SOO HOO SENG KOON

v.

LEE SENG & ANOR

Court of Appeal, Putrajaya
Vernon Ong, Kamardin Hashim, Yew Jen Kie JJCA
[Civil Appeal No: P-04(W)-14-01-2018]
13 February 2020

Damages: *General damages for personal injuries suffered in accident — Appeal against — Whether High Court correct in disallowing Magistrates' Court's award to appellant of RM24,000 for fractures of four ribs — Whether High Court Judge misdirected herself for failure to consider relevant evidence in testimony of relevant expert witnesses*

The appellant appealed against the decision of the High Court Judge ('HCJ') in allowing the respondents' appeal with cost and setting aside the judgment of the Magistrate given earlier in favour of the appellant. The appellant claimed against the respondents for damages for personal injuries resulting from a road traffic accident. Liability was decided 100% on the respondents. The Magistrate allowed the claim and awarded a sum of RM27,000 as general damages which included damages awarded for the fractures of four ribs amounting to RM24,000. The other was RM3,000 damages awarded for left empyema thoracic. The respondents appealed to the High Court, which allowed the appeal. The HCJ set aside the award of RM24,000 for the fractures of the four ribs and only maintained the sum of RM3,000 as general damages being the award for left empyema thoracic. The HCJ acknowledged the appellant's testimony that he was not involved in any other accidents other than the one on material time and that he suffered these injuries as a result of that accident. The HCJ also acknowledged that the appellant's testimony was unchallenged during the trial but the HCJ rejected the appellant's testimony giving reason that the same was 'self-serving' and as such not to be trusted. Her Ladyship then substituted with her own findings of fact before allowing the respondents' appeal. Hence, the appellant's appeal.

Held (allowing the appellant's appeal):

(1) The HCJ had misdirected herself for failing to consider relevant evidence in the testimony of the relevant three expert witnesses. The salient points of SP3's evidence, *inter alia*, were that SP3's report was tendered without any qualification and agreed to by the respondents' counsel. The injuries stated in the report corresponded with the date of the accident and fractures of the four ribs were mentioned. This part of the evidence was ignored by Her Ladyship; SP3 stated that he mentioned in his report of the fractures of the four ribs based on a CT thorax scan. SP3 further stated that the ribs fractures could not have been detected by the appellant by x-ray because the method was not the gold standard for detecting fractures and the best possible way was vide a CT thorax scan which he did with the positive findings. (para 16)

(2) From the evidence advanced by PW3, PW4 and PW5, it could be distilled that, *inter alia*, from the time the appellant saw a doctor at the emergency department, there had been signs that the ribs fractures did occur as a result of the accident at material time, only that they were not detected due to various reasons, such as the x-rays were not done properly, through lateral and oblique views in addition to the one done by way of frontal view. The fractures were not visible enough unless a CT scan was done, which was eventually conducted. The respondents only disputed the ribs injuries but not that the injuries were caused by something else. This was a general and bare denial and not specific which was answered by the appellant through the oral testimonies and medical reports from PW3, PW4 and PW5. This court was thus persuaded that the appellant did suffer the ribs injuries during the accident. (paras 19-21)

Case(s) referred to:

Muhamad Rasul Aliff Jaffar v. D Utrawadi Damodaran & Anor [2015] PILRU 49; [2015] 1 PIR 68 (refd)

Multar Masngud v. Lim Kim Chet & Anor [1981] 1 MLRA 157 (refd)

Sekaran Muniandy & Anor v. Raman Varathan [2016] MLRHU 188 (refd)

Legislation referred to:

Courts of Judicature Act 1964, s 68(1)(a)

Rules of the Court of Appeal 1994, r 16

Counsel:

For the appellant: Syamsul Adzha Hassan (Mohamed Haniff Ahmed Shariff with him); M/s Haniff & Partners

For the respondents: Sean Teh Weng Kim; M/s JS Sidhu & Associates

JUDGMENT

Kamardin Hashim JCA:

Introduction

[1] This is an appeal by the appellant/plaintiff against the decision of the High Court Judge given on 20 July 2017 in allowing the respondents/defendants' appeal with cost and in setting aside the judgment of the Magistrate given earlier in favour of the appellant/plaintiff.

[2] The matter involves a claim by the appellant/plaintiff against the respondents/defendants for damages for personal injuries resulting from a road traffic accident which had occurred on the 21 January 2011. The facts of the accident and the injuries suffered by the appellant/plaintiff had been outlined in the statements of claim at pp 136-145 of the Appeal Record.

