

No. 25 of 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :-

YAHAYA BIN MOHAMAD (Plaintiff)
Appellant

- and -

CHIN TUAN NAM (Defendant)
Respondent

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C A S E FOR THE RESPONDENT

Record

1. This is an Appeal from a Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) (Azmi L.P., Suffian and Ong F.J.J.) dated the 14th day of April, 1973, whereby the Court allowed an appeal by the Respondent herein (the Defendant at the trial) from a Judgment and Order dated the 19th day of August, 1972, of the High Court of Malaya (at Alor Star) whereby Syed Agil J. gave judgment for the Appellant (Plaintiff) for 20 \$22,422/- as general damages and \$1,700/- as special damages in respect of injuries sustained by him in a collision on the 12th day of September, 1968, between a bicycle ridden by the Appellant and a motor car driven by the Respondent.

pp.52-57
pp.58-59pp.24-32
pp.33-34

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2. The principal question raised in this appeal is whether or not the Federal Court acting as a Court of Appeal was entitled to reverse the findings of fact made by the learned trial judge and whether or not the Federal Court was entitled to conclude that the account of how the accident happened given by the Respondent herein was more inherently probable than 30 than of the Appellant herein when considered with the physical evidence of photographs, plans, measurements and damage which the Federal Court held did not bear out the evidence of the Appellant herein and of his witness Omar.

pp.57,
11.38-39
pp.57,
11.24-27

p.3, 1.20 -
p.6, 1.10

3. In his Statement of Claim delivered on the 19th day of September, 1969, the Appellant averred that on the 12th day of September, 1968, he was cycling from his house at Bakar Arang to Sungei Patani 4 feet from the left hand side of the road when he was struck by a motor-car driven in a zig-zag manner by the Respondent. As a result of the accident he sustained multiple injuries, principally to his right leg and head. The Appellant pleaded the accident was caused by the negligence of the Respondent in the following way :-

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p.4,
11.21-36

"That as a result of the negligent driving of motor car No. K 9192 the Defendant's car knocked into the Plaintiff's bicycle and pushed it to the centre of the road. The Defendant's car went back to its correct side of the road and landed on a ditch.

PARTICULARS OF NEGLIGENCE

- (i) Driving the said car in a zig-zag manner and causing it to go to the wrong side of the road.
- (ii) Failing to keep the car on its correct side of the road.
- (iii) Having allowed the car to go to the wrong side of the road, failing to keep a look out for other traffic that might lawfully be on the road and on their correct side.
- (iv) Failing to see the cyclist in sufficient time to take avoiding action".

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p.6, 1.10 -
p.8, 1.7

4. In his Statement of Defence delivered on the 29th day of September, 1969, the Respondent denied the negligence pleaded and averred that:

p.7,
11.9-36

"....at the place and time in question he was driving his car K. 9192 in a proper manner on its correct side of the road going from Sungei Patani to Batu Arang when the Plaintiff who was cycling along the said road and coming from the opposite direction so negligently rode his cycle that he caused the same to collide into the Plaintiff's said car.

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PARTICULARS OF NEGLIGENCE

- (i) Failing to keep any or any proper look out for other users of the road.
- (ii) Failing to observe the presence of the Plaintiff's car coming from the opposite direction.
- (iii) Failing to keep to his proper side of the road.
- 10 (iv) Suddenly and without any warning swerving into the path of the Plaintiff's oncoming car and when so close in front of the said car so as to deprive the Plaintiff of any opportunity despite the use of all care and skill to avoid the same or avoiding a collision with the cycle.
- 20 (v) Failing to brake, slow down, or do anything or to so manage and control his cycle as to prevent it colliding into the Plaintiff's car."

