

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

(APPELLATE Provincial Division.)
Provinsiale Afdeling.)

I.F.P. application am
Appeal in Civil Case.
Appel in Siviele Saak.

AIBARAN SINGH(also known as HEERALALL SINGH) Appellant,

versus

THE MINISTER OF POLICE Respondent

Appellant's Attorney Lovius, B.M. & Cowan Respondent's Attorney
Prokureur vir Appellant Prokureur vir Respondent Dep J A (Bing in

Appellant's Advocate S I Pretorius SC Respondent's Advocate
Advokaat vir Appellant S I Pretorius SC Advokaat vir Respondent J Allan Howard SC

Set down for hearing on 22-5-70
Op die rol geplaas vir verhoor op

23.4.70

Coram: van Blerke, Rumpff, Botha, J.A., de Villiers, et Rabie A.J.A

DCLD 9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 4.00 pm

Postea 2-6-70 per Rabie A.J.A:—
I.F.P. Order granted. appeal upheld
with Costs. Order as per willon
Judgment.

REGISTRAR, APPEAL COURT,
GRIFFIER, APPELHOFF,
BLOEMFONTEIN,
-2-6-1970

I.F.P. application am

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the matter of:

AIBARAN SINGH Appellant,

and

THE MINISTER OF POLICE Respondent.

Coram: Van Blerk, Rumpff, Botha, JJ.A., De Villiers, A.J.A.
et Rabie, A.J.A.

Heard: 22nd May, 1970.

Delivered 2nd June, 1970.

J U D G M E N T.

RABIE, A.J.A.:

On the afternoon of the 8th April, 1966, a collision occurred in Brickhill Road, Durban, between a Landrover motor vehicle driven by the appellant (the plaintiff in the Court below) and a police pick-up van driven by one Smith in the course of his duties as a constable in the South African Police. Appellant, having suffered bodily injuries in the collision, claimed damages in the sum of R20,035-14 from respondent by virtue of

the...../

the provisions of sec. 2 of the State Liability Act, 1957 (Act No. 20 of 1957). The respondent denied negligence on the part of Smith and alleged that appellant had been solely responsible for the collision. In the alternative respondent pleaded that the collision had been caused in part by the negligence of appellant and prayed that appellant's damages be reduced in terms of sec. 1 (1) of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956). Respondent also counter-claimed for the sum of R1732-80, being the amount of the damage allegedly done to the police van in the collision.

The learned trial Judge (James, J.P., sitting in the Durban and Coast Local Division) came to the conclusion that he could not say how the accident had happened and who had been responsible for it, and he accordingly ordered absolution from the instance on both the claim and the counterclaim. In regard to costs he made the following order:

"Except for the cost of the plaintiff's pleadings in the matter of the claim in reconvention, which are awarded to him, defendant is granted all his costs including the qualifying fees of Dr. Kerr."

Appellant noted an appeal against the order made in

respect..../

respect of his claim and thereafter petitioned this Court for leave to prosecute his appeal in forma pauperis. Respondent, not disputing that appellant was a poor person in terms of Rule 4 of the Rules of this Court, but apparently contending that the intended appeal had no prospects of success, filed no reply to appellant's petition. In the circumstances the application for leave to appeal and the appeal were heard together by this Court. There was no cross-appeal by respondent.

Brickhill Road runs from north to south and the collision took place just south of its junction with Molyneux Road, which enters it at right angles from the east. Appellant was driving his Landrover from south to north along Brickhill Road when the collision occurred, whereas Smith was driving his van in the opposite direction. According to appellant's witnesses the collision occurred when Smith entered Brickhill Road from Molyneux Road and, in turning to the south in Brickhill Road, took his turn so wide that he crossed over the centre white line and collided with appellant's Landrover, which was travelling on its correct side of the street.