[3] Liability was decided 100% on the respondents/defendants. The learned Magistrate allowed the claim and awarded a sum of RM27,000 as general

damages which included damages awarded for the fractures of four ribs which amounting to RM24,000. The other was RM3,000 damages awarded for left empyema thoracic.

[4] Dissatisfied with the decision of the learned Magistrate, the respondents/defendants appealed to the High Court. Upon hearing parties, the learned High Court Judge allowed the appeal and reversed the Magistrate's decision. The learned High Court Judge set aside the award of RM24,000 for the fractures of the four ribs and only maintained a sum of RM3,000 as general damages being the award for left empyema thoracic. Hence, the appellant/plaintiff's appeal before us.

[5] We heard the appeal and after considering the submissions of parties on the sole issue raised and ventilated before us, we unanimously allowed the appeal with costs. The decision of the learned High Court Judge was set aside and we reinstated the decision of the learned Magistrate in its place.

[6] Even though the matter was originated from the Magistrate Court, the parties requested for our written grounds in allowing the appeal as the matter involved some important points of law, to which we obliged.

[7] For ease of reference, the parties will be referred to as they were in the Magistrates' Court. This ground of judgment will be confined to one issue only which is whether the learned High Court Judge was correct in her decision in disallowing the plaintiff's award for RM24,000 for the fracture of the four ribs.

At the Magistrates' Court

[8] The learned Magistrate allowed an award for the injuries to the four ribs as general damages with a total sum of RM24,000 even though the injuries were disputed by the defendants. The defendants' objection was solely based on the initial medical report of the plaintiff that did not indicate that the plaintiff had suffered such injuries due to the accident.

[9] But, nevertheless, the learned Magistrate relied on the subsequent medical reports and medical experts' evidence by both side who testified that in fact the plaintiff did suffer such an injuries to his ribs and haemothorax. The learned Magistrate also accepted the plaintiff's own evidence that he was not involved in any other accident other than the road traffic accident pleaded in the statement of claim. The Magistrate made a finding of fact that the plaintiff did suffer ribs and haemothorax injuries due to the accident happened on the 21 January 2011.

[10] As regard to the quantum, the learned Magistrate relied on the Compendium of Personal Injury Awards as Revised on 17 April 2014 where for rib fractures, the award was between the range of RM3,500 and RM4,500 for each rib. The learned Magistrate also relied on *Muhamad Rasul Aliff Jaffar lwn. D Utrawadi Damodaran & Satu Lagi* [2015] PILRU 49, where RM38,000 was awarded for fractures of the right second and third ribs, fractures of the

left first and second ribs and bilateral hemopneumothorax with bilateral lung confusion.

[11] The learned Magistrate in his grounds also did consider the value of Malaysian Ringgit had been depreciated due to effluxion of time.

At the High Court

[12] Aggrieved, the defendants appealed to the High Court. The appeal was allowed. The decision of the learned Magistrate in allowing damages for the fracture of four ribs was set aside with costs.

[13] In respect of the ribs injuries, Her Ladyship held that: (i) there was no credible evidence to show that the plaintiff had suffered the ribs injuries due to the 21 January 2011's road accident; (ii) the initial medical report and the x-ray taken thereafter did not show such injuries suffered by the plaintiff; (iii) that all the three medical experts called by parties could not confirm that the plaintiff had suffered the ribs injuries during the said accident; and (iv) the only evidence the court has was from the uncorroborated self-serving evidence of the plaintiff which was not supported by any other evidence or record; as such it should not to be trusted.

Our Decision

[14] Leave to appeal was granted by this Court Panel comprising Tengku Maimun Tuan Mat JCA (as learned CJ then was), Umi Kalthum Abdul Majid, JCA and Abdul Rahman Sebli JCA (now FCJ) on 14 December 2017 under s 68(1)(a) of the Courts of Judicature Act 1964 and r 16 of the Rules of the Court of Appeal 1994.

[15] At the outset, we observed that the decision of the learned Magistrate was based on findings of fact. The learned High Court Judge had acknowledged that there was this testimony of the plaintiff that he was not involved in any other accidents other than the one on 21 January 2011 and that he suffered these injuries as a result of that accident. The learned High Court Judge also had acknowledged that the testimony of the plaintiff was unchallenged during the trial but the learned judge rejected the plaintiff's testimony giving reason that the same is 'self-serving' and as such not to be trusted. Her Ladyship than substituted with her own findings of fact before allowing the defendants' appeal.

