13 of 1975

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 24 of 1973

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN

CHOP SENG HENG (Sued as a firm)
(Fourth Defendants) Appellants

- and -

THEVANNASAN S/O SINNAPAN
(First Defendant)

- and -

SING CHEONG HIN LORRY TRANSPORT CO. (Sued as a firm)
(Second Defendants)

- and -

PANG CHEONG YOW
(Plaintiff) Respondents

CASE FOR THE APPELLANTS

1. This is an appeal from a judgment dated 14th March, 1973 of the Federal Court of Malaysia (Appellate Jurisdiction) (Ali and Gill FJJ., Ong C.J. dissenting) allowing an appeal from a judgment dated 17th June, 1972 of the High Court of Malaya at Raub) whereby Suffian F.J. gave judgment for the Plaintiff Pang Cheong Yow against the Defendants for $47,125.30, having found the First and Second Defendants 75% to blame and the Third and Fourth Defendants 25% to blame for the accident in which the Plaintiff was injured. On appeal by the First and Second Defendants and on cross-appeal by the Third and Fourth Defendants, the Federal Court by a majority found the Third and Fourth Defendants 100% to blame for the said accident.

2. The accident in which the Plaintiff received injuries occurred on 4th February, 1969 at about 3.00 a.m. at or near the 4¼ mile

stone on the Bentong/Kuala Lumpar road in the State of Penang. At the time of the accident the Plaintiff was travelling as an attendant on motor lorry BL 5223 which was being driven by the Third Defendant Kow Chai alias Chew Chin along the said road in the direction of Kuala Lumpar. The Third Defendant was the servant or agent of the Fourth Defendants and at all material times was acting in the course of his employment. The motor lorry BL 5223 collided into the rear of another motor lorry BL 2715 which had been driven along the same road in the same direction by the First Defendant, but which at the time of the accident was in a stationary position in the road. The First Defendant was a servant or agent of the Second Defendants and at all material times was acting in the course of his employment.

3. After the accident the Third Defendant and the First Defendant made complaints to the Royal Malaysian Police at Bentong police station. A police officer at Bentong police station made a sketch plan of the scene of the accident. A Road Transport Officer made examinations of both of the motor lorries. The Third Defendant was charged in the Magistrates' Court at Bentong that at the material time and place he had driven motor lorry BL 5223 in a manner which was dangerous to the public, and on 12th January, 1970 he pleaded guilty to that charge.

4. The Plaintiff started the present action on 2nd February, 1970. He alleged that the collision had been caused by the negligence of the First Defendant and by the negligence of the Third Defendant or alternatively by the negligence of one or other of them, in the driving use and management of their respective motor vehicles. In particular he alleged against the First Defendant that he had parked his motor lorry without any or any sufficient lights, and had placed it in such a position as to disallow other traffic to pass him safely. Against the Third Defendant the Plaintiff alleged in particular that he had failed to keep any or any proper look-out, and that he had driven at an excessive speed in the circumstances. The First and Second Defendants by their Defence blamed the Third Defendant, and the Third and Fourth Defendants by their Defence blamed the First Defendant.

5. The action came on before Suffian F.J. on 17th April, 1972. Evidence was given by the Plaintiff and by the First Defendant. The

Plaintiff said (inter alia) that the lorry BL 5223 in which he was travelling rounded a sharp left hand blind corner and banged into the rear of a stationary lorry which was parked about 30 feet from the other side of the corner, without any lights on, the whole of the lorry being on the metal portion of the road. He said that the lorry BL 5223 was travelling at about 35 miles per hour. The First Defendant said (inter alia) that he had stopped the lorry BL 2715 because his attendant wished to urinate. He stopped the lorry four or five chains away from a bend, on a straight stretch of road, with the lights and indicator light on. Both the Plaintiff and the First Defendant said that it was misty at the material time.

6. Suffian F.J. gave judgment on 17th June, 1972. After summarising the evidence of the two witnesses, he found the following facts :

(i) that the road was wide enough to have allowed in the ordinary way the moving lorry to pass the stationary lorry in safety;

(ii) that the stationary lorry was parked on its correct side of the road;

(iii) that the stationary lorry had its lights on, including the indicator flasher;

(iv) that there was some mist around which somewhat reduced visibility;

(v) that the moving lorry was travelling at a moderate speed with its lights on when it ran into the rear of the stationary lorry;

(vi) that the First Defendant had parked the stationary lorry 30 feet from the exit of a blind left hand bend;

(vii) that the Third Defendant had worked long hours, but it had been possible for him to rest in between periods of work.

