

**AINAN SALSABEELAA BIN HJ ABDUL WAHAB
AWG HJ ABDUL WAHAB BIN HJ MOHD SALLEH**

**... 1st Appellant
... 2nd Appellant**

AND

UMAR HATHA MOHAMED SALIHU

... Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2005)**

Cons, P.; Power and Mortimer, JJ.A.
18th May, 2005.

Damages for injuries in traffic accident – no evidence at trial of working of automated traffic lights – no submissions relying thereon allowed on appeal – crucial issue of negligence rightly determined by Judge – credibility of unsupported evidence is a matter for trial judge.

Mrs. Susanna Lim of M/S Susanna Lim Partnership for the Appellant.
Mr. Siva Sankaran and Mr. Yusof Halim of M/S Cheok Sankaran Halim for the Respondents.

Cases cited in the judgment:

Joseph Eva Ltd v Reeves [1938] 2 All E.R. 115

Hopwood Homes Ltd v Kennerdine [1975] R.T.R. 82

Miller v Evans [1975] R.T.R. 70

Overseas Investment Pte Ltd v Anthony William O'Brian & Anor [1988] 3 MLJ 332

Radburn v Kemp [1971] 3 ALL ER 249

Rahmah and Ors v Ali Indra Putra and Anor [2000] JCBD 274

Power, J.A.:

These 2 appeals, Civil Appeals Nos. 1 and 5 of 2005, have been heard together. We will deal first with Civil Appeal No. 1.

Both appeals arise out of a traffic accident which occurred on 4th January 2001 at the traffic light controlled intersection where Jalan Basir comes onto Jalan Beribi. A Toyota Corolla BF5267 being driven by Panchatcharam Ramamoorthy (PW4) in which the plaintiff was a passenger came into collision at that intersection with KB1323, also a Toyota Corolla, owned by the Second Defendant and being driven by the First Defendant (D1). It was the intention of PW4 to drive straight across the intersection onto Jalan

Kumbang Pasang which is a continuation of Jalan Basir on which he was driving. He said that, having a green light, he drove onto the intersection.

D1 had proceeded towards the intersection along Jalan Kumbang Pasang. He said that it was his intention to make a right hand turn into Jalan Beribi. This would take him across the path of any vehicle proceeding, as PW4 was, across the intersection from Jalan Basir to Jalan Kumbang Pasang. He said that having stopped for a red light he then proceeded onto the intersection in accordance with a green arrow which allowed him to make a right hand turn.

The Plaintiff having been injured in the resulting collision instituted action for damages for personal injury against the Defendants.

The matter came on for hearing before the Chief Justice. Having considered the evidence he made the following findings of fact:

“There is no evidence of malfunction of the automated traffic lights system so that, as already mentioned, when it is red light at Junction A, it would automatically be green at junction E. I have no hesitation in concluding that, when PW4 drove into the junction box, D1 had in fact stopped at junction as he said, albeit, in view of the evidence as a whole, for a very short time, when the lights changed to green for him to proceed on.”

He went on later to find:

“I find therefore on the balance of probabilities that PW4 driving BF5267 was already some distance down the yellow box when D1 entered the yellow box from Junction A and the vehicles collided at point C.

Before the collision D1 had not, on his own admission, seen BF5267 since he entered the yellow box and as I have mentioned already it was the shout from his front seat passenger that alerted him to the presence of the other car.

According to the Sgt. (PW1) the plaintiff’s car had crossed six lanes and a road divider and had 2 more lanes to cross to reach Jalan Kumbang Pasang, whereas the defendant had crossed only 3 lanes when the accident occurred. It was put to the Sgt. that counting lanes was not necessarily a correct method of calculating the distance that a vehicle had covered. The Sgt’s answer was that this showed how far the car had travelled.

It may not be an absolutely correct method of calculating the exact distance covered by a vehicle, it certainly seems to me to be a rough guide to comparing the distances covered provided the traffic lanes demarcated on the road were of uniform width. There is no evidence suggesting that the lanes mentioned by the Sgt were not so.

Based on the Sgt.'s observations and in the absence of any exact measure of distances, I find on the balance of probabilities that PW4's vehicle had in fact entered the yellow box from Junction A first and was closer to the junction it was heading for, thus having covered greater distance than had D1 in the opposite direction.

