22/83

No. 1 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE COURT OF APPEAL IN SINGAPORE

BETWEEN:

TAN CHWEE ANG — Appellant (Plaintiff)

- and -

HSIA KHO ING — Respondent (Defendant)

CASE FOR THE APPELLANT

	Record
1. This is an appeal from the Judgment and Order of the Court of Appeal in Singapore (Wee Chong Jin, C.J., Kularsekaram and Rajah J.J.) dated 4th August, 1980, which allowed an appeal against the Judgment and Order of the High Court of the Republic of Singapore (Choor Singh J.) dated the 8th February, 1980. By the Order of the Court of Appeal in Singapore the judgment of the court below was set aside and the claim of the Appellant for damages for personal injuries and consequential losses made against the Respondent was dismissed. The High Court (the order of which was set aside as set out above) had found the negligence of the Respondent to be the sole cause of the Road Traffic accident which had given rise to the Appellant's claim herein and had accordingly awarded the Appellant $21,500.00 damages against the Respondent.	Pp. 21 - 22 Pp. 16 - 18 Pp. 22 - 23 Pp. 21 - 22 Pp. 16 - 18 P. 18

2. The principal questions calling for decision in this case are:

(i) Whether or not it is permissible for the Court of Appeal in Singapore to reverse

findings of fact of a trial judge without giving a reasoned judgment for so doing,

(ii) Whether or not there is material in the instant case upon which the Court of Appeal in Singapore could have reversed the findings of fact of the learned Trial Judge, and

(iii) Whether or not the Court of Appeal in Singapore applied the correct principles of law in considering findings of primary fact made by the learned Trial Judge.

Pp. 3 - 5

3. By his Statement of Claim dated 13th February, 1978, the Appellant herein claimed against the Respondent herein damages in respect of personal injuries and consequential loss suffered by him as a result of the negligent driving of the Respondent. Paragraphs 1 and 2 of his said Statement of Claim read as follows:

P. 3 Ll.11 - 33

"1. On or about the 2nd day of September, 1975, the Plaintiff was rising motor cycle No. SAL3749 along Paya Lebar Way intending to turn right into Aljunied Road when he was run into by motor car No. SM1371D which was travelling along Paya Lebar Way towards Paya Lebar Road, Singapore.

2. The said collision was caused solely by the negligence of the Defendant.

PARTICULARS OF NEGLIGENCE

(a) Failing to keep any or any proper lookout.

(b) Driving at an excessive speed in the circumstances.

(c) Failing to observe the presence of the Plaintiff on his motor cycle on the highway.

(d) Driving into the Plaintiff.

(e) Failing to conform to the traffic lights which were red against him.

(f) Failing to stop, swerve, slow down or otherwise avoid the said collision."

Record

The Plaintiff alleged that he had suffered extensive injuries to his left side including multiple fractures of the leg and substantial special damages. Pp. 4 - 5

3. The Respondent delivered a defence dated the 15th day of May, 1978 in which the fact of a collision was admitted but the alleged negligence was denied and the following averments of fact and allegations of negligence against the Appellant were made by paragraph 3 thereof. Pp. 6 - 7

"3. Further or alternatively the said matters were caused wholly or in part by the Plaintiff's negligence. P. 6 Ll.21 - 34

PARTICULARS

(a) Failing to keep any or any proper lookout or to observe or heed the presence or approach of the Defendant's motor car.

(b) Driving too fast.

(c) Turning right in the face of the Defendant's oncoming motor car.

(d) Failing to apply his brakes in time or at all or so to steer or control his motor cycle as to avoid the collision."