The learned Judge found that the primary cause of the accident was the fact that the First Defendant had parked his vehicle too near the exit of a blind corner. The learned Judge further held that the Third Defendant had driven

around the corner at a speed of 35 miles per hour, which in his opinion was a bit fast in the circumstances. He concluded that the First Defendant was 75% to blame,.and the Third Defendant 25% to blame, for the accident. He found that the special damages suffered by the Plaintiff were $7,125.30 and awarded $40,000 general damages.

7. By a notice of appeal dated 14th July, 1972 the First and Second Defendants appealed to the Federal Court of Malaysia (Appellate Jurisdiction). By a notice of cross-appeal dated 13th September, 1972 the Fourth Defendant cross-appealed to the Federal Court. The appeal came on before Ong C.J., Ali and Gill FJJ. on 2nd October, 1972.

8. The judgment of the Federal Court was delivered on 14th March, 1972. Ali F.J., with whose judgment Gill F.J. agreed, recited those parts of Suffian F.J.'s judgment which concerned findings of fact and apportionment of blame. He held that it was impossible for the Fourth Defendants to challenge the finding of liability against them, and agreed with Suffian F.J. that the Third Defendant was negligent in driving round the blind corner at 35 miles per hour. He held further that the First Defendant could not be said to have failed in his common law duty to take care by parking his lorry 30 feet from a corner. He referred to certain authorities relating to stationary vehicles, namely Chan Loo Knee v. Lai Siew San & Ord. /1961/ 1 M.L.J. 253; Kelly v. W.R.N. Contracting Limited /1968/ 1 W.L.R. 921; Coote v. Stone /1971/ 1 W.L.R. 279. He repeated that on the law as he found it the First Defendant could not be held guilty of negligence for having parked his lorry near the blind corner. Accordingly he would allow the appeal and dismiss the cross-appeal.

9. Ong C.J., in a dissenting judgment, stated that the learned trial Judge's finding of fact, namely that the collision occurred because the First Defendant had parked too close to the bend, should not be lightly disturbed in the absence of cogent evidence showing that he was demonstrably in error. He said that the conclusion that the accident occurred for this reason was irresistible; that the Third Defendant could not have

failed to see the huge vehicle ahead, unless it was concealed by the blind bend. He therefore rejected the First and Second Defendants' appeal. Turning to the cross-appeal of the Fourth Defendants, he held that the learned trial Judge had demanded of the Third Defendant a higher standard of care than was reasonable in the circumstances. He said that the Third Defendant could not reasonably be required to anticipate an obstruction lying directly in his path of which there were no warning signs whatsoever; even if the Third Defendant had been travelling at 25 miles per hour, he could not have avoided the collision. Accordingly he would dismiss the appeal and allow the cross-appeal.

10. The Fourth Defendants, the present Appellants, respectfully submit that the majority of the Federal Court of Malaysia erred in holding that the First Defendant, the present Respondent, was not guilty of any negligence in parking the lorry 30 feet from the exit of a blind corner. On the facts as found by the learned Judge, the Respondent created a dangerous situation in parking a large vehicle so close to a bend on a misty night. It was reasonably foreseeable that drivers of vehicles rounding the bend would find it impossible or difficult to take avoiding action. Neither on principle, nor on the authorities referred to by the Federal Court, was it correct in law to hold that the Respondent was not liable in negligence. The judgment of Ong C.J. was correct and should be approved.

11. The Appellants respectfully submit that the Federal Court further erred in holding that the Third Defendant was guilty of negligence in driving the lorry around the bend at about 35 miles per hour. The cause of the accident as found by the learned trial Judge, was the positioning of the Respondent's lorry close to the exit of the bend. The speed of the Appellants' lorry was moderate, and the accident would not have been avoided if it had been slower. There was neither negligence nor contributory negligence on the Third Defendant's part. The judgment of Ong C.J. was correct on this point also.

12. On 3rd September, 1973 the Federal Court of Malaysia made an order granting the Appellants leave to appeal to his Majesty the Yang Di Pertuan Agung.

13. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be reversed, and this appeal ought to be allowed with costs, for the following (amongst other)

R E A S O N S

1. That the majority of the Federal Court erred in holding that the Respondent could not in law be held to be guilty of negligence by parking his lorry near a blind corner.

2. That on the facts found by the learned trial Judge the Respondent was wholly to blame, and the Appellant's servant not at all to blame, for the accident in which the Plaintiff was injured.

3. That if contrary to the Appellants' contention their servant was in part to blame, the apportionment of blame made by the learned trial Judge ought to stand.

GIFFORD

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