

**IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM**

**CIVIL APPEAL NO. 5 OF 1998**

BETWEEN

BESTCON SDN. BHD. . . . Appellant

AND

ROGELIO P. GATPANDAN . . . Respondent

(In the matter of High Court Civil Suit No. 30 of 1995  
Holden at Bandar Seri Begawan, Brunei Darussalam)

BETWEEN

ROGELIO P. GATPANDAN . . . Plaintiff

AND

1. BESTCON SDN. BHD. . . . 1st Defendant  
2. SUNG LEE & CHU CONSTRUCTION SDN. BHD. . . . 2nd  
Defendant

Before : FUAD, P.; HUGGINS AND SILKE, J.J.A.

Dates of Hearing : 12TH AND 14TH NOVEMBER, 1998.

Date of Judgment : 24TH NOVEMBER, 1998.

**J U D G M E N T**

Silke, J.A.:

This is a defendant's appeal and a plaintiff's cross-appeal from a decision of Roberts C.J. in a personal injury action. Mr. John Lee, with him Mr. Adrian Chan, appeared for the defendant/appellant - Bestcon Sdn. Bhd. - "Bestcon" - and Mr. Daljit Singh Sandhu, with him Mr. Vincent Joseph appeared for the plaintiff/respondent - Rogelio P. Gatpandan - "Rogelio".

The pleadings alleged that Rogelio, aged 46, was employed by Bestcon, the first

defendant or by Sung Lee & Chu Construction Sdn. Bhd. - "Sung Lee" - the second defendant or both. As the trial judge said in his judgment, those pleadings displayed some uncertainty as to who employed Rogelio at the material time. Nothing now, apart from a costs order, turns on this. At the hearing it was agreed that Rogelio was employed at the material time by Bestcon and that he suffered his injuries in the course of that employment. It was accepted that any liability found was that of Bestcon.

The trial judge found that, on the 16 March, 1994, Rogelio was working at the worksite of Bestcon at Lot 8005 Kg. Masin, Jalan Sangai-Sangai. His duty was to supervise, service and maintain the equipment on the site. We are concerned with a concrete batching plant and the maintenance of its conveyor belt and silo generally.

At 8 a.m. on that day he climbed on top of the silo to service the screw belt conveyor.

In the course of his work Rogelio, who gave evidence that he had been instructed by Mr. Lau Hua Kuok, the Managing Director of Bestcon, how to maintain the concrete silo, started by greasing the conveyor belt using a ladder alongside the silo to do so. This greasing is not dangerous. The mechanism was switched on. When he finished he switched it off.

He was told by a fellow worker that the conveyor was working intermittently. This belt carried powdered cement to the silo top.

Rogelio climbed back up the silo taking a hammer with him. At the top he opened an inspection cover having attempted to ensure that the switch in the shed at the foot of the machine was off. He had further instructed a Thai national, Wiwat Phunbathor, to keep watch in the shed which contained the power switch to see that the power switch was not turned on while he was working on the silo. Rogelio spoke in English. The Thai workman had no knowledge of that language.

Inside the opened inspection cover Rogelio saw some hardened cement which was causing a blockage. This, as he had been taught to do by Mr. Lau, he broke up

with the hammer. He had used the same method on other occasions prior to the 16th March. Mr. Lau had, as well as directing him to have a workman watch the switch to prevent it being turned on, told Rogelio not to let broken cement get into the silo. Rogelio used his hand inside the inspection hole to remove what he had broken up.

Wiwat, by this time, had left the shed as he had not understood Rogelio's instructions. Another workman, Prasit Ana-An, in ignorance of the work being carried out by Rogelio, turned on the switch. The machine started to operate and Rogelio's right arm was severed 1½ inches below the elbow.

A Writ, with Statement of Claim attached, was filed on 18th April 1995 naming Bestcon as defendants. This alleged negligence and/or a breach of common duty of care and/or breach of contract of employment by them. Particulars of negligence were set out as were particulars of the injuries Rogelio received.

An amended Writ was filed on 4th December 1996 - on foot of an order dated 28th November 1996 - naming Sung Lee as 2nd defendant. Defences were filed by both Bestcon and Sung Lee. It was, as we have indicated, on the 3rd day of the trial conceded that, if negligence be found, it was that of Bestcon as the employer.

