Privy Council Appeal No. 25 of 1973

Yahaya bin Mohamad – – – – – – – – *Appellant*

v.

Chin Tuan Nam – – – – – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 21ST JULY 1975

Present at the Hearing :
LORD CROSS OF CHELSEA
LORD SIMON OF GLAISDALE
LORD KILBRANDON
LORD EDMUND-DAVIES
LORD FRASER OF TULLYBELTON

[*Delivered by* LORD EDMUND-DAVIES]

This is a plaintiff's appeal from the judgment of the Federal Court of Malaysia given on April 14, 1973, whereby it allowed the defendant's appeal from the judgment in the plaintiff's favour of Syed Agil Barakbah J. sitting in the High Court in Malaya on August 19, 1972. The substantial question raised by the appeal is whether the Federal Court was entitled to reverse the finding as to liability arrived at by the learned trial judge.

The action arose out of a collision between the plaintiff's bicycle and the defendant's motor-car on the Bakar Arang/Sungei Patani road at about 12.10 a.m. on September 12, 1968, as the result of which the plaintiff sustained personal injuries, of which the most important were fractures of the right knee and right femur. The road was 23½ feet wide and had a central white dotted line. The plaintiff was riding his bicycle towards Sungei Patani, the defendant driving in the opposite direction, and each had the proper lights. The crucial issue in the case was on which side of the line the collision occurred, the learned trial judge holding that the plaintiff was at all times riding properly on his left-hand side, the Federal Court concluding that he was over on the defendant's side and that it was on that side of the road that the accident occurred.

It is not unimportant to note at the outset how the parties had before trial presented their respective cases in their pleadings. In the Statement of Claim it was asserted that, as the plaintiff was riding about 4 feet from the grass verge on his left, he saw the defendant's car approach in a zig-zag manner, " travelling . . . from the left hand side of the road to the right hand side ", and that as a result, " 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 ". On the other hand, the motorist averred in his Defence that he kept throughout on his own side of the road, but that the plaintiff was negligent in the following respects (among others):

" (iii) Failing to *keep* to his proper side of the road.

(iv) Suddenly and without any warning swerving into the path of the defendant's oncoming car . . .".

At the trial the plaintiff testified that the car was about 191 feet away when he first saw its headlights " coming in a zig-zagging manner " into his side of the road and then back to its own side; that when he was about 3 feet from his nearside verge and the car about 40 feet away it came into his side and knocked into the front wheel of his cycle, adding that, " At the time of collision the car was at an angle, diagonally across the road towards my left grass edge." The defendant's evidence was that he was driving his car about 3 feet from his grass verge at " over 20 m.p.h." when he saw a bicycle light coming towards him on his side and about 100 yards away. Confronted by what must surely have appeared a situation of great danger, what did the defendant do to avert a seemingly inevitable collision? Did he immediately brake or swerve or take any other avoiding action? This was his evidence:

> " I continued driving on. 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. After the collision one of the wheels of my car landed into a hole on the left side of the road. I then got out of my car. I went to the cyclist and lifted his body from the lying position to a sitting position ".

A little later he added that at the time of the impact he saw the bicycle " thrown away towards the front " and that when he got out of his car " the bicycle was then lying near the centre white line on my side of the road ".

In deciding between these widely conflicting versions, the learned trial judge was assisted by other evidence, both oral and documentary. Omar Bin Mat Isa, who had known the plaintiff for a few years and whom the defendant said he knew by sight and had no reason to think bore him any grudge, testified that he was walking on his left side of the road and proceeding towards his home at Bakar Arang; that as he proceeded on his way he saw the plaintiff cycling on the other side of the road and going towards Sungei Patani; that after they had passed each other, he heard a collision at his rear, turned around, and saw the defendant's car " diagonally across the road. It was in the middle of the road."

Omar continued:

> " 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. . . . There was blood on the road at the place where I saw the plaintiff lying."