Brickhill..../

Brickhill Road is 31 feet wide at the scene of the collision. Respondent's case was that Smith entered Brickhill Road from Somtseu Road, which is some distance to the north of Molyneux Road, and that he had been driving down Brickhill Road on his correct side of the road for some distance when appellant's Landrover suddenly swung to its right into Smith's half of the road, making it impossible for Smith to avoid a collision.

Appellant testified that he was driving from south to north along Brickhill Road on his correct side of the road when he suddenly heard a "loud bang". He became unconscious and first came to his senses later that afternoon when he found himself in hospital. Before the collision, he said, he saw no approaching cars, and he never saw the vehicle which collided with his. The learned trial Judge said the following of appellant's evidence:

"The fact that he remembers the bang suggests to me that his memory of what happened extended up to this point and that if he had been paying due attention he would have been aware of what was taking place immediately before he heard the bang and would have observed the approaching police van whether it came from the

North...../

North along Brickhill Road or whether it had moved into Brickhill Road from the East. The inference to be drawn from this is that he was not paying due attention and, if this is so, very little weight can be placed on his assertion that he was travelling on the correct side of the road just before the collision."

Appellant's aunt, Kalaispathy Singh, who sat next to him on the front seat when they drove down Brickhill Road, testified that she first saw the police van as it was in the process of turning into Brickhill Road from Molyneux Road, and that it "took a fast turn from that side road" before it hit the Landrover. According to her evidence the Landrover drove straight down Brickhill Road on its correct side of the road without ever swerving one way or the other. The learned Judge formed a favourable impression of Kalaispathy's demeanour in the witness box and he regarded her as a good witness. There was nothing in the content of her evidence, or in the manner in which she gave it, the learned Judge said, which caused him to think that she was being "deliberately untruthful". At the same time the learned Judge says of her in his judgment: "She was closely tied to the plaintiff by the

bonds...../

bonds of family and mutual financial interest, and the danger of her telling an untruthful story to support her nephew cannot be wholly discounted. The whole matter of the accident was the subject of repeated family debate". The learned Judge, accepting the evidence of a defence witness, Vermaak, who stated that Smith had passed him at a point well to the north of Molyneux Road, rejected Kalaispathy's evidence that the police van came out of Molyneux Road and that it took its turn so wide that it ran into the Landrover on its correct side of the road. Kalaispathy's evidence, the learned Judge said, "may well have been a deduction based on a genuine observation that Smith had moved suddenly to his incorrect side of the road just before the collision, and it is quite possible that Smith was on the wrong side of the road at the moment of impact."

Two further passengers in the Landrover, Basmathy and Harry Singh, were called to testify on plaintiff's behalf. They were in the back of the Landrover when the collision occurred. (The passenger who sat next to Kalaispathy on the

front.../

front seat was killed in the accident.) Both Basmathy and Harry Singh stated that the police van entered Brickhill Road from Molyneux Road and that the collision occurred as it took its turn to the left too wide and went over onto its incorrect side of the road. The learned Judge found both these witnesses to be completely unreliable, and Mr. Pretorius, who argued the appeal on behalf of appellant, did not contend that their evidence was wrongly rejected.

A further witness called by appellant was Detective Sergeant van der Walt of the South African Police. He went to the scene of the collision at about 4.30 or 5 p.m. on the afternoon in question and there took photographs, inter alia, of two spots on the road surface which had previously been marked with white paint. The one mark was in the form of a cross, and the other one was a circle. Both marks were on the western side of the road (i.e. Smith's incorrect side), the cross being 12 to 14 inches from the centre white line, and the circle, which was to the north of the cross, about 6 or 7 feet from the centre white line. It was common cause that a Constable Stighlingh had asked a Constable Sonnekus to..../