4. At the trial of the action, which commenced before Choor Singh J. on 8th February, 1980, the quantum of damages which the Appellant would be entitled to receive subject to the question of liability was agreed at $21,500.00. An agreed bundle of documents was put into evidence which comprised medical and police reports, a police plan and key and a statement made by the General Electric Company of Singapore Private Ltd with a sketched plan annexed explainining the phasing of the traffic lights at the relevant junction. It will be observed that the phasing of the lights at this junction gave an opportunity at one stage in the phase for vehicles travelling from each of the four directions to turn right whilst a green filter arrow was lit in favour of the vehicle wishing to turn right during which time oncoming traffic was subject to a red phase prohibiting such traffic from travelling across the path of traffic turning Pp. 7 - 14 P. 7 1.25 P. 7 1.27 Pp. 42 - 45

Record

right. This phase in each instance followed the phase in which traffic travelling from the same direction had been permitted to proceed generally across the junction by means of a green light. (It is convenient to explain at this stage that it was the case of the Appellant that he had travelled along Paya Lebar Way to the junction with Aljunied Road with green lights generally in his favour as he approached the junction; he had stopped just beyond the white line intending to turn right into Aljunied Road and the filter lights had then become green in his favour. The period during which the lights were generally green in his favour is the "B" phase illustrated at the bottom left hand side side of page 44 of the record; the period during which the Appellant was entitled to turn right is the "D" phase illustrated at the bottom right hand side of page 44 of the record. Despite the nomenclature it is clear that the "D" phase follows the "B" phase.)

P. 44

P. 42

Pp. 7 - 9

5. The sole witness called to give oral evidence on behalf of the Appellant herein was the Appellant himself. After explaining how he had come to stop beyond the stop line as set out in the previous paragraph hereto the Appellant continued his evidence in chief as follows:

P. 8 Ll.2 - 8

> "I waited for the green arrow. When the traffic light changed to green arrow I proceeded to turn right. As I was turning I saw a car coming from the opposite direction. It did not stop. I expected it to stop. It came and knocked into me."

P. 8 Ll.5 - 8 In cross examination it was suggested to the Appellant that he was behind a lorry waiting to turn right at the said junction and that he shot out from behind this lorry but this suggestion was denied by the Appellant.

P. 10 6. Police Sergeant Yeo Ah Bee was called as the first witness on behalf of the Respondent. Evidently the purpose of calling him was to adduce the following evidence:

P. 10 Ll.10 - 12

> "Driver of car told me that m/cyclist came out from behind a lorry. He gave me number of the lorry".

The Appellant respectfully submits that this evidence was not then admissible. More importantly in cross examination the Sergeant

produced a written statement made by the Defendant to him in Hokkien. In that statement the Defendant had said: P.10 Ll.18 - 20 & Pp. 46 - 48

> "When I came to a distance of about two car lengths from the junction, I noticed that the traffic had changed into green, ie in favour of vehicles travelling along the New Road towards the junction. So I proceeded on. As I was nearing the stop line I noticed only a lorry (XA52K) stationary at the junction from the opposite waiting to turn right. It was somewhere in the middle of the junction." P.47 Ll.27 - 37

It is respectfully submitted that because of the phasing of the traffic lights adverted to in paragraph 6 above, this statement could not have been correct; if a lorry was waiting in the middle of the junction to turn right the phase in traffic was generally authorised to proceed along Paya Lebar Way ("B" phase) must have already commenced and thus the statement that the lights became green two cars' lengths from the junction cannot be correct.

7. The Respondent thereafter gave evidence on his own behalf and claimed:

> "I was doing 30 mph as I approached the junction. There was no vehicle directly in front of me. There was a lorry stationary in the centre of the junction. It was waiting to make a right turn. A m/cycle came behind the lorry from its offside. It was intending to turn right. I could not stop in time." P. 10 Ll.32 - 40

which was in conflict with his written statement to Sergeant Yeo. In the course of his cross-examination he acknowledged that in his initial report to the police the same day he had made no reference to the existence of a lorry at the material time. P. 13 Ll.35 - 42 & P.36 Ll. 20 - 31

8. No further evidence was thereafter called on behalf of the Respondent and this failure was subject to criticism by Counsel for the Appellant in his address to the Learned Trial Judge, although no note was made thereof by him. This criticism was based upon the following passage in the written Statement of the Respondent produced by Police Sergeant Yeo Ah Bee. P. 8 L.9

P. 10 Ll.20 - 21

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P.47 Ll.10 - 16

"I had four passengers in my car at the time of accident. Three of them who were seated at the rear did not witness the accident but the one who was seated on the front passenger's seat witnessed it. He is known to me as Soh Eng Tiang."