After a trial lasting six days, the Chief Justice gave judgment on 11th May 1998 and found the main responsibility for the action lay with Bestcon. He found 25% contributory negligence by Rogelio.

He awarded \$60,000 for pain and suffering : what he described as "pre trial damages" being loss of earnings; medical treatment in the Philippines and minor items in the sum of P1,158,038.

We would interpolate here that various sums of money designated in either Brunei dollars or Philippine Pesos are set out in the judgment. It was agreed at trial that an exchange rate of P20 to B\$1 be used. We have done the same.

He awarded what were described as "post trial damages" which, added to the pre-trial damages, gave a figure of P5,059,478.

In Brunei dollars all three sums: pain and suffering : "pre trial" : "post trial" came to B\$312,974. From this global sum was deducted 25% in respect of the contributory negligence leaving a total of B\$234,731.

There was a further deduction of B\$23,000 being Workmens' Compensation received by Rogelio leaving a net total of B\$211,331.

The trial judge awarded interest on the various sums at various rates. While at first contested it is now agreed between the parties - and we think they are right - that the item "b" under the heading "Interest and Costs" is incorrect when it made interest run from the date of the accident and that this should read "interest at 6% on the award of general damages from date of service of the Writ, 27th April 1995, to the date of judgment 11th May 1998". Further, where the date "16.4.1998" appears in this portion of the order it should be altered to read 11.5.98.

By Order Nisi he directed that Bestcon should pay Rogelio's costs and that there be no order for costs in relation to Sung Lee.

Having heard submissions the trial judge affirmed the terms of the Order Nisi refusing in his discretion to order any payment of costs by Rogelio.

The issues at trial narrowed down to: first : was the accident caused by the failure of Bestcon to provide a safe system of work; second: did Rogelio cause or contribute to the accident by his own negligence; third: the quantum of damages.

The issues on the appeal and cross-appeal are now, certain items having been either abandoned or conceded;:

for Bestcon, the appellant, the finding of an unsafe system of work. It is Mr. Lee's contention that this finding was wrong but that, if we were to find that negligence existed, then the negligence of Bestcon was at worst 50% with 50% contributory negligence by Rogelio. In addition Mr. Lee has argued that, because of Rogelio's general expertise, Bestcon owed him a lower duty of care.

On the matter of the finding of 25% contributory negligence by Rogelio, Mr. Lee suggested that this was an inconsistent finding by the trial judge.

The final issue was the apportionment of costs. Rogelio having been found 25% negligent he should have been ordered to pay 25% of Bestcon's costs.

For Rogelio, on the cross appeal, Mr. Sandhu argues that, first, there should be no finding at all of contributory negligence by Rogelio; that, second, the calculation of loss of future earnings was made on an incorrect basis and is wrong in quantum; and, finally, that the trial judge was wrong in failing to award Rogelio the costs incurred in the adding of Sung Lee as the 2nd defendant.

### **NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE**

It is Mr. Lee's main contention that there was a safe system of work. It was a system used by Mr. Lau for some years without incident. In finding that there was not the trial judge had placed excessive reliance on the evidence of a Mr. Jack Apgar, a forensic engineer, called as an expert by Rogelio. Mr. Apgar had no knowledge of any industrial legislation in Brunei Darussalam - there is none, or so we are told - or of safety standards here. In evidence Mr. Apgar had stated that safety standards outside Asia were higher in some respects than in Asia.

Further Mr. Lee submits that Rogelio was a man with many years experience as a mechanic and electrician, which included nine years of maintenance supervisory work, and that Mr. Lau had used Rogelio to maintain all the vehicles and equipment on the site. Therefore the duty of care owed by Bestcon to this skilled and experienced workman who was aware of the dangers is, and should have been, a lower one. All this, added to the supposedly safe system, should have led the trial judge on proper consideration to have absolved Bestcon from all blame. If there were blame at all, Mr. Lee submits in the alternative, that the negligence should have been equally divided between Bestcon and Rogelio.

It is correct that Rogelio was a man of experience in the maintenance of vehicles and equipment but, as he stated in evidence - which evidence was accepted by the trial

judge - before he worked for Bestcon, Rogelio had done no maintenance work on a screw conveyor belt on a concrete batching machine. He was not familiar with the two batching plants on site. He had no qualifications fitting him for work on a batching plant. He relied on instructions from Mr. Lau when maintenance was needed.