to paint these marks on the road surface, and that Smith had previously pointed out the two spots to Stighlingh. It was also common cause that the cross marked the point of impact as pointed out by Smith. Stighlingh, although available, was not called as a witness and Sonnekus could not say what the circle was meant to indicate. Van der Walt, too, did not know on the 8th of April what the circle represented. On the 14th April Van der Walt again went to Brickhill Road, this time to obtain details with a view to drawing a plan of the scene of the collision. Smith, Stighlingh and a Detective Constable Pretorius were also present at the scene. Van der Walt made notes and took measurements, and later he prepared a plan and a key thereto. According to Van der Walt's evidence, which is reflected in the key prepared by him, Smith pointed out various points, marked A to G on his plan, whereas Stighlingh pointed out the points marked C to G. Points C to G need not be discussed. Point A, Van der Walt testified, was the cross which Smith pointed out to him on that day as the point of impact, while point B was the circle which Smith pointed out to

him,...../

him, also on that day, as the point where he (Smith) saw the Landrover swerving sharply to its right. It was put to Van der Walt in cross-examination that Smith was going to testify that it had been explained to him that he had on the day of the collision pointed out points A and B to Stighlingh, and that he was also going to say that when he was asked about these two points on the 14th April, "het hy sommer saamgestem dat hy hierdie plekke al voorheen aan Stighling uitgewys het as die punt van botsing, punt A, en die punt waar die Landrover eers oorgekom het as punt B". Van der Walt's reply was, "Ja, dit is moontlik", but that he could not remember that Smith had said so and that he had not made a note of Smith's having said so. When Smith was cross-examined on this point, however, he rejected the suggestion that he had agreed that he had previously pointed out the spots concerned, and he said, "I could not recall it and I disputed it on the day Sergeant Van der Walt took me to the scene of the accident".

Van der Walt was also asked in cross-examination whether it was possible that Smith had said on the 14th April that

"na...../

"na sy mening dit nie die ware plek van die botsing is en dat u vir hom gevra het om 'n ander punt uit te wys, maar hy het geweier en gesê dat hy die punt in die hof sou verduidelik", and he replied: "Ek weet nie. Persoonlik kan ek nie so iets onthou nie en ek weet nie. Dit mag wees, maar ek het nie eers 'n aantekening daarvan gemaak nie". In re-examination Van der Walt stated, inter alia, that if Smith had not indicated point A, he would not have written down that he had done so, "want ek moet die punt vat wat Smith gewys het", and, "as Smith gesê het A is nie die punt van botsing nie, sou ek dit nie daar aangebring het nie".

The judgment of the Court a quo contains no definite finding on the question whether Smith pointed out points A and B as alleged by Van der Walt. The learned Judge does state, however, that he "did not form a favourable view of Smith's evidence on this point" and that he did not regard him as being "wholly truthful about the events of this day", (i.e., the 14th April).

I now turn to the evidence of respondent's witnesses.

SMith's.... /

Smith's description of how the collision occurred appears from the following passage in his evidence in chief:

"Whereabouts on the road were you travelling?-- I was travelling right on my side next to the left-hand side pavement.

What happened after that?-- As I was approaching the intersection of Molyneux and Brickhill Roads, a Landrover driven by an Indian male came along from the opposite direction, travelling south to north along Brickhill Road. This vehicle being about a few yards - 10 to 15 feet or a bit more from my vehicle. It swerved sharply to the right-hand side of the road - that is right onto my way of traffic.

How far away was it when it did that, do you think?-- 15 to 20 feet.

And what happened?-- When the vehicle swung onto my way of traffic, I suddenly tried to swerve left and apply brakes, but it was too near and I couldn't avoid it.

And was there an impact?-- Then the police vehicle being driven by me, collided with the Landrover. That is the last I can recall."

Smith stated that he had no recollection of what happened after the collision and that he came to his senses that afternoon while receiving attention from the District Surgeon, Dr. Johnson.

