Privy Council Appeal No. 5 of 1973

Hitam bin Abdullah and Another – – – – – *Appellants*

v.

Kok Foong Yee (f) and Another – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH MAY 1974

Present at the Hearing:

LORD WILBERFORCE
LORD DIPLOCK
LORD CROSS OF CHELSEA
LORD KILBRANDON
SIR HARRY GIBBS

[*Delivered by* SIR HARRY GIBBS]

This is an appeal from a judgment and order of the Federal Court of Malaysia which dismissed an appeal from a judgment given by the High Court in Malaya in favour of the present respondents. The action was brought on behalf of the estate and dependants of Cheong Chok Heng (" the deceased ") who sustained fatal injuries when a motor car which he was driving collided with a lorry driven by the first appellant as servant or agent of the second appellant. The only issues at the trial were whether the collision had been caused by the negligence of the first appellant, and if so, whether the deceased had been contributorily negligent. The High Court answered the first question in the affirmative and the second in the negative and the Federal Court on appeal reached the same conclusions.

The collision occurred at about 2 o'clock in the afternoon on a roadway between Kuantan and Kemaman. The first appellant, who was driving the lorry in the direction of Kuantan, had rounded a right-hand bend and had driven for some distance along a straight stretch of road before his vehicle collided with the deceased's motor car which had been proceeding in the opposite direction. The photographs tendered in evidence show that each vehicle was damaged on its off-side at the front. The only direct evidence as to the occurrence was given by the first appellant and by another person who had been a passenger in the lorry. They asserted that the brakes of the lorry had been applied and the lorry had been stopped before the collision and that the collision was caused because the deceased drove his car on the wrong side of the road. Two other witnesses, both of whom were lorry drivers and acquaintances of the first appellant, said that they had seen the deceased driving in an erratic and dangerous manner before the collision occurred.

However, the trial Judge placed no reliance on any of this evidence. He did not accept the testimony of the first appellant and his passenger as to the manner in which the lorry had been driven or as to the position of the car, and he regarded the evidence of the other two witnesses as probably fabricated and as in any case not of assistance in relation to the question whether the deceased had been at fault immediately before the collision. His conclusions that the first appellant had been negligent and that the deceased had not been guilty of contributory negligence were based on the evidence of an Inspector of Police who visited the scene of the accident some time afterwards, and particularly on a sketch plan drawn by the Inspector which showed the position of the vehicles after the collision, the tyre marks seen on and near the roadway and two heaps of fragments of glass found in the vicinity, one on the roadway and the other on the grass verge beside it on the right-hand side having regard to the direction in which the lorry was proceeding.

The trial Judge found that some tyre marks, shown on the plan as A.1–A.3, A.4–A.5 and B.1–B.2, were made by the lorry. He considered that Mark A.1–A.3, which was partly on the roadway and partly on the grass verge to the left of it, showed that the first appellant had driven at great speed and had lost control of the lorry when negotiating the bend. Marks A.4–A.5 and B.1–B.2 were admitted by the appellants to have been made by the lorry and clearly showed that at the time of the collision the lorry was being driven over the crown of the road so that its off-side encroached on to its wrong side of the roadway. There were some further marks, C.1 and C.2, which the Judge found "could only have been caused by the offside wheels of the car" and which, if so caused, showed that the car was on its correct side of the road immediately before the collision. The Judge accordingly found that at the time of the collision, the car was well on its correct side of the road. He appears to have considered that the glass on the roadway marked the point where the collision occurred. On appeal, the Federal Court placed no reliance on the marks A.1–A.3 and expressed the opinion that the impact occurred somewhere between the two heaps of glass. However, that Court affirmed the conclusion of the trial Judge that at the time of the collision, the car was well inside its own half of the roadway and that the lorry was over the crown of the road.

Before their Lordships' Board, counsel for the appellants submitted that there was no evidence on which the trial Judge could conclude that the marks C.1–C.2 were made by the offside wheels of the car and that on the whole of the evidence the probability was that they were made by the car's nearside wheels; if so, the car was being driven on its incorrect side of the road and the trial Judge should at least have found that the deceased was guilty of contributory negligence. Further it was submitted that since the trial Judge had rejected the evidence of the eye-witnesses, the question was what inferences should properly be drawn from the facts disclosed by the plan and that the trial Judge was in no better position than an appellate Court to decide that question.

It is very well established that as a general rule, their Lordships' Board will decline to interfere with the concurrent findings of two Courts on a pure question of fact. The nature of the exceptions that will justify a departure from the Board's settled practice are set out in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C. 508 at p. 521. Lord Thankerton there said:

> "That in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure."

> He defined " miscarriage of justice " and then continued: " That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

Counsel for the appellants relied on this statement and sought to show that there was no evidence to support the finding that when the collision occurred, the car was on its correct side of the roadway. Their Lordships, however, consider that the sketch plan and photographs and the facts which they revealed as to the path taken by the lorry, the position of the two vehicles and of the two heaps of glass after the collision, and the nature of the damage suffered by the respective vehicles, provided some evidence from which it could have been inferred that the marks C.1–C.2 were made by the offside rather than by the nearside wheels of the car and that the car was accordingly on its correct side of the road. Having reached this conclusion, their Lordships do not think it proper to review the evidence with a view to considering whether the concurrent findings were correct. The fact that there were some differences between the reasons given by the trial Judge and those given by the Federal Court does not justify the intervention of the Board, *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy, supra,* at p. 521, and there are no other circumstances in the case that would justify a departure from the settled practice of the Board.

Their Lordships will therefore advise the Head of Malaysia that the appeal should be dismissed and that the appellants should pay the costs of the appeal.

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