GERALDINE EDITH LITTLE AND JOHN J. McDONALD ..... APPELLANTS;

1958

*May 7, 8, 9
Jun. 26

AND

THOMAS MAYLON LITTLE .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeals—Findings of fact by trial judge sitting without jury—When Court of Appeal entitled to interfere.

Divorce—Sufficiency of evidence—Private detectives—Interference on appeal.

An action for divorce was dismissed by the trial judge, who found that the evidence of private detectives called by the petitioner was not worthy of belief and that apart from their evidence there was no evidence of adultery. This judgment was reversed by the Court of Appeal, which was of the opinion that the trial judge had failed to give sufficient weight to other circumstances disclosed in the evidence which supported, to some extent, the evidence of the detectives, and that the latter evidence should consequently have been accepted. The respondent and corespondent appealed.

Held (Rand and Judson JJ. dissenting): The appeal should be allowed and the judgment at trial should be restored. The record did not indicate that the trial judge failed to make full use of the advantage that he had in seeing the witnesses and observing their demeanour in the witness-box. With that advantage, he had formed an opinion as to the truthfulness of the evidence given by the private detectives. This finding should not have been interfered with on appeal, in the circumstances of the case. *Watt or Thomas v. Thomas,* [1947] A.C. 484 at 491-2, applied. Further, it should be borne in mind that Courts in

*PRESENT: Rand, Locke, Cartwright, Martland and Judson JJ.

matrimonial causes had, for a long time, very closely scrutinized the evidence of paid detectives. *Ciocci v. Ciocci* (1854), 18 Jur. 194 at 198; *Sopwith v. Sopwith* (1859), 4 Sw. & Tr. 245 at 246, referred to. Eliminating this evidence, there was nothing but suspicion in the record and no evidence to support a decree of divorce.

Per Rand and Judson JJ., *dissenting*: Bearing in mind the rules laid down in *Powell et ux. v. Streatham Manor Nursing Home,* [1935] A.C. 243; *Yuill v. Yuill,* [1945] P. 15; *Watt or Thomas v. Thomas, supra,* it still must be said that the judgment at trial was one that required interference by the Court of Appeal. The detailed review by that Court of the evidence showed convincingly that the judgment of the trial judge was ill-founded, (1) because of a failure to test his findings of credibility against the probabilities of the situation before the Court, and (2) because the evidence that was left after rejection of that of the private detectives led irresistibly to an inference of adultery. Unless the credibility and demeanour of witnesses were tested against the whole of the evidence, a finding of credibility could be no more than an unsupported and unwarranted, and consequently non-judicial, subjective determination of rights.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing a judgment of Sullivan J., who dismissed a petition for divorce. Appeal allowed, Rand and Judson JJ. dissenting.

T. P. O'Grady, for the appellants.

David G. Sloan, for the respondent.

The judgment of Rand and Judson JJ. was delivered by

JUDSON J. (*dissenting*):—The principles which must guide an appellate Court in reviewing a finding of fact which is based on a trial judge's impression of the demeanour of witnesses and of their credibility are not in doubt and have been set out in *Powell et ux. v. Streatham Manor Nursing Home*[2], *Yuill v. Yuill*[3], and *Watt or Thomas v. Thomas*[4], cases which have been repeatedly cited and approved in this and other appellate Courts. The difficulty is not in the statement of the rule but in its application. In the present case the British Columbia Court of Appeal came to a unanimous conclusion that they ought to reverse such a finding of fact. I am in respectful agreement with their decision and I think the judgment at trial was one that needed their interference. Their detailed review of the evidence convinces me, as it did them, that the trial

[1] (1957), 21 W.W.R. 193.
[2] [1935] A.C. 243.
[3] [1945] P. 15, [1945] 1 All E.R. 183.
[4] [1947] A.C. 484, [1947] 1 All E.R. 582.

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judgment was ill-founded for two reasons: first, because of a failure to test the finding of credibility against the probabilities of the situation before the Court, and second, because the evidence that was left after the rejection of the impugned evidence led irresistibly to an inference of adultery.