The learned Judge, holding the view that no reliance could be placed on Smith's evidence where it stood alone, accepted his evidence that he had entered Brickhill Road from...../

from Somtseu Road because it was corroborated by the evidence of Vermaak, who was found by the learned Judge to be an "excellent witness". Smith's version of how the accident occurred received some support from that of Vermaak, who testified that he was driving about 100 to 150 yards behind Smith's van when he saw "die Landrover swaai en bots met die vangwa". Both vehicles, he said, were near the white line when the Landrover swung. He estimated the swing to have been from 1 to 2 feet, or from 2 to 3 feet, and he described it as "baie gering". It seems clear that Vermaak's evidence that there was a swerve on the part of the Landrover was based on no more than an impression which he had formed. This is shown, e.g., by his statement that "dit was net vir my asof hy geswaai het en toe het hulle gebots". The learned Judge, stating that Vermaak's impression must have been a fleeting one, held that his evidence as to how the collision took place "must be treated with considerable reservation", and that it should not be treated as "wholly accurate". I think I should add that the evidence which was given by Vermaak at certain inquest proceedings was inconsistent with his assertion in the Court below that

he observed a swerve on the part of the Landrover. At the inquest he admitted that he did not watch the vehicles ahead of him at all closely. When he was asked whether he had at any stage ("op enige stadium") seen the police van move to the right, he replied that he could not say "want ek het nie daarvoor opgelet nie, and when he was asked whether the Landrover had kept on a straight course throughout, he answered "Dit sal ek ook nie kan sê nie, ek het nie daarvoor opgelet nie".

The learned Judge found Smith's evidence as to how the collision occurred unreliable, and rejected it. One of the reasons which weighed with the Court in rejecting his evidence, was the evidence which he had given at the inquest and in a criminal trial that he was about to pass a Volvo motorcar, which was travelling in the same direction as he was, when the Landrover swung over to its right. The words used by him at the inquest proceedings were: "Die voertuig was heeltemal aan die linkerkant van die pad. Ek het gepoog om aan sy regterkant verby te gaan. n Landrover met registrasienommer N.T. het gereis van suid na noord. Toe die Landrover ongeveer 10 voet of so, of n bietjie verder af van my gewees het, het hy ewe skielik voor met die pad ingeswaai asof hy wou

regs draai, en toe het ek 'n poging aangewend om remme aan te sit maar die volgende oomblik het daar 'n botsing gekom - die laaste^{wat}/ ek onthou". At the hearing in the Court below Smith stated that he could not remember having spoken of a Volvo at either the inquest or the criminal proceedings, but there can be little doubt that he was untruthful when he said so, and, in answer to a suggestion by the Court that he might have tried to improve his case by inventing the Volvo, he replied, "It could have been". He declined to comment on the suggestion that he invented the story about the Volvo in an effort to explain how it came about that he had gone so close to the centre line, and the learned Judge states in his judgment that the evidence about the Volvo "is also of some significance because it illustrates that Smith was aware that he was travelling, at the very least, perilously close to the centre line immediately before the collision".

In regard to the evidence that after the collision Smith pointed out what he considered to be the point of impact and, also, the point at which the Landrover had begun its

swerve onto its incorrect side of the road, the learned Judge came to the conclusion that it had been shown on a balance of probabilities "that Smith did not know what he was doing after the accident and was not in a fit state to indicate the point of collision with any degree of certainty".

The passage in the judgment in which the learned Judge dealt with this question reads as follows:

