved. On 30th May, 1985 the learned judge having taken some time to consider her decision, dismissed the appellant's action and entered judgment on behalf of the defendants. The appeal is against that judgment and the grounds of appeal which are concerned with matters of fact, were stated thus:

> "(1) The decision of the Learned Trial Judge so preponderated against the weight of the evidence that in all the circumstances her findings of fact are unsupportable on a balance of probabilities.
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> (2) That the aforementioned findings of fact were coloured by the Learned Trial Judge's belief of the existence of an intimate relationship between the Appellant and the First-Named Respondent, which belief is supported by the evidence of both the Appellant and the First-Named Respondent.
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> (3) That the finding of the Learned Trial Judge of the First-Named Respondent's right to take the motor car and that the car at the time of the taking belonged to the First-Named Respondent is contrary to the provisions of the Sale of Goods Act and the general law relating to detinue and conversion.
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> (4) The Learned Trial Judge misdirected herself as to the original and copy letter dated 19th November, 1976 as it was in evidence that two letters were written by the Plaintiff on that date one of which was discarded and it was copies of the discarded letter which inadvertently appeared as copies to the original document which formed the exhibit in the case. This misdirection appears to weigh heavily on the Learned Trial Judge's finding that the Plaintiff was an unreliable witness."

Although the facts which provoked the suit occurred nearly a decade ago, their resolution has only recently been brought about. But before rehearsing the facts, it is, I think, desireable to point out that the learned judge was not a little critical of the appellant's aversion to fact rather than fiction. She expressed herself in this way:

> "It appears somewhat harsh to say but I am left with a poor impression as to the plaintiff's regard for the truth. I would not call him a reliable witness, and he is not straightforward in his approach to the court nor logical in his account of the history of his acquisition and loss of the car. He cannot be relied upon."

Seeing then, that the matters canvassed, raise matters of fact, we are very aware of the constraints which a Court of Appeal faces, if it is minded to disturb findings of fact. See Industrial Chemical Co. (Jamaica) Ltd. v. Ellis (P.C.) (unreported) dated 17th March, 1980. This is especially relevant where there are two mutually exclusive stories. That situation is eminently suited to be determined by the judge below who both sees and hears the parties and their witnesses and is thus placed in the most advantageous position to assess the demeanour of the several persons who testify in his court. It is with that caveat firmly in mind, therefore, that I approach a consideration of this appeal.

As to the appellant's case, there were two aspects; first, the motor car transaction including the seizure of that car which involved the appellant and the first respondent, and secondly, the assault and battery imbroglio involving all the parties.

With respect to the first matter, it was the appellant's case that it was Mrs. Johnson-Henry who first bruited the idea that he purchase from her the car which she was committed to purchase from a professor at the University of the West Indies. It was agreed that she would sell it to him at the same price she had paid. The price was eventually fixed at $2300 and it was agreed that the appellant would repay Miss Johnson (as she then was) for the repairs. He paid a deposit of $1200., took possession of the car, and received the registration booklet and the ignition key. This took place sometime in June 1976. He never ever received the transfer. The car was used essentially in connection with his practice which covered Linstead,

Ocho Rios and Kingston, but also for other domestic purposes. I would add that no arrangements were made as to the mode of paying the balance of the purchase price, but she did advise him that she had had the car repaired.

On 26th October, 1976 the appellant wrote to Mrs. Johnson-Henry requesting to be advised of the amount of the balance owing. At this time, the relationship between them had become less than cordial. This request prompted a response from the 1st respondent, which was made by a letter dated 15th November, 1976 and I recite it in full:

"Dear Mr. Samuels,

Re: My Car AW 516

Your letter of the 26th October, 1976 in respect of the above car amazed me for two reasons.

Firstly the car as you ought to know is licensed as above and not as your letter stated as AW 5.

Secondly you know that the price arranged between us was Three Thousand, Five Hundred Dollars ($3,500) of which you paid One Thousand, Five Hundred Dollars ($1,500) in two instalments. As a matter of fact just 12 days before you wrote that letter we discussed the whole matter.

At that time I reminded you that I had paid for the car from my salary and had to be borrowing from friends to pay my domestic bills. You had failed to keep your promise to complete payment by the end of August.

Payment is now nearly three (3) months overdue and if this balance of Two Thousand Dollars ($2,000) is not paid in Fourteen days (14) time, I will take the necessary steps to repossess my car.