P.34 L.2

This tallied with his earlier report to the police about the accident. Further it seems that Soh Eng Tiang had been brought to court although he was not called on the Respondent's behalf. This appears from the note of the Learned Trial Judge where he records the Respondent as saying in his evidence in chief, after dealing with the fact that he was driving the relevant car at the relevant time,

P.10 Ll.29 - 30

"I was sending some of my workers home. Seated beside me was Soh Eng Tiang (identified)."

P.14 Ll.10 - 14

Pp. 16 - 18

Pp. 16 - 17

P. 17 Ll.31 - 38

9. Having heard the evidence and the submissions of Counsel the learned Trial Judge gave judgment for the Plaintiff in the agreed sum on the day of the Trial. Grounds of judment were given on 17th April, 1980. The learned Trial Judge summarised the evidence of the parties and deduced that the Respondent had taken some sixty one feet to pull up. He then stated:

P.17 Ll.39 - 51

"I accepted the evidence of the plaintiff because in my opinion he was speaking the truth. In my opinion there was a failure on the part of the defendant to keep a proper lookout. Furthermore, the plaintiff had the right of way. The length of the brake marks also indicated that the defendant was travelling at speed and it was more probable than not that he tried to rush through the junction when the traffic lights were against him. In my opinion he was solely responsible for the accident and there was no evidence of negligence on the part of the plaintiff."

10. It is respectfully submitted that the learned Trial Judge was correct in the findings that he made. It is further respectfully submitted that the primary conclusion of the learned Trial Judge in this case was based upon his assessment of the Appellant herein as a witness. It is implicit, that having had the opportunity of considering his demeanour, the learned Trial

Judge was not prepared to believe the evidence of the Respondent. The learned Trial Judge evidently tested his conclusions as to the inherent credibility of the parties against the other elements in the case, in particular the length of the brake marks. It is, in the respectful submission of the Appellant, clear that he did not misuse his position as Trial Judge nor fail to take due advantage of seeing and hearing the witnesses.

11. The Respondent herein gave Notice of Appeal to the Court of Appeal in Singapore by notice dated 29th February, 1980. In his Petition of Appeal dated 16th May, 1980 the Respondent herein advanced the following two grounds only in support of the same: P. 19 P. 20 - 21

> "(a) The learned Trial Judge erred in law and in fact in concluding from the length of the brake marks that the Appellant was travelling at speed and was trying to rush through the traffic lights. P. 20 L. 32 - P. 21 L3
>
> (b) The learned Trial Judge erred in law and in fact in holding the Appellant wholly negligent against the weight of the evidence."

12. It appears from the "Judgment" of the Court of Appeal in Singapore that the Respondent's Appeal to that Court came on for hearing on 4th August, 1980, when Counsel for the parties were heard and the Record was read. It was thereupon adjudged: P. 21 - 22

> "1. That the Appeal be allowed with costs in this Court of Appeal and in the Court below; P. 22 Ll.3 - 10
>
> 2" That the deposit in the sum of $500.00 as security for costs of the Appeal be paid out to the Appellant's Solicitors, Messrs. Chan, Goh & Company by the Accountant General of Singapore".

None of the members of the Court of Appeal in Singapore hearing the Appeal in the instant matter (Wee Chong Jin, C.J. Kularsekaram and Rajah J.J.) delivered any oral or written judgment to indicate the reasons why the Court of Appeal in Singapore had allowed the Appeal of the Respondent herein.

