

No. 32 of 1976

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

LUDHIANA TRANSPORT SYNDICATE Appellants

- and -

SOMANAIDU S/O BANKARIAH (Defendants)

- and -

10 CHEW SOO LAN (widow) and
CHONG CHAP SENG the Administratrix
and Co-Administrator of the estate of
CHOONG TUNG CHEUNG also known as
CHONG THONG CHONG, deceased Respondents
(Plaintiffs)

CASE FOR THE APPELLANTS

RECORD

20 1. This is an appeal from a judgment dated p.41-48
the 19th July 1976 of the Federal Court of p.18-24
Malaysia (Appellate Jurisdiction) GILL C.J.
WAN. SULEIMAN and ALI. F.J.J. allowing an
appeal from a judgment dated the 12th February
1976 of the High Court of Seremban whereby
AJAIB SINGH, J found the driver of the motor
car in which the deceased husband of the
First Plaintiff was travelling 100% to blame
for the accident in which the deceased died
and gave judgment for the Defendants. On
30 appeal by the Plaintiffs the Federal Court
found the Defendants 50% to blame and the
driver of the vehicle in which the deceased
was travelling 50% to blame for the said
accident and accordingly gave judgment for
the Plaintiffs in the sum of \$22,071.50 and
interest.

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2. The Plaintiffs brought this action as administratrix and co-administrator of the deceased's estate for the benefit of the widow and dependant children of the deceased.

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3. The accident in which the deceased husband of the First Plaintiff died occurred on the 31st December 1970 at about 12.50 pm at or near the 12½ milestone on the Seremban/Kuala Pilah Road in the Police District of Kuala Pilah. At the time of the accident the deceased was travelling as a passenger in her Mercedes Benz motor car NB 5522 driven by Chia Chah Hoo as his servant or agent along the said road in the direction of Seremban. At the same time a motor lorry ND 1969 driven by the Second Defendant as servant of the First Defendants in the course of his employment was travelling in the opposite direction on the said road. The Mercedes Benz motor car collided with the motor lorry and the deceased was killed.

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4. After the accident the Second Defendant and Chia Chah Hoo made statements to the Royal Malaysian Police at Terachi Police Station. A police officer at Terachi Police Station made a sketch plan of the scene of the accident.

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5. The Plaintiffs started the present action on the 15th November 1972. They alleged that the collision had been caused by the negligence of the Second Defendant as servant or agent of the First Defendants in his driving of the motor lorry. In particular the Plaintiffs alleged that the Second Defendant was negligent in that he failed to give way to the deceased on seeing the deceased's motor car approaching from the opposite direction and failed to manoeuvre so as to avoid hitting the deceased's motor car approaching from the opposite direction and failed to manoeuvre so as to avoid hitting the deceased's motor car. The defendants by their Defence blamed the driver of the Deceased's motor car and in particular alleged that the said driver drove too fast, drove onto the wrong side of the road and knocked into the motor lorry which was on its correct side of the road.

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(v) that it was the motor car rather than the motor lorry which was in all probability travelling very fast,

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(vi) that there was a scratch mark on the left hand side of the road as one comes from Seremban and glass from the car windscreen on the verge beside the motor lorry which tended to confirm that the collision was on the motor lorry's side of the road.

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The learned Judge found that the driver of the deceased's motor car was wholly to blame in that he failed to exercise due care and attention by driving fast and encroaching into the other half of the road and that the Plaintiffs had failed to prove any negligence on the part of the Defendants.

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8. By a notice of appeal dated the 9th December 1975 the First and Second Plaintiffs appealed to the Federal Court of Malaysia (Appellate Jurisdiction). The Appeal came before GILL C.J. Wan Suleiman and Ali F.J.J. on the 7th April 1976.

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9. The Judgment of the Federal Court was delivered by Gill C.J. on the 19th July 1976. The learned judge first summarised the course of the proceedings and referred to the earlier action tried by Ajaib Singh J. After reviewing the evidence heard and the findings of the learned trial Judge, Gill CJ gave the judgment of the Appeal Court in the following terms.

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(i) the learned trial Judge was speculating when he drew the inference that the lorry driver could not have been travelling fast,

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(ii) the fact that after impact the car turned right round and landed on the left hand side of its road was highly indicative of the speed of the lorry,

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(iii) the learned trial Judge ought not to have accepted the explanation of the lorry driver as to why he had not specifically mentioned in

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his report that the car encroached onto his side,

(iv) there was no evidence as to how the scratch mark on the road came to be there and no evidence that it was made by the car; neither the position of the scratch mark nor the place at which broken pieces of glass were found gave a clear indication as to the point of impact,

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10 (v) Using the words of Thompson C.J. in Foong Yit Voon v Yap Thian & Anor (1963) MLJ 104 the Federal Court thought that they were in as good a position or as bad a position as the trial judge to form a view as to what happened,

(vi) It was stated by Lord Edmund Davies in Yahaya Mohamad v Chin Tuan Nam (1975) 2 MLJ 117 that the percentage of traffic accident cases which can be satisfactorily decided wholly independent of oral testimony must be very small. However the oral testimony of the 2 witnesses was well balanced; the trial judge did not decide the case wholly on the oral testimony of the witnesses. Nothing much turned on the evidence as to the mark on the road or the glass on the verge. The balance of probability therefore was in favour of the view that the drivers of both vehicles were to blame and it was impossible to say in what proportion the blame should be allocated between them.

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(vii) the trial Judge in the absence of cogent and reliable evidence on which he could come to a definite finding out to have apportioned liability equally between the drivers.

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10. The Appellants respectfully submit that the Federal Court of Malaysia erred in taking the view that they were in as good or as bad a position as the trial Judge to form a view as to what happened when they had not themselves seen or heard the witnesses and had not been able to judge their demeanour. The Federal Court did not attach sufficient

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weight to the finding of the trial Judge that he accepted the evidence of the Second Defendant and he rejected the evidence of the driver of the motor car.

11. The Appellants respectfully further submit that the Federal Court was wrong to reject the inferences drawn by the learned trial Judge from the evidence other than that testified by the witnesses involved in the collision as being either incorrect or speculation. The Federal Court was, it is respectfully submitted, further wrong to substitute its own inferences and a different conclusion drawn from the same or a similar kind of evidence. 10

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12. On the 13th September 1976 the Federal Court of Malaysia made an order granting the Appellants leave to appeal to his Majesty the Yang di Pertuan Agong.

13. The Appellants respectfully submit that the judgment of the Federal Court of Malaysia was wrong and ought to be allowed with costs for the following (amongst other). 20

R E A S O N S

(1) BECAUSE the Federal Court were not in as good a position as the trial Judge to form a view as to what happened and should not have disturbed the findings of the learned trial Judge.

(2) BECAUSE the Federal Court erred in rejecting the finding of the learned trial Judge that he accepted the evidence of the second Defendant and did not accept the evidence of the driver of the motor car. 30

(3) BECAUSE the Federal Court erred in rejecting the inferences drawn by the trial Judge from the other evidence and substituting its own inferences.

A. KING

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LUDHIANA TRANSPORT SYNDICATE
and SOMANAIDU S/O BANKARIAH

Appellants
(Defendants)

- and -

CHEW SOO LAN (Widow) and
CHONG CHAP SENG the Administratrix
and Co-Administrator of the estate
of CHOONG TUNG CHEUNG also known
as CHONG THONG CHONG, deceased.

Respondents
(Plaintiffs)

C A S E

DOUGLAS GOLDBERG & CO.,
Goldsmiths' House,
137/141 Regent Street,
London W1R 7LD.