Privy Council Appeal No. 3 of 1978

Muthusamy s/o Tharmalingam – – – – – *Appellant*

v.

Ang Nam Cheow – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JUNE 1979

Present at the Hearing:

LORD WILBERFORCE

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This is an appeal from the Court of Appeal Singapore by the plaintiff in a road accident case. The trial judge, D'Cotta J., concluded that the defendant (present respondent) was wholly to blame for the accident, in which the plaintiff was gravely injured. The Court of Appeal reversed that conclusion, and held that the plaintiff (present appellant) was wholly to blame.

At about 11 p.m. on 22 May 1973 the defendant was driving an Opel Commodore 2000 car, borrowed from his employer, from the City towards Changi Point where he lived. It is convenient to describe the City as to the North and Changi Point to the South to conform to the top and bottom of the police plan of the area. The defendant had been at a Chinese wedding party in the City, and was driving alone. The road was Upper Changi Road. It, perhaps curiously, had on the East side of the "centre" dotted line a lane width of about 13 feet, while the width of the lane on the West side was some 18 feet.

Coming into Upper Changi Road on its East side was Tangmere Road. It forked just before joining Upper Changi Road, the right fork going towards the City. That fork had a continuous white line dividing it into two lanes.

The plaintiff had finished his work and on a reasonably elderly motor cycle was going home. This journey, to which he was habituated, involved his taking the right fork of Tangmere Road with a view to crossing the East lane of Upper Changi Road into its West lane and turning North therein towards the City.

According to the plaintiff's evidence he stopped at the stop sign at the debouchment of Tangmere Road (a minor road), looked right, then left, then right. He saw the lights of a vehicle to his right, approaching him on Upper Changi Road. In his evidence he said that he reckoned them to be 120 yards away, and that they were somewhere

about the Chartered Bank. He said they were " much beyond " the bus stop on the East side of Upper Changi Road which stop he marked on the police plan, if it was anywhere near to scale (which it may not have been), as about 135 feet from his halting point in Tangmere Road. The plaintiff said that he crossed the East lane of Upper Changi Road, and turned towards the City having crossed the " centre " dotted line by 3 or 4 feet (having moved up from first to second gear) when he observed a car coming at him, very near, overlapping the West lane of Upper Changi Road. He said he veered left to avoid being hit by the car, but was unsuccessful.

The defendant's car sustained considerable damage to its off front side, that wing and headlight assembly being broken, and the bumper bent. The damage to the motor cycle was as follows: front offside crash bar dented: cylinder oil tank broken: offside petrol tank dented: offside footrest bent. The damage, and the injuries to the plaintiff, were consistent with a glancing impact and with the plaintiff's evidence of veering left too late to avoid collision, though neutral as to the point of impact.

The defendant (in summary) said that the plaintiff shot out of Tangmere Road into Upper Changi Road across his path: that he had no time to avoid the collision which happened about 8 feet into the East lane of Upper Changi Road. He denied that it was a glancing impact.

The motor cycle as a result of the impact was thrown (with the plaintiff) to the West side of Upper Changi Road. The defendant said that he pulled up beyond Tangmere Road, but that he heard a commotion from a group of people emerging from a café or canteen and drove on because he was frightened. To explain his fear he said they were crying " Assault, assault ", but later said he had not heard those words but only a commotion. The next morning he told his employer that he had driven the car into a tree: the employer collected the car and took it to a repair shop. The defendant only reported the accident to the police when the police discovered the car in the repair shop in the course of inquiries into the accident, and the employer told him to report it. The report when made said nothing of the circumstances of the collision. The trial judge inferred, correctly in their Lordships' opinion, that if the police had not found the car and connected it with the accident the defendant would never have said a word about it—apart from his lie to his employer. The trial judge said that the defendant's conduct was " such that it can only be attributed to one who knows full well that the accident occurred as a result of his negligence ". In their Lordships' opinion, while it was quite legitimate to have regard to this conduct as a part, and indeed an important part, of the circumstances involved in an enquiry into responsibility in law for the accident, the phrase selected by the judge was too absolute in form. But that is not to say that his finding on liability is thereby vitiated.

The trial judge thus expressed himself on the credibility of the defendant:

> " I did not believe the defendant at all. I watched him very closely when he was giving evidence and I also watched his demeanour and I was convinced that he was not a witness of truth. I rejected his evidence ".

In a further passage (page 35, Record), which in fact contained some errors of measurement, the trial judge nevertheless plainly accepted as a fact established by the evidence that the impact occurred when the plaintiff was over the dotted line in Upper Changi Road and had turned right towards the City, as the plaintiff had said.

There are two matters in the plaintiff's evidence which in their Lordships' opinion led to error in the judgment of the Court of Appeal: and it must be remembered as a matter of great importance that the Court of Appeal had before it, so far as oral evidence was concerned, merely a note of it by the trial judge based upon evidence given through an interpreter. According to that note the plaintiff originally said, in explaining the point of impact, that he was 3 or 4 feet " into Upper Changi Road ". His later evidence in chief and cross examination was clear that he was saying that he was 3 or 4 feet over the dotted line in Upper Changi Road on the West side when he tried by moving to his left to avoid the impact. This apparent discrepancy in his evidence is well explained when it is observed that he said that before emerging from Tangmere Road he was in the centre of the road: but when he drew his starting point on police plan " A.B. 3 " it was in the centre of the left lane of Tangmere Road, which has a solid white line down its middle. The Court of Appeal in reaching its conclusion relied much upon their assumption that the plaintiff had in this regard changed his story. Their Lordships do not consider that there is any justification for this view. The plaintiff's first reference to his position on the main road is clearly to be taken as a reference to his position on his correct lane of the main road, and the trial judge in his judgment so took it.