Olive R. Johnson."

The riposte was not slow in coming. It was dated 19th November. I set it out below:

"Dear Miss Johnson,

RE: "Your" Car AW 516

I have read your letter of the 15th November, 1976, several times and can only attribute what you have written as a lapse of memory. Though I have come to

"expect the worse from you, yet I certainly would not expect you to be other than straightforward.

Our discussions about the car was frank and plain. You told me that it was a 1969 car and Prof. Stuart was asking $2,500 for it. You however said you were trying to get him to accept less. If I can recall well you said he had agreed to accept $2,300 and that you would pay the costs of the minor repairs to it. I agreed to pay the costs of the repairs. The understanding was clear that I would be repaying you what you paid Prof. Stuart for the car. At a later date you did tell me that Mr. Braithwaite your Mechanic said you could probably get $3,500 for it in the open market. I have no intention of paying $3,500 for a 1969 V W car as this was never the contractual price as agreed.

If I read your letter correctly what you are now trying to do is to make a quick profit of $1,200 off me and to say that that was the agreement between us.

Of course you have completely forgotten that in the years past I had several opportunities of making a profit off you and even recently with great insistence I saved you substantially.

You write as if I was unable to pay you for the car when at that very time I was paying from my own pocket over $4,000 on the Kensington Crescent venture and pumping more than that in "your" Company.

I notice in your said letter that you make no mention of the Repair Bill. Maybe since you have upped the price to $3,500 you will forget that.

If you intend to make a profit please come out and say so openly.

Whether it was intentional or not I do not know but you showed me no document of ownership of the car. I trusted you and looked at no papers. It is necessary however that I should have:-

(a) Evidence that you bought the car from the U.W.I. or Professor Stuart;

(b) The Repair Bill

Your statement of $1,500 as payment on the car is also wrong. By Canadian Imperial Bank Cheque No. 1586 drawn on the 12th day of June, 1976, I paid you $1,200 and by Workers Bank Cheque No. 141165 dated 14th day of October, 1976, I paid you $500. That to my mind makes a sum total of $1,700.

As I now feel most uncomfortable driving in "your" car, I am now most anxious to close out this matter and forward your cheque to you.

Kindly now let me have the documents as requested at your earliest convenience.

" "In the meantime "your" car is either in a parking lot opposite my office at 9 - 11 Church Street, Kingston, or at my home, Lot 2, Wireless Heights, Kingston 9. You are free to re-possess it at anytime night or day.

NORMAN O. SAMUELS"

The first respondent for her part said that she was aware in 1974 that the car in question was up for sale. She bought it on 12th May, 1976 on which date she was put in possession of the transfer and registration booklet. The car was in need of considerable repairs which she had effected. By June she once more had the car, and it was then that she was approached by the appellant who indicated that as he was experiencing car problems, he would be minded to purchase it. But she was not so inclined. Later in the same month, as a result of further importuning on his part, she finally agreed to sell. The agreed price was $3500., and a deposit of $1200 was paid by the appellant. He promised to make a further payment of $1000., and the balance would be paid after she returned from leave. He was told that he would receive duplicate key and transfer when the balance was paid.

When Mrs. Johnson-Henry returned from leave in August, she enquired about the balance and was told by the appellant that he was having financial problems. On 14th October she was paid $500., with the promise that the amount outstanding would be settled by the end of that month. She then received the appellant's letter of the 20th October to which she responded.

I turn now to the respective versions of the assault and battery cum seizure of car episode. The date of this event was 30th November, 1976 when a Directors' meeting took place at the home of the first respondent, 26 Arlene Drive. Present were the appellant and the first and third respondents. The appellant described the atmosphere as so

unpleasant as to precipitate his departure. The car which he had bought and in which he had arrived, was parked on the roadway by the gate. Having got in the car, he prepared to drive off homewards and at that time the 2nd respondent (who at that time was not yet married to the 1st respondent) flung open the door on his side of the car. The first respondent made it clear that he would not be allowed to leave in the car, and ordered that he be removed from the car. The second respondent Henry gripped the appellant's right hand, while the third respondent Johnson held him in his waist. In this unceremonious manner, he was dragged from his car, "cuffed" in his neck and had his right arm wrenched behind his back by Mrs. Henry. She directed Henry to use the duplicate key she said she had, to drive the car into the premises.