"Mr. Pretorius, for the plaintiff, placed great store on the fact that shortly after the accident Smith pointed out a point of impact which was marked then and there with paint by the police. This point was 12 to 14 inches from the middle line on the western side of the road, that is to say on Smith's incorrect side of the road. Mr. Pretorius submitted that this was a clear indication that Smith had been driving negligently. There can be no doubt that Smith did point out this spot, but Sergeant Pretorius who arrived on the scene almost immediately after the accident says that there was so much glass and other stuff from the vehicles on both sides of the road that it was impossible to fix the point of impact with any certainty so the point fixed by Smith could not be confirmed by visual inspection. A great deal of evidence was led relating to Smith's mental condition immediately after the accident and it was alleged that at ~~the~~^{that} stage he could not possibly have known what he was doing. He himself claims to have remembered nothing about his conduct until late that evening; Vermaak says that he was in a shocked condition and kept on saying that he had hit the jackpot. This is not the sort of phrase which Vermaak would be likely to have made up. Pretorius says that Smith was in a shocked condition and was wandering...../

wandering around talking to everybody, and that he pointed out a spot and said, "Look where the bloody Indian hit me". It seems improbable that he would have appeared to be so indignant if he had appreciated that the point he was indicating was on his wrong side of the road. Sonnekus, another officer in the police force, confirmed that Smith was shocked and that he was interfering with members of the public at the scene. Smith had had a serious head injury some little time before this accident and the medical evidence is that another bump on the head could have had serious consequences. His statement that he had no recollection of what he was doing was supported by Dr. Johnson who visited him that evening and found that he was shocked; and Dr. Kerr the neuro-surgeon who gave expert evidence about his condition expressed the view that Smith might well be telling the truth when he claims that he suffered amnesia as the result of the accident, and expressed the further opinion that one could not rely on any statements made by him during this period as being accurate or reliable."

The learned Judge, having stated his view, as set out earlier in this judgment, of the evidence of Kalaispathy, Smith and Vermaak as to how the collision occurred, concluded his judgment on the issue of responsibility for the accident as follows:

In my opinion there is nothing in the probabilities to enable me to find that the accident was caused by the negligence of one or other of the drivers. I am left in a position that I am unable to say how the accident happened and who was responsible for it. There are general indications which cause me to think that an accident such as this could not have happened if both drivers had been alert, but it is quite

impossible to allocate responsibility for the accident on these indications. The fact is that the accident might have been caused solely by the negligence of one or other of the drivers, or it might have been caused by their joint negligence.

I have come to the conclusion that it is impossible upon a balance of probabilities to hold that the negligence of one or other or of both drivers jointly was the cause of the accident."

Mr. Pretorius, in arguing that the Court a quo erred in the conclusion to which it came and that it should have found that there was negligence on the part of Smith, contended:

(1) That the Court, having rejected Vermaak's account of how and where the collision occurred, should have accepted Kalaispathy's version as to where in the road the vehicles collided;

(2) that the Court should have found (a) that on the day of the collision Smith, well-knowing what he was doing, pointed out the point of impact, and (b) that he again, six days later, pointed out the same spot to Van der Walt, and

(3) alternatively, that the Court should have found that both drivers were negligent.

Kalaispathy...../

Kalaispathy, it will be remembered, testified that appellant was proceeding on his correct side of the road when Smith's vehicle came from Molyneux Road, swung to its left and took its turn so wide that it went onto its incorrect side of the road. The learned Judge, accepting the evidence of Vermaak, rejected Kalaispathy's evidence that Smith entered Brickhill Road from Molyneux Road, but he made no specific finding on her evidence that appellant was travelling on his correct side of the road when the collision occurred. It seems to be implicit in the conclusion to which he came in the end, however, that he was not satisfied that he could accept this evidence of hers as proved, but it does not appear from what is said in the judgment why her evidence was not accepted. Mr. Howard, who appeared for respondent, argued that her evidence about the position of the vehicles was so bound up with her observations as to where the police van came from, that the rejection of her evidence on the latter point necessarily involved the rejection of her evidence that the Landrover had been proceeding on a straight course before the collision.../

collision. I do not think, however, that this line of reasoning is justified. The witness testified that she saw the broken white line in the centre of the road, that they travelled on a straight course on the left hand side of that line and that she was at no time conscious of the vehicle swerving one way or the other, and it seems to me that there is no sufficient reason for saying that this evidence could not have been accepted once her evidence about where the Land-rover came from was rejected. It seems to me, with respect, that the learned Judge, having found Kalaispathy to be a good witness who was not deliberately untruthful in any of the evidence she gave, and having found, also, that her evidence as to where the police van came from "might well have been a deduction based on a genuine observation that Smith had moved suddenly onto his incorrect side of the road just before the collision", should have accepted her evidence that the Landrover was on its correct side of the road when the collision occurred.