[16] We had an opportunity to peruse the appeal records and we observed that the learned High Court Judge had misdirected herself for failure to consider relevant evidence in the testimony of the three expert witnesses, ie SP3 (Dr Tiow Choo Aik), SP4 (Dr Fauzi bin Jamaluddin) and SP5 (Dr Irfan Ali bin Hyder Ali). The salient points of SP3's evidence are as follows:

(i) SP3 stood by his report dated 23 July 2013 (P7) which clearly stated that the date of the accident was 21 January 2011. This

report P7 was tendered without any qualification and agreed to by the defendants' counsel;

(ii) The injuries stated in the report P7 corresponded with the date of the accident and mentioned the fractures of the four ribs. This part of the evidence was ignored by Her Ladyship;

(iii) SP3 had stated that he still mentioned in his report P7 of the fractures of the four ribs based on a CT thorax scan done on 7 February 2011. SP3 further said when he saw the plaintiff, he already knew of the ribs injuries;

(iv) SP3 further stated that he is not sure why the ribs fractures were not detected when the plaintiff was first examined on 21 January 2011 but added that it could not have been detected by x-ray because the method is not the gold standard for detecting fractures and the best possible way is via a CT thorax scan which he did on 7 February 2011 with the positive findings;

(v) Under cross-examination, SP3 said that it is normal that rib fracture would not necessarily show up in an x-ray procedure; and lastly that,

(vi) SP3 did not aware of any intervening event between 21 January 2011 to 1 February 2011.

[17] SP4 testified the following:

(i) In SP5's report (P8), he did not mention of the ribs fractures but SP4 and SP5 were the ones who suggested the CT thorax scan since the plaintiff had complained of pain in the left side of his chest;

(ii) SP4 was shown P8 which had stated that the x-rays were done twice but still did not show any fractures. SP4 explained that the x-rays were done from the front (frontal x-ray) will not be able to detect the fractures, unless SP5 had done the lateral and oblique view x-rays;

(iii) According to the plaintiff's medical records which SP4 brought with him during the trial, only x-ray from the frontal view was done;

(iv) SP4 further said that the tell-tale sign which prompted him to conduct the CT scan was when he aspirated 1.3cc of blood from the plaintiff's chest cavity, signifying a deeper problem;

(v) SP4 had concluded that from the CT scan, there were fractures of the ribs by just looking at the result;

(vi) SP4 also added that it is possible for the plaintiff to live on, even when the fractures were not detected initially when he went to the emergency department as long as they did not interfere with breathing and not all ribs fractures require treatments and they can be left alone to heal on their own. This corroborated with the plaintiff's statement that he was asked to go back and the hospital would monitor his condition in a week;

(vii) SP4 said from the history in the records, the plaintiff had told him that he was allowed to go home right after visiting the emergency department immediately after the accident. At home, he persistently experienced pain, and decided to return to the hospital;

(viii) SP4 added during cross-examinations that the reason SP5 did not comment on the fractures was because he is a lung specialist and only a radiologist can confirm a fracture; and

(ix) Again, SP4 was asked whether there was any intervening event between 21 January 2011 to 1 February 2011 to which he replied he did not know.

[18] Now the salient testimony of SP5 which with due respect was ignored by the learned High Court Judge as well:

(i) he did not personally examine the patient but did meet him. He stated that the plaintiff was complaining of chest pain and he had met with an accident prior to the visit on 21 January 2011. Again, here the plaintiff did not state any intervening event between 21 January 2011 and 1 February 2011 apart from the accident on the 21 January 2011;

(ii) The diagnosis then was left pleural effusion;

(iii) SP5 added that when he saw the plaintiff, he was worried that there might be injuries in the lungs because he had aspirated fluid mixed with blood. When this happened, he referred the patient to the thoracic surgeon (SP4 in this case). Upon taking over of the case, the thoracic surgeon ordered a CT scan; and

(iv) During re-examination, SP5 concluded that the final provisional diagnosis was post-traumatic haemothorax which means fractures of ribs puncturing the lungs.

[19] What can be distilled from those evidence advanced by PW3, PW4 and PW5 were these:

(a) The plaintiff had been complaining of chest pain ever since he was admitted on 1 February 2011.

