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IN THE JUDICIAL COMMITTEENo. 25 of 1973OF THE PRIVY COUNCILON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

YAHAYA BIN MOHAMAD

Appellant

and

CHIN TUAN NAM

RespondentCASE FOR THE APPELLANTRECORD
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1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia (Azmi, L.P., Suffian F.J., Ong Hock Sim, F.J.) dated and entered on the 14th April 1973, allowing the Respondent's Appeal from an Order of the High Court in Malaya (Syed Agil Barakbah J.) dated 19th August 1972, whereby Judgment was entered for the Appellant against the Respondent on the Appellant's claim for damages arising out of a road accident. An order granting leave to appeal to the Judicial Committee of the Privy Council was made by Suffian F.J., Gill F.J., Ong Hock Sim F.J. on 3rd September 1973.

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2. The substantial question raised by the Appeal concerns the entitlement of an appeal court to vary the findings of a trial judge as to liability in a traffic accident and whether on the facts of the present case the Federal Court of Malaysia was entitled to vary such findings

3. The Appellant in his Statement of Claim claimed damages, costs and other relief arising out of the negligent driving of a motor vehicle, by the Respondent. On September 12 1968 at about 12.10 a.m. the Respondent was driving his motor vehicle along Bakar Arang away from Sungei Patani town when he was in collision with a bicycle ridden by the Appellant. By his defence the Respondent denied negligence and alleged that the Appellant was negligent alternatively that he had been contributorily negligent.

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4. The Appellant gave evidence that he was presently unemployed but that prior to the accident had been a crab catcher for about 6 years. He said that at about 12.30 on 12th September 1968 he was cycling along the main road from his house to Sungei Patani where he intended to get fish as bait for crabs. He was on the left hand side of the road (the correct side) about 3 feet from the verge. He saw the headlights of a vehicle zig-zagging towards him. He edged closer to the verge but the car collided with him. He also gave evidence of the effects of his injuries and details of special damages.

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5. Mr. C. K. Young a Consultant Thoracic Surgeon gave evidence of the permanent effects of the injuries based on an examination in May 1972.

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6. The last witness for the Appellant was a pedestrian, Omar Bin Mat Isa. He said he was walking on the left hand side of the road away from the town and was passed by the Appellant on his bicycle on the other side of the road. He heard the sound of the accident, turned round and saw a motor car still moving diagonally across the road. He also saw the Appellant on the road way on the Appellant's side of the road with his bicycle further on. He helped to move the Appellant to the verge of the road but did not make a statement to the police until a month or two after the accident.

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7. The Respondent gave evidence on his own behalf. He said he was driving on the left hand side of the road about 3 feet from the verge. He saw the Appellant approach on the wrong side of the road and when about 20 feet away move across in front of him. The Respondent stated that he swerved to his left but was unable to avoid the Appellant. The Respondent also denied that the witness Omar had been at the scene of the accident that night.

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8. Syed Agil Barakbah J. dealt with the pleadings and all the evidence in his judgment. In particular he dealt with a discrepancy between the Respondent's testimony in court and a statement made to the police shortly after the accident.

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After dealing with the witnesses' evidence he stated that where there was a conflict of the

parties' evidence the test to be applied was that laid down by the Court of Appeal in San Seong Choy and Others v Yuson Bien 1963 29 MLJ 235 namely that photographs, plans and reports of damages to the vehicles provide the most reliable guide to test the evidence. From this he concluded that the off-side front head lamp of the Respondent's vehicle had come into contact with the right side of the Plaintiff's bicycle probably at the front fork.

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- 10 9. Taking into consideration all the evidence he considered that the Appellant's version was the more probable. He stated that even if he put aside the Defendant's conflicting stories, and the Plaintiff's corroborated version, there were factors which brought him without hesitation to conclude on the balance of probability that the Defendant was negligent.

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20 He then went on to find that the Appellant was not contributorily negligent and assessed damages as follows:

 §10.422/- for loss of future earnings
 §12.000/- for pain and suffering and for
 loss of amenities
 § 1.700 for special damages and costs
 §24.122

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Interest on the §12.000 was awarded at 6% from the date of service of the writ to the date of trial. Interest of 3% was given on the special damages from the date of the accident to the date of trial.

- 30 10. The Respondent appealed to the Federal Court of Malaysia and the appeal was heard on 19th December 1972 by Azmi L.P. Suffian F.J. Ong Hock Sim F.J. judgment being given on 14th April 1973 allowing the appeal.

40 11. The judgment of the Court of Appeal was given by Ong Hock Sim F.J. He found that there was no evidence to support the learned trial Judge's findings in relation to certain brake marks on the road as being made by the Respondent's motor car. The appellate judge discounted the evidence given by Mr. Omar, speculated as to which side of the road he said he was on and came to the conclusion that Mr. Omar was lying. The Court of Appeal found

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as a fact that the Appellant was on the right hand (incorrect) side of the road, and also concluded that the Respondent's evidence to the police was not inconsistent with his testimony in court.

12. The Appellant respectfully submits that this appeal ought to be allowed and that the judgment of Syed Agil Barakbah J. was correct. In finding that there was no evidence to support the findings concerning the brake marks, Ong Hock Sim F.J. adopted an argument never adduced in the court of trial. Indeed counsel for the Respondent addressed the court of trial on the issue on the basis that they were the brake marks. Further the photograph of them was in the agreed bundle. It is respectfully submitted that in the circumstances it was not open to the learned appellate judge to take issue with that part of the evidence. 10

13. In dealing with the evidence of Mr. Omar, there was no evidence to support a finding that he was on the right hand side of the road. Whilst the learned trial judge would have been entitled, having seen the witness to come to the conclusion that he was lying, he did not do so. It is respectfully submitted therefore that this finding was not open to the Court of Appeal. 20

14. The finding that the Respondent's previous statement was not contradictory was not supported by the evidence and in particular by the evidence of the Respondent. He himself never attempted so to do. Again it is submitted that the appellate court should not have found as a fact that the Appellant was riding on the right hand side of the road. Such a question of fact was, it is submitted, peculiarly within the trial judge's power. 30

15. Apart from the above errors apparent in the judgment of the Court of Appeal it is submitted that the judge at first instance reached the correct view on the probabilities for the following reasons in addition to those adduced below.

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16. The Respondent alleged that he was about 3 feet from the verge and swerved towards it to avoid the cyclist. It is submitted that even at 20 mph it is impossible so to do to any appreciable degree without travelling some distance off the road. 40

17. Rather than Mr. Omar being shown to be a liar, his evidence was actually supported in one respect namely that no one suggested he was wrong about the Respondent's motor car eventually becoming stationery in a monsoon drain.

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10 18. The Appellant respectfully submits that the order of the Federal Court of Malaysia was wrong and ought to be reversed, and the order of the High Court in Malaya ought to be restored and this Appeal ought to be allowed with costs for the following among other ...

REASONS

1. Because the Court of Appeal reversed the learned trial Judge's findings of fact when there was no justification for doing so
2. Because the Court of Appeal's findings were speculative and not supported by the evidence.
3. Because the findings of Syed Agil Barakbah J. were right.

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