His evidence was strongly challenged by counsel for the defence, but he repulsed suggestions that he never saw the accident, that the car had

never been well out into the road and pointing diagonally towards its near-side, and that he did not arrive at the scene until " well after the accident ".

When the police arrived on the scene, they proceeded to make a sketch plan and took photographs of the car and the cycle *in situ*, and after daylight they took further photographs of the vehicles and of the *locus*. These, together with a key to the police photographs, were all put in as agreed documents at the trial. The sketch, not to scale, indicated that, on leaving the carriageway, the car had traversed a 15-foot grass verge and had then come to rest with the front nearside wheel in a drain. On the defendant's side of the central white line lay the cycle (minus its front wheel and cycle seat) and the plaintiff's shoes. On the grass verge, lying to the plaintiff's left, were the cycle seat and front wheel. Five feet eight inches from the plaintiff's nearside verge the road was stained with blood, and over an apparently wide area glass had been scattered over both sides of the white line (the car's front windscreen, and offside headlamp had been smashed), more of it lying on the defendant's correct side. Examination of the car also showed slight denting of the offside of the front bumper bar and the offside front mudguard, and on the offside of the cycle was a paint mark.

Of the eight police photographs the most important is the one described in the attached key as " showing the road from Sungei Patani leading to Bakar Arang and also brake marks ". Junior counsel for the respondent informed the Board that it, together with another showing the blood mark on the road, had been photographed by the police very early on the morning after the accident. The importance of the brake marks is that they start well on the defendant's wrong side of the white line and swing away in an arc towards his correct side, and the trial judge observed that they

> " tend to support the evidence of Omar who saw the defendant's car first diagonally across the centre of the road on the plaintiff's side and then moving to its left into the defendant's side to stop with one of its wheels in the drain ".

One other piece of evidence which must be referred to is the defendant's police statement given in Malay within an hour of the accident. The English translation contained the following passage:

> " . . . I saw a male cyclist coming from the right 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 . . . ".

The trial judge read this as an assertion that the plaintiff had crossed from the defendant's right to his left, and described it as " a vital contradiction " to the defendant's testimony. But in giving the judgment of the Federal Court, Ong Hock Sim F.J. said that there had been a mistranslation of the report and that in truth what the defendant had told the police was, " I saw a male cyclist *riding on* the right-hand side of the road from Bakar Arang going towards Sungei Patani . . . ". The Board has had some difficulty in seeing that the new version makes any substantial difference, but, accepting though it does the substituted translation, the question remains unanswered as to whether when the defendant spoke of " the right-hand side of the road " he was referring to *his* right-hand side or, to the cyclist's right-hand side. And in this context it must not be forgotten that, as has earlier been pointed out, the pleaded defence was that, instead of keeping to his *proper* side of the road, the plaintiff suddenly swerved into the path of the defendant's car, which can only have meant that the plaintiff allegedly came across the road from the defendant's right and proceeded towards his left.

Their Lordships revert to the brake marks, to which the trial judge understandably attached importance. As to these Ong Hock Sim F.J. said,

> " . . . it is agreed that there is no evidence whatsoever to support the finding that the brake marks on photograph 3 . . . were made by the motor-car and for the conclusion that the impact took place on respondent's side ".

Their Lordships have to say that they are unable to accept this rejection of the photograph. There was indeed no " evidence " called regarding them, for the police photographs and the key thereto were agreed documents and they therefore needed no proof. Furthermore, it is clear that the trial proceeded on the basis that the brake marks *were* made by the defendant's car; for example, the defendant's counsel used them in his closing address to attack the plaintiff's evidence that at the time of the collision the car was pointing in the direction of his nearside grass verge, while the plaintiff's counsel retorted that the defendant was unable to explain how they were made. Not until the defendant's Memorandum of Appeal does the origin of the marks appear to have been challenged. Unfortunately, neither counsel who appeared before the Federal Court was present before the Board and their Lordships are therefore unable to understand how or why the agreement referred to was reached. But their Lordships are quite clear that the trial was conducted on the wholly different basis that the brake marks were those of the defendant's car and were thus directly relevant to the issue of liability.