I now turn to Mr. Pretorius's second submission, and will first deal with Smith's pointing out of the point of impact on the 8th April. From the learned Judge's treatment

of this issue, which I have quoted above, it will appear that he relied on the evidence of Smith, Sergeant Pretorius, Vermaak, Sonnekus, Dr. Johnson and Dr. Kerr - all of whom are specifically mentioned - in coming to the conclusion that it had been shown that "Smith did not know what he was doing immediately after the accident and was not in a fit state to indicate the point of collision with any degree of certainty".

There are a number of unsatisfactory features about the evidence relating to Smith's condition after the collision. According to the evidence of Vermaak, who came onto the scene immediately after the collision, Smith was confused ("heeltemal deurmekaar"), running about and shouting, "seker vreeslik onder skok". Detective Sergeant Pretorius, who also came onto the scene just after the collision, said that Smith "het aanhoudend rondgeloop en met almal daar gepraat", and that "dit was duidelik aan my dat hy nie geweet het wat hy gepraat het nie".

Sonnekus, who arrived on the scene sometime later - he could not say what the time was when he came there - said that

Smith walked to and fro across Brickhill Road, apparently

not...../

not "normal", and interfering with members of the public. Now, if Smith was indeed in the condition described by these witnesses, Stighlingh should also have observed it and, if that is so, it is difficult to understand why he should have asked, or allowed, his colleague, Smith, to indicate the point of impact and the point from where the Landrover commenced its swerve to the right. Stighlingh would obviously have been the best man to testify to the circumstances in which the pointing out took place, but he was not called.

A factor which also has a bearing on this issue, and to which no reference is made in the judgment of the Court a quo, is that Smith's pocket book contains three entries, all of them in his own handwriting, which relate to events which took place after the collision. The first entry appears against the time 2.40 p.m., which was probably about 10 minutes after the collision. This entry contains details which are factually correct, and seems, on the face of it, to have been written by a man who was in his sound senses. It records, for example, the mileage of Smith's vehicle, the registration number

of the Landrover, the number of passengers in the Landrover, and the death of a woman who was a passenger in the Landrover. The next entry, which appears against the time 3.50 p.m., records that Smith was at the police station at that time, and the third entry, which appears against the time 7.30 p.m., relates to Smith's going off duty. Smith's evidence was that he saw the entries in his pocket book on the day after the collision, and that he could not explain how or when they were made. Dr. Johnson testified that Smith could not have made the 7.30 p.m. entry at the time stated, because he had been given a pethidine injection and was asleep at that time. Smith's evidence was that he saw the 7.30 p.m. entry in his book the next morning, i.e., he did not make it on that morning. As to the first entry, it was suggested by Mr. Howard that Smith might have written it at the scene of the collision from someone else's dictation, or that he might have written it the following day, obtaining the details from police reports. The first suggestion does not seem to me to merit serious consideration, and, as for the second, if Smith had made the entry on the next day he could have said so and explained that he had

not been in a fit state to make any entries the previous afternoon. In regard to the second and third entries it was suggested that Smith might have drawn upon his imagination. That was, of course, not his evidence.

In regard to the opinion expressed by Dr. Kerr as to Smith's condition after the collision, it should be remarked, first of all, that he never spoke to Smith about the events of the day in question. Secondly, when Dr. Kerr was supplied with certain information by the Government Attorney and asked to express an opinion thereon as to Smith's condition, he was not told about Smith's pocket book and the entries therein. When he gave evidence in the Court below he was also not asked any questions relating to the pocket book. The book was in the possession of the police and was brought to Court by the witness Kitching, the Station Commander at the police station where Smith was stationed at the time of the collision. He gave evidence after Dr. Kerr had given his evidence.