He sought medical attention as a result of this manhandling, which had caused a painful and swollen shoulder, elbow and forearm.

Before Mrs. Henry issued her directions to have the car removed into her premises, he required her to restore the car to him so that he could make his way home. He also gave evidence of the hiring of a car at $25 per day for in excess of five (5) months.

So far as the respondents were concerned, they all denied that any violence was used upon the appellant. The first respondent said that the appellant arrived late at the meeting which did not go well. At the point where item 3 was reached on the agenda, the appellant stated that he wished an adjournment as he had another appointment. Before he left, she sought information as to when he proposed to settle the balance due on the car. She was told that she could have the car because he had no intention to pay $3500. for it. Her response was to the effect that although she had received $1500., on account she did not wish him to have the car without paying therefor, and if he was not minded to keep the car, then some compensation could be worked out as he has had the use of the car for several months.

According to Mrs. Henry, the appellant observed that she was at liberty to take back her car. Whereupon she handed the duplicate key she had to Henry and requested him to drive the car into the premises. Eventually the appellant departed.

Mr. Henry said that while he was on the verandah he overheard a discussion between appellant and his present wife, the first respondent, the purport of which, was that the appellant was not willing to pay $3500 and suggested that the first respondent should take the car. He was requested to drive the car in the premises by the first respondent, and he carried out those instructions.

The other respondent, Mr. Johnson, said that after the meeting ended, he went out to speak to his brother who was on the verandah. While there, he overheard a conversation between the appellant and the first respondent but he did not pay much attention to what was being said. The second respondent was given a key and thereafter drove the car into the premises.

These then were the contending versions: they were diametrically opposed. In the event, McKain J., preferred the version of the respondent as to the circumstances of the sale of the car, rejected that of the appellant and dismissed his claim in that regard. She also preferred the respondents' account of the re-delivery of the car and the alleged assault and again found in their favour.

I think it would be helpful if the appellant's pleadings as they relate to the motor car transaction, were noticed. It was pleaded in this way in his statement of claim:

> "7. On or about the 19th day of June, 1976, it was orally agreed between the Plaintiff and the first defendant that the first defendant would sell and the plaintiff would purchase the said motor car at or for the price of TWO THOUSAND THREE HUNDRED DOLLARS ($2,300.) and that in addition thereto the plaintiff would indemnify the first defendant for the costs of repairing the said motor car which she the first defendant had undertaken to have done.

"9. There was no agreement between the Plaintiff and the first defendant as to how the payment of the balance of the purchase price would be accomplished or within that period this would be done.

10. There was no Hire Purchase Agreement between the Plaintiff and the first defendant in respect of the said motor car.

11. There was no Bill of Sale in favour of the first defendant in respect of the said motor car.

12. By Canadian Imperial Bank Cheque No. A 1586 dated 19th day of June, 1976, and drawn in favour of the first defendant the Plaintiff paid the first defendant the sum of ONE THOUSAND TWO HUNDRED DOLLARS ($1,200) towards the purchase price of the said motor car and the first defendant delivered to the plaintiff the said motor car together with the ignition key therefor and the Registration Booklet for the said motor car. And by Barclays Bank Cheque No. 659419 the Plaintiff paid the said amount of $2,400 for and on her behalf in respect of the matter as pleaded in paragraph 8.

13. By Workers Bank Cheque No. A 141165 dated the 14th day of October, 1976, and drawn in favour of the first defendant for FIVE HUNDRED DOLLARS ($500.00) the Plaintiff made a further payment of $500 on the purchase price of the said motor car.

14. In or around the month of October, 1976, differences arose between the Plaintiff and the first defendant who were business partners and the plaintiff immediately wrote the first defendant expressing his readiness and willingness to complete the payment of the balance of the purchase price for the said motor car and to pay the cost of the repairs of the said motor car and requesting the first defendant to state exactly the amount due to close out the said transaction.

15. By letter dated 15th November, 1976, the first defendant in reply to the said letter informed the Plaintiff that the purchase price was THREE THOUSAND FIVE HUNDRED DOLLARS ($3,500.) of which the Plaintiff had paid ONE THOUSAND FIVE HUNDRED DOLLARS ($1,500)."