Mr. Lau's evidence was generally that he gave no instructions to Rogelio, in particular, that he did not tell him that cement blockages had to be cleared or how to clear them. The trial judge, however accepted Rogelio's evidence on this in preference to that of Mr. Lau. Further, Mr. Lee suggested, it might be that Rogelio had come down from his initial greasing job on the belt and had not turned off the switch of the machine. This was not a case made below and it is not a matter which emerges from the evidence given. We do not intend to consider it.

Mr. Apgar in evidence, and in his Report which was before the Court, said that to remove the cement which, if that were not done, might cause the conveyor belt to seize up, it was necessary to put one's hand into the installation - or inspection - hole. He thought the possibility, given the nature of this machine, of cement hardening at the top of the screw conveyor belt was very high.

He went on that the only acceptable method of switching off a piece of equipment, and the switch here had to be off before the cement removal work could be done, was a "lock up" system whereby the switch is locked and tagged with a padlock the key to which should be in the possession of the person who locks the switch and does the work. None such existed here. It is readily available and very cheap. The "lock up" should be tagged so that workers would know what was going on. There was no warning sign of any kind here. The absence of all of this was a departure from normal, safe working practice and "even common sense".

Rogelio that morning had first greased the belt having switched on the machine to do so. There was a shed next to the silo divided, by partition, into two. The first half contained the cement bags. These bags, when the machine was being worked, were picked up by a tractor which then went into the second half and suspended them over a big hopper. The men working the cement then slit the bags and the cement went into the hopper and thus to the conveyor belt.

The switch was placed high on the wall behind the place where the hopper was. It was necessary to climb over the hopper to get to it.

To repeat: Rogelio came down from his greasing and switched off the machine. He was told by someone that the conveyor was working intermittently. He decided to go up again to clear any blockage. As he had been instructed to do he looked for a worker to guard the switch. There was none working inside the shed at this particular time. He met Wiwat outside. The trial judge preferred Wiwat's evidence to that of Rogelio on this. He told him in pidgin English not to turn on the switch and to see no one else did. To these instruction Wiwat answered "yes, yes". Rogelio thought he had understood what he was to do.

Rogelio went up again to the top of the silo. From there he could not see what went on in the part of the shed which held the switch. The distance between the top of the silo and the ground was about 60 feet. Wiwat, who had not understood and whose duties that day lay outside the shed shovelling sand, went off to do his work.

Prasit, who was about to carry out his work at the hopper slitting the bags of cement, went into the shed. He did not know that Rogelio was at the top of the silo. He turned on the switch which was a simple one not, as in the control room where another switch existed, a trip fuse switch. The machine started up and the accident happened.

On the evidence it was fully open to the trial judge to find that an unsafe system of work existed. He placed reliance, and not excessive reliance, on Mr. Apgar. Bestcon owed a common law duty of care to its workman whether standards are different in Asia or not. Even if that standard was lower in the case of an experienced man that does not absolve Bestcon from its duty. The trial judge's finding is not one which we are minded in any way to disturb.

It is Mr. Sandhu's submission that Rogelio had followed the instructions he had been given to the letter. Therefore there should have been no finding of contributory negligence. He could have done no more.

We accept he followed, generally, his instructions but Rogelio did not go far enough. His own safety was involved. He knew that what he was doing was dangerous. He should have either given the directions about the switch to someone working in the shed or, if there was no one there at the time, ensured that the person to whom he did speak came inside the shed to keep watch. Further if there was a language difficulty he should have ensured, by gesture or otherwise, that the person to whom he spoke understood exactly what he was to do.

Wiwat had understood only that he was not to turn on the switch. That Rogelio failed to ensure that he understood the vital requirement that he was to stand guard over the switch to make sure no one else turned it on meant that Rogelio did not, in his own interests, take reasonable care of himself and that this want of care contributed to the accident which caused him injury.

We do not accept that the evidence here was insufficient to enable the trial judge to make his finding of contributory negligence. The facts were there and their interpretation by the judge was correct.

The apportionment of contributory negligence is at the discretion of a trial judge provided that there is evidence to support his findings and that he was not manifestly wrong. It matters not that any or all the members of this Court might have reached a figure different from the 25% found here. If the discretion has been properly exercised it should not be interfered with. It was here and we are not disposed to alter the trial judge's percentage.

The appeal and the cross-appeal on the issue of negligence fail.