(b) The final diagnosis was haemothorax, ie fractures of ribs based on CT scan.

(c) All three witnesses could not confirm whether there was any intervening event between 21 January 2011 and 1 February 2011.

(d) However, all of them confirmed that the plaintiff did not mention any other accident between that periods other than the one on 21 January 2011. All of them confirmed that the plaintiff had been staying at home after the accident.

(e) From the time the plaintiff had seen a doctor at the emergency department, there had been signs that the ribs fractures did occur as a result of the accident on 21 January 2011, only that it was not detected due to various reasons, such as the x-rays were not done properly, through lateral and oblique views in addition to the one done by way of frontal view. And the fractures were not visible enough unless a CT scan is done, which was eventually conducted.

(f) The plaintiff was able to live on despite the ribs injuries, when it was not detected because ribs injuries do not normally require intervention at all as long as they do interfere with breathing.

(g) There was no record of the plaintiff having difficulties breathing apart from having chest pain.

[20] From the pleading, it shows that the defendants only disputed the ribs injuries but not that the injuries were caused by something else. This is clear from para 8 of the Statement of Defence, as follows:

> "8. Defendan-defendan tidak mengaku bahawa plaintif telah mengalami kecederaan, kerosakan dan kerugian yang dinyatakan dalam perenggan 6 Pernyataan Tuntutan dan meletakkan plaintif di bawah beban pembuktian yang ketat."

[21] It is our considered view that para 8 above was a general and bare denial and not specific which was answered by the plaintiff through the oral testimonies and medical reports from PW3, PW4 and PW5 as we discussed above. We are persuaded that the plaintiff did suffer the ribs injuries during the accident on 21 January 2011.

[22] In *Multar Masngud v. Lim Kim Chet & Anor* [1981] 1 MLRA 157, the Federal Court held:

> "[1] The Appellate Court loathes to disturb the findings of facts by the trial Court. But in the circumstances of this case, the Federal Court found that they had to interfere as the Federal Court was satisfied that crucial evidence has been misconstrued resulting in the uncertainty of the first respondent's evidence as

to how he came in contact with the motorcycle being put in a favourable light and the consistency of the appellant's evidence being disregarded.

[2] On the evidence, the Federal Court was satisfied that the 1st respondent was wholly to be blamed for the accident.

[3] The appellant's evidence was consistent with his report and the sketch plan and his evidence as to how the accident occurred was not challenged. The 1st respondent's report, on the other hand, was at a variance with his evidence in Court and the sketch plan.

[4] Although in this case the trial court did not assess damages provisionally which practice requires that assessment should be made even if the decision was against the plaintiff claimant, s 69(1) of the Courts of Judicature Act gave the Federal Court all the powers and duties of the High Court in relation to appeals.

[5] Having regard to the fact that this case was decided in 1976 and with inflation, it should be accepted that money nowadays cannot be regarded as having the same value as in 1976. Considering all the circumstances, the appellant was awarded RM22,000 for pain and suffering, loss of amenities and earning capacity."

[23] In *Sekaran Muniandy & Anor v. Raman Varathan* [2016] MLRHU 188, Lim Chong Fong JC (when His Lordship then was) had decided:

"14. According to the appellants, the initial medical examinations as seen in the reports from the Bukit Mertajam and Seberang Jaya hospitals showed only subluxation/dislocation of the respondent's right shoulder. There were x-rays of the shoulder taken during that medical examination at both hospitals on the day of the accident on 26 August 2012. The appellants therefore contended that there was no fracture of the humerus.

15. However the respondent pointed out that the subsequent medical examinations conducted on 27 February 2014 and 31 December 2014 as seen in the reports of the Penang Gleneagles hospital and the Sungai Petani Pantai hospital respectively showed that there was a fracture of the right humerus. Both medical examination included x-ray too. In the former, Dr M. Shunmugam opined that "There also appears to be a deformity of the head of the humerus probably due to the fracture sustained at the time of the accident" and in the latter, Dr Vinayaga Moorthy opined that "The right shoulder dislocation is well reduced. He however is confirmed to have an united right humerus head fracture." As result of the following x-ray and diagnosis report: "There is united fracture of right head of humerus. The part is well reduced - right humerus fracture and shoulder joint dislocation has healed with persistent pain, stiffness and weakness."