The only point which might be made in respect of these averments is that they claimed that the sale of the car was unconditional. The question which McKain J., had to consider was whether or not the sale was an unconditional one. As Mr. Rattray correctly pointed out, if the sale was proved to be such, then the first respondent would have been acting tortiously in retaking the car and refusing to return it on demand. I can go straight to Section 19 of the Sale of Goods Act, which would be the relevant provision and it states as follows:

> "19. Unless a different intention appears the following are rules for ascertaining the intention of the parties as to the times at which the property in the goods is to pass to the buyer.
>
> Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

The important words are "unless a different intention appears." Having regard to the divergence of the evidence between the former business associates, the learned judge had no alternative but to accept one or the other. She accepted the circumstances of the sale as told by the first respondent. In particular, she found that the property in the car was intended to pass only when the balance of the purchase price was paid. It was common ground that the first respondent did not sign or deliver the transfer to the appellant nor did she provide him with the duplicate key. But I will return to this point shortly.

Mr. Rattray urged that the first respondent's evidence that the sale was conditional, was inconsistent with her pleading and as also with evidence that she was given permission to re-possess the car; for if the sale was conditional, the appellant's permission would be unnecessary. It should be pointed out that the first respondent in paragraph 16 of the defence, averred as follows:

> "..... The Plaintiff had also stated in his letter of 19th November, 1976 to the First-Defendant mentioned in paragraph 16 of the Statement of Claim and also mentioned in paragraph 15 of this Defence "Your"(sic) are free to repossess it any time day or night." In accordance with the oral and written authority given by the Plaintiff to the First-Defendant as aforesaid, the First-Defendant requested Edwin Henry the Second-Defendant to drive the said motor car (which was parked outside of her premises on Aldene Drive) into her premises of 26 Aldene Drive and handed him a duplicate ignition key which she had for the motor car."

The final paragraph of the letter of November 19, 1976 is set out hereunder:

> "In the meantime "your" car is either in a parking lot opposite my office at 9 - 11, Church Street,

> "Kingston, or at my home, Lot 2, Wireless Heights, Kingston 9. You are free to re-possess it at any-time night or day."

She also said that on the occasion when the car was taken, she had been told that she could. The learned judge believed the appellant made that statement and plainly he could not deny that he had written what appears in his letter. It was an incautious statement. But a lawyer who appears as his own counsel has, it has been said, 'a fool for a lawyer'. The retaking of the car could be justified on either of these bases, which were supported on the evidence and I am not able to understand why the evidence should therefore be characterised as inconsistent. It could rightly be said that there was some inconsistency if the effect of the evidence adduced was to cancel out each head of justification. But, in my view, learned counsel was saying no more than that there was no need to have permission, if indeed the sale was conditional. I am not much impressed by the contention.

It was also pressed upon us that in order for the first respondent to exercise the right of re-possession, she was required to bring herself within the provisions of Section 20(1) of the Sale of Goods Act. I would remind of that provision:

> "20.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

Learned counsel said there was no such evidence. The learned judge found specifically that the property had never passed to the plaintiff (by virtue of Sec. 20(1) of the Act). In evidence, the first respondent said that there was a conversation about the ownership of the car between herself and the appellant in the course of which she had informed

him that when she received the balance of the purchase price, he would be given the duplicate key and have the car transferred in his name. The learned trial judge accepted this evidence as being the truth and this finding of fact justifies her conclusion that at the time of re-possession, property in the motor car had not passed to the appellant.

It was further argued before us that the learned judge's findings were coloured by a belief on the part of the judge that there was an intimate relationship between Mr. Samuels and Mrs. Henry. Counsel complained that there was no evidence to support such a finding.

Neither of these parties said in evidence that the relationship was other than that of social friends and business partners. I am not able to find where the learned judge ever suggested that intimacy occurred. The terms she used in her judgment, "amicable relationship", "the parties had been amicable", "the hitherto good relationship", "the pleasant relationship", "a beautiful relationship". It is, I think, enough to say that that ground was devoid of merit.

So far as the matter of assault was concerned, it was a clear issue of fact for the learned judge. There were two stories in this regard, both plausible and she accepted one, rather than the other. In such a situation, this Court could hardly interfere. I am not persuaded that any reasons have been shown for disturbing her finding.

For these reasons I was of opinion that the appeal should be dismissed with costs.

ROWE, P.:

I agree.

WHITE, J.A.:

I also agree.