It is difficult to comprehend how a prudent and careful driver, keeping a proper lookout for other traffic, would have not seen the approaching vehicle in such circumstances having crossed six lanes, until his front seat passenger warned him about the approaching vehicle. Belated though his reaction was, it must be recognized that it was such that it avoided any fatalities resulting from the collision."

The Chief Justice was satisfied that the Plaintiff was an "innocent passenger" and that "PW4 having entered the yellow box on green light when D1 had stopped at Junction A on red light and, later at the change of the traffic light to green for him, D1 had failed in complying with the *Radburn Test* (*Radburn v Kemp* [1971] 3 ALLER 249) in (i) not satisfying himself that it was safe for him to drive on into the yellow box, (ii) not taking the utmost care upon entering the yellow box to save harmless people who rightly were already on the junction before he entered it and (iii) failing to prove that the other driver PW4 if he had seen the car before the collision could have done anything to avoid it."

The Chief Justice was, in short satisfied that PW4 had driven his vehicle onto the intersection when permitted to do so by a green light and that D1 had driven his vehicle onto the intersection when permitted to do so by a green arrow but that he had failed to take proper care by keeping a proper lookout when so doing. The Defendants now appeal against that decision.

Mrs Lim, before dealing with her grounds sought to open her argument by asserting that "understanding the automated traffic light system at the junction where the collision occurred" was an "important" part of her appeal. She had in her meticulously prepared written submission, usefully submitted to the court well in advance of the hearing, set out in great detail the working and sequences of the "automated traffic light system". However the fatal flaw in his approach, and in the grounds that rest upon it, is that there was no evidence in this regard called by either side. There is no evidential basis upon which to mount the assertions that followed. Given the lack of evidential basis they become untenable and the Grounds upon which they rest fail inlimine.

In the outcome Mrs Lim only argued two of her Ground of Appeal – Grounds 1 and 12. Under Ground 1 she urged that the Chief Justice had erred in law and in fact when he failed to consider the Plaintiff's inconsistent versions of the collision against the defendants consistent version. She referred to inconsistencies submitting that these so manifestly cast doubt upon the evidence of PW4, the driver of BF 5267, that we should reject his evidence that the traffic light was green when he drove onto the intersection. She submitted then that the evidence of D1 should be accepted and that the court below should have been satisfied that, given the unsatisfactory evidence of PW4 and the

accepted evidence of D1 that he had proceeded on a green light, PW4 had driven onto the junction against a red light.

It is all too easy to criticize a witness on the ground of inconsistency for failing to recall with exactness the multiplicity of incidents occurring during the few seconds of a traffic accident.

The assessment of such a witness' evidence and the weight to be given to any inconsistencies is essentially a matter for the trial judge.

The Chief Justice plainly did not regard PW4 as an untruthful witness. We see no warrant for this court to hold that because there were unsatisfactory features in PW4's evidence the Chief Justice was wrong to have in large part accepted it and that he should have rejected it and found that he drove through a red light.

We pause here to deal with the submission, made under this head, that evidence towards which no cross-examination is directed is "therefore deemed admitted". This contention seeks to rely upon a statement of the then Chief Justice Sir Denys Roberts in *Rahmah and Ors v Ali Indra Putra and Anor* [2000] JCB 274 at 284 where he said "as was held in *Overseas Investment Pte Ltd v Anthony William O'Brian & Anor* [1988] 3 MLJ 332, where one party gives sworn uncontradicted testimony to prove a fact, that evidence should be accepted, *as there is nothing to the contrary.*" (Emphasis supplied)

The written argument did not include the immediately following observation by Sir Denys: "I should make it clear that, if I were in any doubt as to the evidence of PW1, I would reject it. I am, however, sure that what he said is correct and that the collision occurred as he described it."

It is clear, even from the above statement when it is considered in full, that the extent to which the observations can be applied depends very much upon the facts of each case. There is, for example, something "to the contrary" if there are opposing facts sworn to by the witnesses for each side. In such a case even if cross-examination is not directed to all of the matters sworn to by one or other side the trial judge is quite entitled to accept one version and to reject the other. Further in the present case a reading of the cross-examination of Mr Yusof Halim, who appeared for the plaintiff, makes it plain that he was challenging the whole version of the defendants and their witnesses.