There is another point on which the Court of Appeal relied. The plaintiff, challenged upon his estimate that when he first saw the lights of a vehicle they were 120 yards away, said that it was twice the width of the trial courtroom—which would make it about 60 feet. The Court of Appeal treated it as an " undisputed fact " that the plaintiff saw the defendant's lights that distance only away. But this was not so. The plaintiff, as the judge said, was not good at distances: but his other evidence, which their Lordships would consider more reliable, was that they were " much beyond " the East bus stop—by the Chartered Bank, which is far beyond the 60 feet.

It is perhaps desirable to quote that which seems to their Lordships the crucial part of the judgment of the Court of Appeal. This was as follows:—

> " The real issue in this case is, where did the accident occur?. The Appellant said it occurred on his side of the road near the broken centre white line when the motor cycle shoot (sic) across the road. At first the Respondent said it occurred when he was three to four feet on the main road after passing the stop sign, that is on the Appellant's side of the road, but he later changed his story and said it occurred after he had crossed the broken centre white line implying that the Appellant went to the wrong side of the road and collided into him.
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> We are of the view that the trial Judge was wrong in his finding that the accident occurred after the Respondent had crossed the broken centre white line and had straightened his motor cycle and that it was a head on collision.
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> The damage to the Appellant's motor car and to the Respondent's motor cycle was on the offside of the vehicles. The Respondent suffered injuries to his right leg. After the accident the Respondent's motor cycle landed on the opposite side of the road. The Respondent, when he was at the stop sign, saw the lights of the Appellant's car fifty-nine feet away. All these undisputed facts support and are consistent with the version of the accident given by the Appellant and not the version given by the Respondent and it is clear that it could not have been a head on collision. In fact the Respondent's

> We have no doubt that the accident occurred in the way described by the Appellant, that the Respondent shot out of Tangmere Road. The Respondent, on seeing the Appellant's motor car about 60 feet away, should have waited at the stop sign and let the Appellant's motor car pass before crossing the road. We are of the view that this accident was caused solely by the negligence of the Respondent ".

It will be observed from this quotation that the Court of Appeal relied for its (in their Lordships' view) erroneous conclusion upon (*a*) a view that the plaintiff had changed his story and (*b*) that the plaintiff had first seen the defendant's vehicle lights 59 feet away. These they treated as " undisputed facts ". They were not.

There is one other point. The plaintiff drew on the police plan his approximate course across the East lane of Upper Changi Road to within the West lane and indicated with " XX " his estimate of the point of impact. The course drawn was a projection of the plaintiff's lane in Tangmere Road and consequently not quite at right angles to Upper Changi Road. The trial judge accepted that the distance from " XX " to the point where the motor cycle was found by the police—on top of the kerb on the West side of Upper Changi Road—about an hour and three quarters after the accident was 50 to 60 feet. It was argued that this supported the evidence of the defendant as to the point of impact, who had marked it in the East lane immediately opposite Tangmere Road and consequently considerably nearer the point where the motor cycle was discovered than the " XX " point. The trial judge did not consider that this driving back of the motor cycle some 50 to 60 feet threw doubt on the plaintiff's version, and their Lordships agree. It must be remembered that the damage to the motor cycle and car indicated very forceful impact with the leg guard and foot rest. No expert evidence was called to say that in this respect the plaintiff's point of impact was for this reason at all unlikely. It is not even certain that the machine came to rest where it was found much later by the police. And finally on this point their Lordships observe that the judgment of the Court of Appeal did not suggest that this point told against the plaintiff.

It is of course true to say that an appeal to a Court of Appeal is a rehearing of the case. But much authority goes to show that such a Court is, and indeed should be, much fettered in practice in its ability to disagree with findings of a trial judge in matters of this kind, particularly when they are restricted to the judge's notes of the evidence given, and given through an interpreter, and particularly when the judge has formed the opinion from the manner in which one of the parties has given his evidence that he was lying. Their Lordships do not propose to spell out further or repeat what has been previously said on this matter, inter alia by this Board in *Chow Yee Wah v. Choo Ah Pat* [1978] 2 M.L.J. 41. The Court of Appeal in this case has certainly not in express terms reminded itself of the practical fetters upon its ability to disagree with the findings of the trial judge. In effect it has said that despite the conduct of the defendant after the accident, and despite the bad impression as to his veracity made on the judge in the witness box, the judge should have accepted his evidence, and rejected that of the plaintiff. And this conclusion was based upon an erroneous assumption of two so-called " undisputed facts " as is shown by the passage already quoted.

For the defendant it was argued that this was after all a case of an emergence from a minor into a major road. The defendant might have been faced with an emergency and veered to his right into the West lane to avoid collision. But this was quite contrary to the defendant's evidence, and is the purest supposition of possibility. Their Lordships

agree with the Court of Appeal that the crucial question on liability was where in Changi Road the collision took place: but they are of opinion that the Court of Appeal failed to appreciate the practical limitations upon its ability in the circumstances of the case to disagree radically with the conclusion of the trial judge, and based its disagreement upon unsound grounds. Accordingly the appeal is allowed, and the judgment of the trial judge restored, and the defendant must pay the costs of the plaintiff in the Court of Appeal and of the appeal to this Board.