5. By a statement of agreed facts dated the 17th day of January, 1972, it was admitted that there was a collision between the Appellant's bicycle and the Respondent's motor-car travelling in the opposite directions at 12.10 a.m. on the 12th day of September, 1968. p.70, 11.1-12

30 6. The hearing commenced before Syed Agil J. on the 28th day of June, 1972. Three witnesses gave oral evidence on behalf of the Appellant. The first witness called was the Appellant himself who after his description stated his account of the accident as follows: pp.8-12

40 "On 12.9.68 I was involved in an accident. Prior to accident I was a crab catcher for about 6 years. On 12.9.68 at about 12.30 a.m. I was cycling along the main road from my house and going towards Sungei Patani town to get fish as bait for crabs. I was cycling on the left-hand side of the road about 3 feet away from the grass verge. When I arrived in front of the Esso petrol station I saw a vehicle coming from the opposite direction. It was coming fast and in a zig-zag manner. When it neared me it encroached into my path and knocked into me. I become unconscious. When the motor car came and knocked into me, I was about 3 feet from the edge of the road." p.8, 11.12-25

He went on to describe his injuries.

pp.12-13 7. The second witness called by the Appellant was Dr. Young who only dealt with the Appellant's injuries.

pp.13-16 8. The third witness called by the Appellant was Omar Bin Mat Isa who described himself as a trishaw pedaller who had known the Appellant for 5 or 6 years. His account of the accident was as follows:

p.14,
11.5-27 "At the time of the accident I was walking home from Sungei Patani town towards my house. I was walking on the left-hand side of the road. (Witness corrects evidence). As I was walking I saw Plaintiff cycling on the other side of the road and going towards Sungei Patani. I did not speak to him. After I had passed him I heard the sound of a vehicle colliding. The sound came from my rear. I turned around. I saw a motor car diagonally across the road. (Witness demonstrates with toy car). It was in the middle of the road. I saw the Plaintiff in front of the car. He had fallen in front of the car near the offside of the car. The Plaintiff was on his side of the road about 3 feet away from the left edge of the road. The bicycle was further in front of the Plaintiff about 20 feet away. I approached the Plaintiff. He was lying down on the road. The car was still moving on the road and went towards the drain on the left side as one faces Bakar Arang. When one of the wheels went into the drain, it came to a stop." 10
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p.16,
11.8-10 He admitted in cross examination that he had not seen the accident although he maintained he had been present when it occurred. Omar conceded that he had not told Police Officers investigating the accident at the scene what had transpired at the time of the accident. 40

pp.63-67
Photographs
separate 9. In addition to oral evidence the Appellant put in various exhibits in evidence including a Sketch Plan, with a key, a bundle of Photographs with a key and a certificate of examination of the Respondent's vehicle. No witness, it seems, formally produced these documents and their makers were not examined or tendered for cross-examination. 50

10. Only the Respondent gave evidence on his behalf. He described his involvement in the accident as follows:

"On 12.9.68 at about 12.10 a.m. I was driving a car K 9192 along Sungei Patani/Bakar Arang Road, proceeding towards Bakar Arang from Sungei Patani.

p.16, 1.26
- p.17, 1.9

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When I reached near the Esso filling station, an accident happened. I was driving on the left side of the road. The nearside wheels were about 3 feet from the grass verge. My car is an Opel Kapitän. I was doing over 20 m.p.h. As I drove along I saw from a distance the light of a bicycle from the opposite direction. The light was on my left side of the road. At that time it was about 100 yards in front of me. I continued driving on.

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When my car was about 20 feet away from the bicycle the cyclist suddenly rode across the road to my right. I found he was so close to me that I swerved to my left in order to avoid the cyclist. I knocked into his bicycle at the cyclist's right leg. The front offside headlamp knocked into the cyclist."

11. The learned trial judge reserved his judgment until the 19th day of August, 1972. In his judgment after reviewing the conflicting oral evidence the learned judge, it is submitted correctly, directed himself:

pp.24-32

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"....it is only proper to examine the other evidence available considering the conflicting stories given on either side, before making a definite conclusion."

p.26,
11.22-25

He then reviewed the documentary evidence and concluded:

"the offside front headlamp of the Defendant's motor car had come into contact with the right hand side of the Plaintiff's bicycle."

p.27,
11.28-30

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The learned judge then concluded, it is submitted correctly, that there were two probable versions of how the accident had taken place, one of which he had to find as being the more probable. The two versions were these:

"(1) That the Defendant's car zig-zagged and went across to the wrong side of the

p.27,1.39 -
p.28,1.2

road and knocked into the Plaintiff who was cycling straight ahead on the left side towards Sungei Patani; that is the Plaintiff's version.