The Board would nevertheless have seriously considered the suggestion made by respondent's counsel that the case be remitted for re-trial by another judge had it entertained any doubt as to the proper outcome of the appeal. But it has not. This is a perfectly ordinary case arising out of a traffic accident which the trial judge resolved by having regard, as he should, to all the evidence adduced. On behalf of the motorist, it has been said that the learned judge could not make up his mind which of the sharply conflicting accounts of the accident he should accept and that, in accordance with the decision in *San Seong Choy & Ors. v. Yuson Bien* ((1963) 29 M.L.J. 235), he thereupon proceeded to decide the case on the photographs, plans, and the nature of the damage to both vehicles, but fell into error in carrying out that exercise. Indeed, the Federal Court said that:

> " The *only* issue to be decided is whose version is more probable, adopting the test in *San Seong Choy & Ors. v. Yuson Bien* ".

Their Lordships, with all respect, cannot agree, for its adoption involves ignoring the oral testimony of the parties themselves and that of Omar. Counsel for the respondent submitted that the learned trial judge derived no assistance from their testimony and formed no view as to their credibility; otherwise he would have said so, and he did not. As Mr. Chye pithily put it, " The Judge used the real evidence to resolve the question of credibility which he had not decided for himself ". With respect, nothing could be wider of the mark. In *The Hontestroom* ([1927] A.C. 37) Lord Sumner said (at p. 47):

> " The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it ".

But in fact Syed Agil Barakbah J. *did* express a view about the credibility of the witnesses whom he had seen and heard and, though he rightly proceeded to test their evidence by the other available material, it was on the basis of their testimony that he arrived at the specific finding of fact that the collision occurred on the plaintiff's side of the road. Thus, he referred in his judgment to " the plaintiff's *corroborated* version ", which

indicated his acceptance of the evidence of the seemingly independent Omar, whose integrity had been directly challenged and whom he could not possibly have regarded as a source of corroboration had he not considered that such challenge had failed.

The percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral testimony must be very small, and this is certainly not one of them. To say that all its features can be wholly explained by accepting one side rather than the other would be inaccurate; for example, the distribution of debris as marked on the sketch-plan is in some respects difficult to comprehend. But the Board entertains no doubt that the oral evidence, and particularly that of Omar, and the manner in which it was given, must have played a dominant part in the formation of the trial judge's conclusion. The Federal Court, though lacking the inestimable advantage of seeing the witnesses, thought fit to say that "Omar lied so brazenly" and that he "continued to lie". But their Lordships have no doubt that this is not one of those rare cases where an appellate court, lacking the advantage of seeing and hearing the witness, was justified in coming to such a conclusion on credibility. Certainly, the fact that the trial judge's note of Omar's evidence contained after one sentence in brackets the words "corrects evidence" could not possibly provide such justification. Their Lordships have no reason to think that the trial judge "has not taken proper advantage of his having seen and heard the witnesses" (see *Watt or Thomas v. Thomas* [1947] A.C. 484 at 487–8 *per* Lord Thankerton) and they regard it as unthinkable that he would have failed to make clear that he rejected Omar's testimony had he not been satisfied as to its acceptability. The learned judge manifestly regarded it as acceptable, and the Board see no reason why it should do otherwise. Nor, in its judgment, should the Federal Court. If Omar's evidence *is* accepted, counsel for the respondent concedes that his client is bound to fail in this appeal. He is right in making that concession, and their Lordships will accordingly tender to the Yang Dipertuan Agung the advice that the plaintiff's appeal should be allowed, the Order of the Federal Court set aside and the Order of the trial judge restored and that the respondent should pay the costs of the appeal to the Federal Court and of this appeal.

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In the Privy Council

YAHAYA BIN MOHAMAD

v.

CHIN TUAN NAM

DELIVERED BY
LORD EDMUND-DAVIES

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