16. In her grounds of judgment, the learned Sessions Court Judge found that the respondent suffered both subluxation/dislocation and fracture of the head of the right humerus. The finding is based on a later MRI report according to the testimony of Dr Ng Wai King of the Seberang Jaya hospital who produced the initial medical report of the respondent. In the MRI report, it is stated that there is "old avulsion injury with callus at greater tuberosity of right humerus".

Furthermore Dr Mohd Zulkifle bin Ibrahim of the Bukit Mertajam hospital who examined the respondent also testified that there is a possibility that the respondent suffered fracture of the humerus notwithstanding that it was not stated in the initial medical note documentation. There is no evidence that the Respondent was involved in another accident before the fracture was detected. Hence based on the available medical reports, specialist medical reports and testimony of Dr Ng Wai King as well as Dr Mohd Zulkifle bin Ibrahim, she found that the fracture of the right humerus was sustained from the same accident.

17. Having reviewed the medical reports and notes of proceedings, I think she is right. It is probable that the fracture might not have been detected or overlooked initially but it became clear from a later MRI report as well as later x-rays when deformation of the humerus head is detected due to callus formation.

18. Consequently, it is my view that the learned Sessions Court Judge did not misdirect herself that justified appellate intervention in respect of her finding of fracture of the humerus."

Conclusion

[24] For the reasons given, we find merit in the appeal. The appeal is allowed with costs. The decision of the High Court is set aside. The decision of the Magistrate is reinstated.

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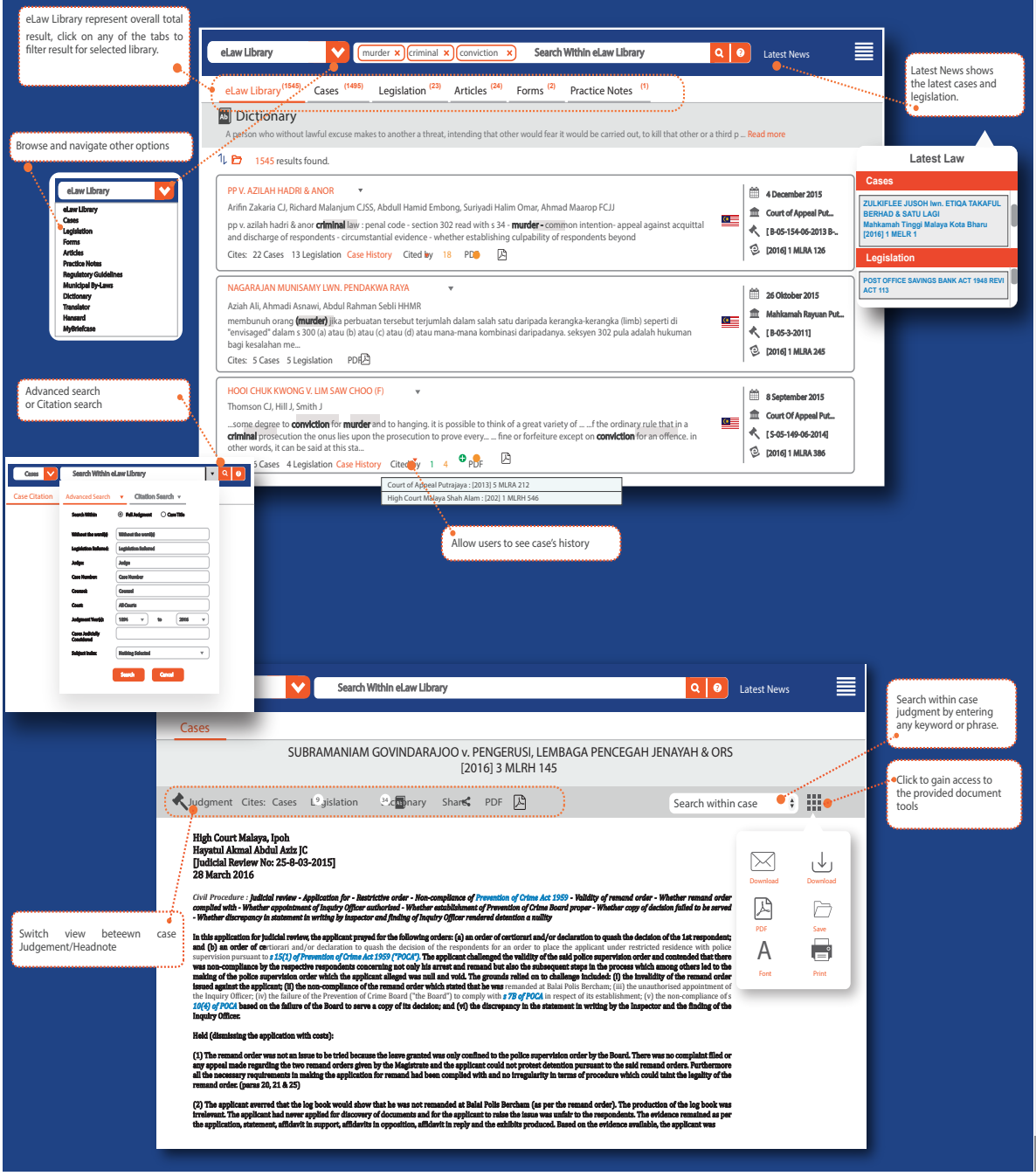