- (2) That the Plaintiff rode his bicycle diagonally across the road from the Defendant's left to the right in the path of the oncoming car which when trying to avoid him by swerving to its left knocked into the right side of the bicycle. This is the Defendant's version." 10

The learned judge then concluded that the Appellant's version was more probable and gave judgment for the Appellant. He based this reasoning on four factors.

p.28, 11.6 and 7 12. The first factor which the learned judge relied on was the Respondent's allegedly conflicting stories. He had earlier said:

p.25, 1.47 - "The Defendant when tested in cross-examination revealed a vital contradiction to his own testimony. In his police report made about forty minutes or so after the accident, he said on reaching in front of the Esso station he saw a male cyclist coming from the right side of the road from Bakar Arang going towards Sungei Patani. When the cyclist was near him he crossed towards the left side of the road and collided with his car. The cyclist fell down. He got out of the car, carried the cyclist and placed him by the side of the road. In his evidence, as stated earlier, the Defendant stated the reverse." 20 30

It is respectfully submitted that this was not an inconsistent statement because it appears that the Respondent's statement in Malay had been mis-translated into English. In the judgment of the Federal Court, on appeal, Ong F.J. has translated the Malay statement himself into English by placing in parentheses in his judgment after the official translation his own translation of the statement. The relevant portion of his judgment reads as follows: 40

p.55, 11.25-30 "On reaching in front of the Esso station I saw a male cyclist coming from (riding on)

the right (-hand) side of the road from Bakar Arang going towards Sungei Patani. When the cyclist was near me, he crossed towards the left side of the road and collided with my car".

13. The second factor the learned judge relied on was the blood spot on the side of the road which the Plaintiff ought to have been riding on. It is respectfully submitted that this does not corroborate the Appellant's case as, if, as the Respondent maintains, the Appellant rode his bicycle from the Respondent's left to the Respondent's right, and, as was found as a fact both by the learned trial judge and the Federal Court, the collision was with the Respondent's offside headlamp it seems probable that the combination of the Appellant's own momentum and the momentum imported by the collision with the Respondent's motor car would tend to throw him on to the place where the blood spot was found. Further or alternatively the Respondent submits that there is no evidence (save possibly Omar) that the blood spot was where the Appellant initially fell.

p.28,
11.10-12

p.27,
11.28-30
p.55,
11.44-47

pp.14-15

14. The third factor relied on by the learned judge was the finding of the front wheel and the seat of the bicycle on the verge on the same side of the road as the blood spot. The Respondent respectfully suggests for the reasons given in the previous paragraph hereto and those given by Ong F.J. in the judgment of the Federal Court that the learned judge was wrong in attaching weight to this factor or concluding that it supports the Appellant's evidence.

p.54,
11.1-10

15. The fourth factor the learned judge relied on, namely the brake marks shown in photograph 3, was, as it appears to have been conceded in the Federal Court, on appeal, a false point, for Ong F.J. said in the Judgment of the Federal Court:

p.28,
11.17-29
separate

"...it is agreed that there is no evidence whatsoever to support the finding that the brake marks on photograph 3 of Exhibit P.1(8) were made by the motor-car and for the conclusion that impact took place on Respondent's side."

p.53,1.38 -
p.54,1.1

The Respondent further submits that examination of Photograph 3 does not justify the inference that the Respondent's car came from the Appellant's correct side of the road, which the trial judge sought to draw therefrom. It is significant that the brake mark does not appear to be visible in Photograph 4.