In spite of what has been said in the last few paragraphs, I cannot say that I am persuaded that the Court a quo was wrong in the conclusion to which it came as to Smith's condition...../

condition on the 8th April, and it is not necessary to pursue the question any further. As I have tried to indicate, however, it seems to me that there is a substantial degree of doubt as to whether Smith was not in his sound senses at the moment when he pointed out the point of impact on the afternoon of the 8th April.

I now turn to the submission that the Court a quo should have found that Smith pointed out the point of impact on the 14th April as testified to by Van der Walt. The evidence of Van der Walt was, as I have set out above, that Smith indicated to him on the 14th April that the point of impact was about 14 to 16 inches on the western side of the white centre line, and the point at which the Landrover began its swerve about 6 feet from that line. As I have also stated, Smith's evidence was not - as it was suggested by respondent's counsel that it would be - that he had agreed that he had previously pointed out the two spots to Stighlingh simply because he had been told that he had previously pointed them out to Stighlingh, but that he had not pointed out anything, and that he had refused to point out anything. Van

der Walt, as has been said, admitted that it was possible that Smith had refused to point out the point of impact and that he had said that he would show the point to the magistrate, but, as against that, his evidence was that he could not remember that Smith had said anything of the kind, and that he did not make a note of Smith's having said so. He stated, furthermore, that it was his practice, and his duty, to show on a plan drawn by him the points actually pointed out, and that he would not have recorded that Smith had pointed out a spot if he had not actually done so. A further point about his evidence is that, when he prepared the key to his plan, he was careful to state specifically which points had been pointed out by Smith and which by Stighlingh. The learned Judge, as I have stated, did not form a favourable view of Smith's evidence and did not regard him "as being wholly truthful about the events of this day", and in the circumstances it seems to me that the aforementioned admission by Van der Walt should not be construed as an admission that there was any real possibility of Smith's evidence being true.

Pretorius said in his evidence that on the 14th April Smith denied that he had pointed out any marks on 8th April, and that he stated that he was not prepared to indicate the point of impact and that he would explain ("verduidelik") the point of impact to the magistrate. In cross-examination he stated that he could not say to whom Smith had said these things, but that Van der Walt must have been present because he was the person who drew up the plan. When asked whether the Court could accept that Smith had spoken in the presence of Van der Walt, he replied evasively: "Die plan is getrek as gevolg van daardie merk, so dit is aanvaar", and then the following questions and answers followed:

"Sersant, dit is 'n maklike vraag. Die vraag is dit: toe Smith gesê het dat dit is nie hy wat die punt uitgewys het nie, en dat hy nie bereid was om 'n punt uit te wys nie, hy sal dit aan die landdros wys, toe hy daardie woorde geuiter het, was van der Walt teenwoordig?-- Ek kan nie definitief sê nie.

Weet jy dan wat hy vir van der Walt gesê het aangaande daardie punt?-- Nee.

As die sleutel van die plan sê dat die kruis was uitgewys deur Konstable Smith, sal u dit betwis?-- Nee, ek sal dit nie betwis nie."

Pretorius's evidence on the issue which I am discussing is not dealt with in the judgment of the Court a quo.

His evidence does not read well, and it seems clear that he hedged on the question whether Van der Walt was present when Smith spoke as alleged by him. It seems highly improbable, furthermore, that Smith would have mentioned his objection to pointing out the point of impact to either or both of the other two persons present, i.e. Pretorius and Stighlingh, and not to Van der Walt, who was the person who asked him to do the pointing out and who had gone to the scene of the collision on that day for the express purpose of drawing up a plan and of showing thereon points indicated by witnesses.