We return to Mrs Lim's argument. In Ground 12 Mrs Lim submits that the Chief Justice erred in his conclusion as to the point of collision. It must be accepted that Mrs Lim has demonstrated that the Chief Justice may have been wrong in his finding as to the point of impact and we do find some difficulty with his finding which accepts that each driver proceeded onto the junction on a green light. What, however, must be borne in mind is that for the plaintiff to succeed it was necessary only for him to establish some degree of negligence on the part of the driver of KB 1323. If we are satisfied, even though criticisms might be levelled at some findings, that the Chief Justice correctly found on the evidence before him that there was negligence on the part of D1 then this appeal must fail. Was the finding of the Chief Justice that D1 failed to take proper care by keeping a

proper lookout when he drove onto the junction justified upon the evidence? That is the crucial question for this court's decision.

We are satisfied that he clearly was justified in making that finding as it was squarely based upon the evidence of D1 himself and, to a lesser extent, upon that of his passenger who shouted to alert him to the presence of the other vehicle. In his Affidavit Evidence in Chief, D1 said:

“Whilst waiting for the traffic light to turn green at Junction A, I saw a car (which I am now informed was Toyota Corolla bearing registration plate number BF 5267) (‘BF 5267’) being driven in the innermost right lane of Jalan Basir (as one faces Jalan Tutong) towards the mouth of the junction, which I have marked ‘E’ in the Sketch (‘Junction E’). Before BF 5267 reached the mouth of Junction E I saw the driver of BF 52267 turning towards the direction of the side lane to Junction F (leading into Jalan Kiulap Link). At that time the traffic light at Junction E was green.

When the driver of BF 5267 whom I am now informed is one Panchatcharam Ramamoorthy (‘P. Ramamoorthy’) was driving towards the direction the direction of the side lane to junction F (leading into Jalan Kiulap Link) the traffic light and the arrow (pointing right towards Junction F) at Junction A (where I was waiting) lighted up green. I accelerated and entered the yellow box. At that time I noticed there was another car traveling slightly behind us on the lane to my left also going towards the direction of Junction F.

When I was roughly three-quarters into the yellow box, when I have nearly reached Junction F suddenly Ashadi (the front seat passenger) shouted to me that BF 5267 is coming towards us; at this time the traffic light at Junction E would have been red. I re-acted immediately by driving KB 1323 away from Junction F that is, I immediately swerved to my right to avoid BF 5267 (which was coming towards me at high speed on the left side) towards the direction of the next junction which I have marked ‘G’ on the sketch (‘Junction G’). BF 5267 did not stop nor did P. Ramamoorthy swerve. BF 5267 rammed/collided head-on and violently into the middle of KB 1323 (at the left front and rear doors) causing KB 1323 to spin where it eventually stopped inside Junction G (see the sketch).”

In cross-examination D1 said:

“Q Put to you that you failed to observe the road in front of you?

A What do you mean by road in front. I was turning. I was concentrating on the road in front of me.

Q What was in front of you that you were concentrating on?

A On the yellow box towards junction F.

Q When you observed BF5267 earlier going to the left and then swerving back, were its headlights on at the time?

A Yes, they were on.

Q When you were turning right into junction F, did you not see its headlamps?

A No. ”

We were referred by Mrs Lim to:

Hopwood Homes Ltd v Kennerdine [1975] R.T.R. 82

Miller v Evans [1975] R.T.R. 70

And *Joseph Eva Ltd v Reeves* [1938] 2 All E.R. 115

The plaintiff and the Chief Justice relied upon:

Radburn v Kemp [1971] 3 All E.R. 249.

All, except for *Radburn's* case, involved crossing against a red light which, for the reasons we have given, we cannot accept that he was established so to have acted.

None of the authorities suggest that a driver entering a junction in the circumstances here obtaining is in any way relieved of the duty to keep a proper lookout of that junction and of oncoming vehicles.

There was clearly evidence to found the finding of the Chief Justice that there was negligence on the part of D4.

This Appeal must fail.

Appeal fail