### **PROPORTION OF COSTS**

The award of costs is again at the properly exercised discretion of the trial judge. In the exercise of that discretion here the trial judge ordered that Bestcon should pay the costs of the action despite his finding of 25% contributory negligence by Rogelio.

We have considered the submissions on this point and we are not persuaded that the trial judge wrongly exercised his undoubted discretion in making the order he did.

That point also fails.

## **THE CROSS-APPEAL LOSS OF FUTURE EARNINGS**

We now turn to the second main issue on the cross-appeal.

There was evidence as to disability given at trial by Dr. Anbalagan and by Dr. Josephine M. Robredo-Bundoc.

Rogelio, who was 46 at the time of the accident on the 16th March 1994, was said by Dr. Anbalagan to have a 65% disability and by Dr. Bundoc to have a disability of 95% of the upper extremity of his right arm and a 60% disability of his entire body. This last percentage was accepted by the trial judge. There is no quarrel as to the quantum of this percentage. Rogelio's life expectancy as accepted by the trial judge was to the age of 68. This would not be affected by the injury. In the light of his general experience in Brunei and in the absence of any real evidence on the issue the judge held that Rogelio would in the normal course retire at the age of 60. Again this is not in issue.

After the accident Bestcon, as a matter of kindness to Rogelio, continued to employ him at full wages until the end of his contract in February 1995. His work was not of the same nature. He was a sort of trafficman directing the cement trucks, changing the oil filters and cleaning the power generators. He was no longer the supervisor.

On the 21st February 1995 he returned to the Philippines where he found it difficult to get work. A friend did eventually give him work as a time keeper and store man. This was from April 1995 to November 1996. He was paid P2,400 per month (B\$120). He left that work as he had to use public transport to get to it and this tired him.

He has had no regular work since then though he has tried to get jobs. He sells flowers from a garden from which he has a gross return of P1,200. He makes about P1,000 clear (B\$50).

He said that, had he not been injured, he would have continued to work overseas as he had done for many years. He may not, the construction industry in Brunei having depreciated in recent years, have obtained employment in this country. But there are other places where a man of his experience and qualifications could have found work.

He receives a disability allowance in the Philippines of P1,700 per month. This comes from "insurance" payments Rogelio had made before he went to work overseas. This, quite properly, was not taken into account by the trial judge in his assessment.

By taking the figure of P2,400 Rogelio earned in the Philippines before he resigned from that job together with the P1,000 earned from the flower selling the judge reached a post accident earnings figure of P3,400 (B\$170) per month. This was, he thought, the continuing income Rogelio could have earned, with the flower income in addition to the job income and not in substitution for it. He further thought that the Brunei income which he found to be the continuing income would have been P46,000 (B\$2,600) per month. There is no contest in respect of any of these figures.

The judge then went on to "jump", if we may use the expression, from Dr. Bundoc's 60% disability to equate it with a 60% loss of earnings capacity and to base his calculations of loss of earnings on this percentage.

Issue is taken on this.

With respect to the judge the percentage of disability does not equate with the percentage of loss of earnings. It is the evidence of the diminution in wages as between pre-trial and post-trial earnings which is the true measure of loss of earning capacity. There was, other than the alteration in income, no specific evidence at trial as to loss of future earnings. The doctors gave none: it was not their function. The effect of the disability on "a particular claimant's earning capacity may vary greatly according to the

age and particularly to the nature of the employment of the particular claimant .....".  
 Chan Wai Tong and Anor. v Li Ping Sum [1985] 1 AC 446 at p.460. To take an extreme  
 example: a piano player who loses two fingers in an accident may have a small disability  
 percentage but a huge loss of earning capacity depending on his forte.

Here as we have said the actual figures - the multiplicand - involved are not  
 contested.

Given the age of Rogelio at the time of the accident and the age of his retirement  
 the judge look a general figure of 14 and discounted this to 10 to allow for what are  
 called the vicissitudes of life. This multiplier is not contested.

Following upon what we have said the correct calculation, should have been on  
 the basis of P42,000: that is the Brunei income of P46,000 less the earning in the  
 Philippines of P3,400: multiplied by 12 to get the yearly income of P511,200 multiplied by  
 10 - the multiplier - giving a final figure of P5,112,000 or B\$255,600.

The pre-trial loss from 16th February 1995 - Rogelio having been employed at his  
 normal salary until that date - to the 11th May 1998, a period of 38 months, at P42,600  
 per month comes to P1,618,800 (B\$80,940).