Record

13. The Court of Appeal in Singapore is a statutory creation governed by Part IV of the Supreme Court of Judicature Act, 1969 (Cap 24); power to make rules of court is conferred by Section 80(2) thereof. The Rules of the Supreme Court, 1970 (S.274) clearly envisage, in the respectful submission of the Appellant, reasoned judgments being delivered, although there is no specific requirement as to this. The Appellant relies especially on Order 57 rule 19 of the said rules which provides

> "19. (1) The judgment of the Court of Appeal shall be pronounced in open Court, either on the hearing of the appeal or at any subsequent time of which notice shall be given by the Registrar to the parties to the appeal.
>
> "(2) Such judgment may be pronounced notwithstanding the absence of the judge who composed the Court of Appeal or any of them, and the judgment of any Judge not present may be read by any Judge present."

14. It is respectfully submitted that the failure to deliver a reasoned judgment, when a Court of Appeal must, by necessary implication, have reversed findings of primary fact, is a material error. It is respectfully submitted that in these circumstances it is incumbent upon the Board to examine for it self upon hearing this Appeal all issues that were before the local appellate court. There is no material upon which the local Court of Appeal could have reviewed the findings of fact other than material before the Board. It is not apparent, and it is respectfully submitted that it should not be inferred, that the Court of Appeal in Singapore reminded itself of the practical fetters surrounding its ability to differ on questions of fact from the judge in the Court below. It is further submitted that in all appellate judgments where findings of fact are reversed some reference - albeit a passing one - to this problem needs to be made. In The 'Michael' 1979, 2 Ll. L.R 1 at page 12 Roskill L.J. gave an example of how it is incumbent upon an appellate court to examine its duties when it is reviewing a decision of a Trial Judge sitting alone when that Judge has based his conclusions largely upon the demeanour of the witnesses whom he has seen and heard. He did so in the following terms which the Appellant would respectfully adopt:

"The position of an Appellate Court in these circumstances has been considered so often and, indeed, very recently by the House of Lords that there is no need for a review of the authorities in this judgment. We were, in particular, referred by Mr Evans to Powell v. Streatham Manor Nursing Home (1935) A.C. 243 and Onassis v. Vergottis (1968) 2 Lloyd's Rep. 403. The speeches of their Lordships in those two cases contain many references to other decisions, both of the House of Lords and of other tribunals, in the same field, to which it is not necessary to refer.

It is, of course, clear that no trial Judge can make himself immune from the due process of judicial review by an Appellate Court by seeking to rely upon the demeanour of witnesses when other evidence relevant to his evaluation of their demeanour points strongly the other way. But an Appellate Court must always be very slow to disturb the judgment of a Judge who both saw and heard the witnesses in a case where he, unlike the Appellate Court, must clearly be in a much better position to determine where the truth lies. There are valuable passages in Powell's case in the speeches of Viscount Sankey L.C. at page 251, Lord Atkin at page 55 (where his Lordship stresses that this is especially so in those cases which involve character and reputation), Lord Macmillan at page 257 and Lord Wright at pages 265-266, quoting Lord Sumner in The Honestroom (1926) 25 Ll. L.Rep. 377; (1927) A.C. 37 at pages 381, 383 and 47 and 50. A trial Judge must always test his impression of the veracity of a witness based on demeanour against other evidence in the case which may point the other way. There is no doctrine of judicial infallibiity for trial Judges. In the Onassis case the trial Judge was criticised in this Court for not putting into the scales against his assessment of the demeanour of the plaintiff's witnesses a certain document pointing the other way, a view with which the majority of the House of Lords subsequently did not agree. Clearly if a trial Judge fails to take proper advantage of his position in seeing and hearing the witnesses an Appellate Court will be more

> ready to interfere. But even then it will be very slow indeed to do so unless his failure to take advantage of his position is clearly shown. Of course, as Lord Pearce put it in his dissenting speech in the Onassis case, a trial Judge has also to consider probabilities as a touchstone of truth. But probabilities are no certain guide to the determination where truth lies, for human beings do not always act or react as an objective onlooker might think was probable."