Separate
p.28,
11.18-20

Separate

p.29, 11.5-28	16. The Learned trial judge went on in his judgment to hold that the Appellant had not been guilty of contributory negligence. It is conceded that if the learned trial judge was right on his finding of fact, no issue of contributory negligence arises. Conversely, the Respondent respectfully submits that if the second version of the facts of the learned trial judge's two probable versions - namely the Respondent's version - is held to be the more probable, no issue of contributory negligence by the Respondent arises.	10
p.27, 1.39 - p.28, 1.1		
p.29, 11.2-4 pp.29-32	17. The learned judge, having concluded (it is submitted wrongly) that the Respondent was negligent, considered the question of the appropriate amount of damages.	
Not reproduced	18. By a notice of appeal dated the 24th day of August, 1972, the Respondent herein appealed to the Federal Court. The grounds of appeal were on questions of fact only and averred (it is submitted correctly) that the learned trial judge had failed to draw the right inferences from the evidence. These grounds appear in the memorandum of appeal dated the 27th day of September, 1972.	20
pp.34-36		
pp.37-48 pp.48-52	19. The appeal came on for hearing before the Federal Court (Azmi L.P. Suffian and Ong F.J.J.) on the 18th day of December, 1972. The Respondent tendered a written submission as did the Appellant herein to which counsel then spoke.	30
pp.53-57	20. The Federal Court reserved judgment until the 14th day of April, 1973, when Ong F.J. gave the judgment of the Court allowing the appeal of the Respondent herein.	
p.55, 11.31-33	21. After reviewing the evidence, Ong F.J. stated: "The judge was quite correct when he said that the main question is in what manner the accident took place."	
	and later on:	
p.55, 11.45-49	"The judge was also correct in holding that the offside front head lamp of the motor car came into contact with the right-hand side of the bicycle."	40

22. The Federal Court's conclusions differed however from the learned trial judge Ong F.J. put it this way:

"Where however the judge erred, in my view, is where he concluded that the Appellant when tested in cross-examination revealed a vital contradiction to his testimony. I have already quoted the relevant portion of the report and translation with bracketed interpolations of my own and also the cross-examination. With respect, I am unable to find any contradiction between them and his evidence in Court. There was no confusion as to the Plaintiff's position and the inference drawn by the learned judge that "If the version in his report which he made when the accident was still fresh in his mind, though perhaps he could have been excited is true, then his car could not have knocked into the Plaintiff's right side causing the injuries on the right. Apparently in the circumstances the injuries would have been sustained on the Plaintiff's left side, arose from the judge's taking the view that the Respondent was riding along his proper side of the road when in fact he was riding on the right-hand (incorrect) side of road from Bakar Arang to Sungei Patani."

p.56,
11.4-26

23. Thereafter the Federal Court decided that the evidence of Omar was unreliable. The learned trial judge had however not gone further in his judgment than summarising Omar's evidence and stating that it corroborated the Plaintiff without commenting on his credibility.

p.56,1.27 -
p.57,1.9

p.25,11.5-27
p.27,11.33-34
p.28, 1.8

24. It is respectfully submitted that:

(a) the judgment of the Federal Court arrived at the correct conclusion on the evidence

further or alternatively;

(b) the judgment of the Federal Court ought not now to be questioned as to the facts found by the Federal Court. As the trial judge based his judgment on inferences, the Federal Court was at no disadvantage on appeal.

25. In addition to the reasons given in its judgment, the Respondent also relies on the following matters of fact as supporting the conclusions of the Federal Court on the facts:

- pp.37-48 (a) the matters set out in the Respondent's written submission before the Federal Court;
- p.8,11.21-33 (b) the inherent improbability of the Appellant's account that the Respondent zig-zagged before striking him on his right side when there was no apparent reason for zig-zagging;
- p.14,11.42-43 (c) the fact that although the Appellant lived on the side of the road he alleged he cycled on to Sungei Patani, it would have been shorter for him to cut the corner of the road by riding on the wrong side according to Photographs 3 and 4; and 10
- Separate (d) the fact that the Appellant's bicycle was apparently not fitted with lights according to Photographs 1, 5 and 6.
- Separate
- pp.59-60 26. On the 3rd day of September, 1973, an order was made granting the Appellant final leave to appeal to His Majesty the Yang di-Pertuan Agong. 20

27. The Respondent respectfully submits that this appeal should be dismissed with costs for the following among other

R E A S O N S

- (1) BECAUSE the Judges of the Federal Court were entitled to make the findings of fact they made.
- (2) BECAUSE the Judges of the Federal Court having made careful and detailed findings of fact from the evidence it would be wrong to reverse the same. 30
- (3) BECAUSE the trial Judge's findings of fact were wrong and/or based on a misapprehension of the evidence.
- (4) BECAUSE the collision was wholly due to the negligence of the Appellant.

NIGEL MURRAY

No. 25 of 1973

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YAHAYA BIN MOHAMAD (Plaintiff)
Appellant

- and -

CHIN TUAN NAM (Defendant)
Respondent

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