The figure appearing at p.45 of the judgment under the heading "Pre-trial special  
 damages", Item 2 - Loss of earnings, should be increased from P919,600 to P1,618,800.  
 An increase of P699,200 (or B\$34,960).

The figure appearing as the total of the special damages should be increased by  
 that amount to a figure of P1,857,238 (or B\$92,861).

Under the heading "Post trial damages" the figure at Item 3 on the same page:  
 "Loss of earning capacity" should be increased from P1,718,200 to P5,112,000 an  
 increase of P3,393,800 (or B\$169,690). This gives a total under this heading of  
 P7,376,240 (or B\$368,812).

The total damages are therefore \$60,000 - damages for pain and suffering - plus

P1,857,238 (B\$92,861) pre-trial damages plus P7,376,240 (B\$368,812) post trial damages.

This gives a gross award of B\$521,673.

From this should be deducted 25%, leaving a figure of B\$391,255, in respect of the contributory negligence.

From this should again be deducted the sum received for workmens' compensation paid - B\$23,400 - leaving a total award in the sum of B\$367,855 and the cross-appeal succeeds to that extent.

#### **COSTS - SUNG LEE**

Rogelio was employed by Sung Lee in their workers' quota. He was seconded to Bestcon.

In the course of discovery Rogelio's advocates found a number of letters which suggested that he was employed of Sung Lee not Bestcon which was, at that time, the sole defendant.

The advocates wrote letters to Bestcon's advocates seeking to clarify the matter. They received little assistance. It is noted that the same firm represented both Bestcon and Sung Lee.

To their first query Rogelio's advocates were told that they were entitled to "treat their pleading as it stands". This was a reference to the pleading in the statement of claim, para 2 which, with respect, was somewhat ambiguous as to whose liability was being alleged. That paragraph in the pleading was admitted in Bestcon's defence.

As the result of another query, by letter on 7th October 1996 the advocates for Bestcon denied ever admitting that Rogelio was employed by them, merely that they accepted he was employed by Sung Lee and seconded to Bestcon. They then specifically stated that Rogelio was not employed by them.

Rogelio's advocates then, by summons, joined Sung Lee as 2nd defendant. They filed an amended statement of claim. Sung Lee filed a defence and there was a reply to that filed. Costs had begun to run.

The defence of Sung Lee denied liability - it was in terms the same as Bestcon's defence.

Getting up for trial was done against both defendants.

The trial started on the 10th March 1998. On the 12th March Bestcon accepted they were the liable employers.

It was in these circumstances, and after submissions, that the trial judge stated, "having accepted that the concession was made on the third day of the trial and that proceedings against both named defendants was necessary in order to determine which, if any, was liable", said "..... I think it would be fair to make no order for costs in relation to D2".

Sung Lee was not represented before us. Mr. Sandhu asks that we alter that order so that he can, for Rogelio, obtain the costs incurred by joining Sung Lee which would include the summons: the amended statement of claim, the Reply to the defence: the getting up for trial and the three days of the trial.

Sung Lee was not dismissed out of the action at the time of Bestcon's concession. They are still on record as defendants.

As indicated earlier, we are aware that costs are a matter for the judge's discretion., and it should not be disturbed lightly. We find it difficult, however, to understand the reasons why the trial judge made the order he did. Fairness, we would have thought, necessitated the plaintiff being reimbursed for the considerable costs incurred against Sung Lee and that those costs be paid by Bestcon with whom the fault clearly lies for their being incurred. The concession was made very late in the day. Had it been made at a much earlier date it would have avoided the confusion and the resulting steps which incurred costs. Who was liable was vital to the plaintiff's claim.

In these circumstances, with great respect to the trial judge, we feel the order

under consideration was wrong.

We would accede to Mr. Sandhu's submission that we set it aside and order that Bestcon pay the costs incurred by the plaintiff in respect of Sung Lee.

We will hear counsel as to the costs of the appeal and cross appeal.

WILLIAM SILKE  
Judge, Court of Appeal

KUTLU TEKIN FUAD  
President, Court of Appeal  
Appeal

ALAN HUGGINS  
Judge, Court of

John Lee            }  
Adrian Chan        }

for Appellant

Daljit Singh Sandhu }  
Vincent Joseph     }

for Respondent