15. That these principles are equally applicable in appeals from Singapore and Malaysia is clear from the review thereof by the Board in Chow Yee Wah and Another v. Choo Ah Pat (1978) 2 M.L.J. 41. It is convenient to observe that Lord Fraser of Tullybelton observed in that case, giving the judgment of the Board, that all the Federal Court of Malaysia had before it was the Judge's notes of the evidence, perhaps augmented in places by a transcript of the shorthand notes and stated (at page 42):

> ".... it is obvious that the disadvantages under which an Appellate Court labours in weighing evidence are even greater when it has to rely on such an incomplete record than when it has verbatim transcript."

16. In so holding this echoed an earlier judgment of the Board delivered by Lord Robson in Khoo Sit Koh v. Lim Thean Tong (1912) A.C. 23 where he said at page 325:

> "The case was tried before the judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present where those Courts have only his note of the evidence to work upon, there are many

> points which owing to the brevity of the note, may appear to have been inperfectly or ambiguously dealt with in the evidence and yet were elucidated to the judge's satisfaction at the trial either by his own questions or by the explanations of counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial judge based on verbal testimony."

17. It is respectfully submitted that in road traffic accident cases the disadvantage of an absence of transcript is all the more apparent. This is clear from Yahaya bin Mohamad v. Chin Tuan Nam (1975) 2 M.L.J. 117 and Muthusamy s/o Tharmalingam v. Ang Nam Cheow (1979) 2 M.L.J. 271. In the latter case Lord Russell of Killowen delivering the judgment of the Board said:

> "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."

Record

It is to be observed that a judgment in the Muthusamy case was delivered on 25th June 1979 (and reported in the same year in the Malaysian Law Journal as an appeal from the Court of Appeal of the Republic of Singapore) prior to
Pp. 21 - 22 the delivery of the judgment of the Court of Appeal in Singapore in the instant case.

18. The case of Ramoo s/o Erulapan v. Gan Soo Swee (1971) 3 A.E.R. 320 is an example of a case involving traffic lights in Singapore where the judgment of the learned Trial Judge was restored by the Board.

19. In the respectful submission of the Appellant there is no material on which the Court of Appeal in Singapore could have properly allowed the appeal in the instant case.

Pp. 22 - 23 20. On 13th October, 1980 the Court of Appeal in Singapore (Wee Chong Jin C.J., Chua and Choor Singh J.J.) granted the Appellant leave to appeal to the Judicial Committee of the Privy Council.

21. The Appellant respectfully submits that
Pp. 21 - 22 this appeal should be allowed with costs before the Privy Council and in the Court of Appeal in Singapore, that the judgment and order of the Court of Appeal in Singapore be set aside
Pp. 15 - 18 and that the judgment and order of the learned Trial Judge should be restored for the following, among other

R E A S O N S

(1) BECAUSE the Court of Appeal in Singapore failed to apply the correct principles of law in their consideration of the instant case.

(2) BECAUSE the Court of Appeal in Singapore failed to give due consideration to the findings of fact by the learned Trial Judge.

(3) BECAUSE the Court of Appeal in Singapore had no material which might have entitled them to reverse the findings of fact made by the learned Trial Judge.

(4) BECAUSE the Court of Appeal in Singapore failed to give any judgment showing that they had applied the correct principles of law.

(5) BECAUSE the learned Trial Judge was entitled to make the findings of fact that he did.

(6) BECAUSE the findings of fact of the learned Judge are correct on the evidence.

(7) BECAUSE the learned Trial Judge was right.

(8) BECAUSE the Court of Appeal in Singapore was wrong.

10 NIGEL MURRAY

No. 1 of 1981

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL IN SINGAPORE

B E T W E E N:

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- and -

HSIA KHO ING — Respondent (Defendant)

CASE FOR THE APPELLANT

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