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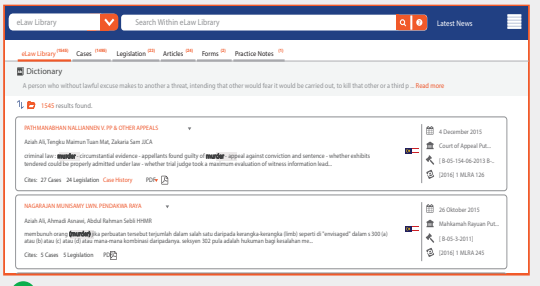

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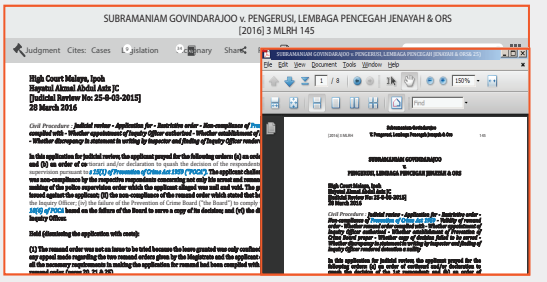

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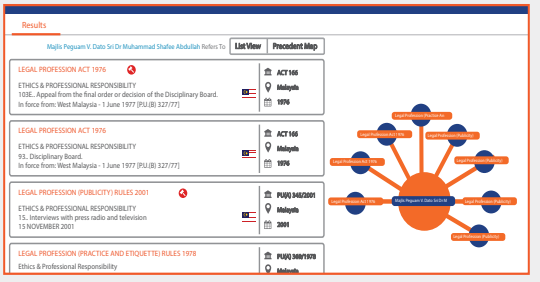

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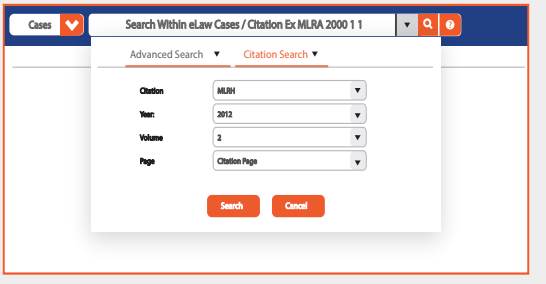

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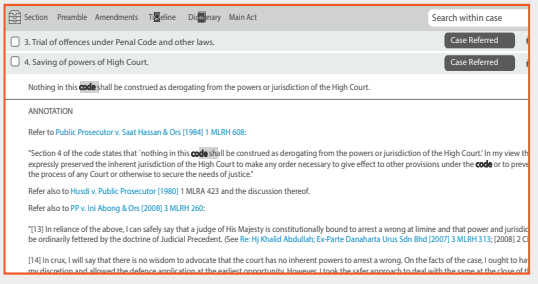

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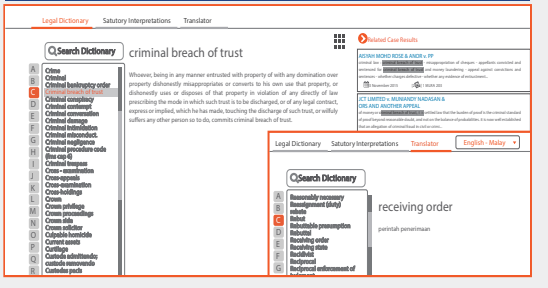

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