It remains to consider whether weight can be attached to any pointing out of the point of impact by Smith on the 14th April, if it be borne in mind that the Court a quo found that he "did not know what he was doing immediately after the accident and was not in a fit state to indicate the point of collision with any degree of certainty". The
answer..../

answer to this question is, I think, that although Smith's evidence was that he had no recollection of what happened after the collision, he did not say that he did not know how, or where on the road, the collision occurred. On the contrary, his evidence was that he knew how and where the collision took place and that the Landrover was to blame. This appears, inter alia, from his description of how the collision occurred which I have already quoted. According to his evidence he could recall the impact, and when he was asked whether he had any recollection as to precisely how the two vehicles collided, his answer was, "My front side of the vehicle with the Landrover's right hand side". When asked whether on the 14th April he had "any idea as to approximately where the point of impact was", his answer was "Yes", and he proceeded to describe that point as follows:

"JAMES, J.P.: Where was it on the road?-- Being on the western side of the road, approximately 6" to 9" away from the white line. I'm sorry, on the eastern side, that is, on my left-hand side - my side of the road, nine inches away from the white line, that is onto my way of traffic."

Furthermore, as has been said above, Smith's evidence was

that...../

that he told Van der Walt that he would point out the point of impact to the magistrate.

It is my view, therefore, that the Court a quo should have accepted Van der Walt's evidence as to the pointing out of the point of impact by Smith on the 14th April, and that it should have found that Smith was on his incorrect side of the road when he collided with the Landrover.

This finding that Smith was on his incorrect side of the road is strengthened, I think, by the evidence relating to Smith's fabrication of the story about the Volvo. As I have pointed out, the learned Judge found that the evidence about the Volvo was of significance because it showed that Smith was "aware that he was travelling, at the very least, perilously close to the centre line immediately before the collision". Smith, in cross-examination, seems to have been quite prepared to admit that he was driving close to the white line on the day in question. His line of travel, he said, was "14 inches to 22 inches from the centre line". (In the criminal proceedings Smith said

that..../

that he drove about 12 inches from the centre line). He also went further and said that he always drove close to the centre line. This appears from the following passage in his cross-examination:

"Why was it necessary for you to drive so near the white line?-- It is my way of travelling. I am used to travelling like that.

You could, of course, have come very much further away from it if there was nothing to prevent you?-- That's right.

But you say that is your way of travelling?-- That is my way of travelling, 8 inches to 2 feet from the centre white line of the road. That is always my way of travelling."

In my view the probability is that Smith invented the story of the Volvo not to explain what was usual conduct on his part - conduct which he was, also, willing to admit - but to explain why he had crossed over the centre line onto his wrong side of the road.

On the finding that Smith drove on his incorrect side of the road when the vehicles collided, it must be found, as I see it, that he was at least 50% to blame for the collision. Kalaispathy's evidence about the manner of

Smith's...../

Smith's driving having been rejected, there is no evidence on which a finding can be based that Smith suddenly swung onto his incorrect side of the road. If such a finding could have been made, Smith might well have been held wholly to blame for the collision. In the circumstances I hold that Smith's fault is to be assessed at 50 per cent.

The following order is made:

1. Leave to appeal in forma pauperis is granted, respondent to pay the costs of the preparation of the petition;
2. The appeal is upheld with costs, including the fees occasioned by the employment of two counsel;
3. The order of absolution from the instance made on appellant's claim, as well as the order of costs made in respect of that claim and respondent's counterclaim, is set aside, and the case is remitted to the Court a quo to deal with the issue of damages suffered by appellant and to make an appropriate order as to costs. The assessment of appellant's damages is to be on the basis that Smith's responsibility for the collision was 50 per cent.

J. Rabie a.g.

VAN BLERK, J.A.	}	Concur.
RUMPF, J.A.		
BOTHA, J.A.		
DE VILLIERS, A.J.A.)		