The judgments of the Court of Appeal review the evidence in great detail and I do not intend to repeat more than is necessary to explain my agreement with these judgments. When the investigators employed by the husband began their work in August of 1955 the wife had been living alone in a self-contained apartment in Victoria since the month of February 1955, when she had left her husband and three children in Halifax. The wife admits that from February to August the corespondent McDonald was visiting her at this apartment two or three times per week. She denies adultery and she denies that he ever stayed the whole night. Mrs. McDonald knew of this association and suspected what was going on. The wife knew of Mrs. McDonald's attitude and was quite indifferent to her feelings. Mrs. McDonald says that when Mrs. Little returned to Victoria, her husband began to stay out all night and gave her an explanation that he was sleeping at the store where he worked. This she did not believe.

It is against this background of undenied association and, to me, an association for which no satisfactory explanation was or could in the circumstances be given that the learned trial judge's assessment of the evidence of the two investigators should be considered. I am entirely unable to understand how this long and entirely private association between this man and this woman, both of whom were on bad terms with their spouses, can be dismissed in any off-hand way as an innocent association. The petitioner pleaded this association and alleged adultery on August 7, 10, 12, 14 and 15, 1955, at the apartment occupied by the wife. The investigators said that on the first three occasions they saw McDonald enter the apartment in the evening and that he had not come out when they left at 7 o'clock in the morning. On the last occasion they say that they saw him go in in the evening and that he did not come out until close to 8 o'clock the following

morning, when he came out in company with Mrs. Little. Mrs. Little denies that the corespondent had stayed with her the whole night. Her explanation of the fact that they came out together in the morning is that McDonald, although he had been with her the previous evening, had left at a reasonable hour and had come back in the morning to take her to work. The trial judge accepted this explanation. McDonald did not testify.

It was this evidence that the learned trial judge rejected *in toto,* basing his conclusion on discrepancies, which he did not enumerate or explain, between the accounts given by the two witnesses. The Court of Appeal did analyze this evidence in detail and could find no substantial difference between the two accounts. On all points their evidence was in accord with contemporaneous written notes of their observations kept by one of them. The Court of Appeal found confirmation for its view of the facts in the evidence of Mrs. McDonald, who said that her husband was absent all night on at least two occasions when these observations were being made. It is not disputed that McDonald did enter the apartment on the evening of August 14 and did come out on the morning of the 15th. To accept Mrs. Little's explanation that McDonald had merely called to take her to work in the morning was beyond the credulity of the Court of Appeal and it is beyond mine. How can negative testimony given by the landlord that McDonald's car was not outside when he left to go to work in the morning prevail against this weight? He admits that he had no particular reason to remember it. How can anyone testify to a fact of this kind unless his mind is directed at the time of the event to the importance and significance of the observation and to the need for taking accurate note of the date and time? This man's attitude to the matter is indicated by the following extract from his evidence when he was asked about a conversation with Mrs. Little about the presence of these investigators:

Q. Did she tell you why they were investigating? A. I didn't inquire. I had my suspicions only it is none of my business.

Q. What suspicions have you got, Mr. Haigh? A. Well, really I haven't got any.

Q. You just said you had. A. Well, what I meant, it was no business of mine, you see.

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I do not overlook the need for close and even suspicious scrutiny of the evidence of paid investigators in a case of this kind. Nevertheless, I think, as did the Court of Appeal, that there was no attempt in this case to test the credibility and demeanour of these witnesses against the whole of the evidence and that the criticism directed against them was unjustified and that their evidence was in accordance with the probabilities and the admitted facts of the situation. I have the greatest difficulty in understanding how a finding of fact can carry weight unless it is capable of being tested in this way. Unless it is so tested it seems to me to be no more than an unsupported and unwarranted, and consequently non-judicial, subjective determination of rights. The Court of Appeal was justified in reviewing this finding of fact and coming to a contrary conclusion.

I would dismiss the appeal with costs.

The judgment of Locke, Cartwright and Martland JJ. was delivered by

LOCKE J.:—This is an appeal by the respondent and by the corespondent in a divorce action from a judgment of the Court of Appeal for British Columbia[1], by which the judgment at the trial, delivered by Sullivan J., dismissing the petition, was set aside and a decree granted. By the judgment appealed from, the custody of the three children of the marriage was awarded to the husband, the respondent in the present appeal.

By the petition it was alleged that since the solemnization of the marriage between the parties the respondent had committed adultery with John J. McDonald, the corespondent, "on divers occasions from January, 1953, until August, 1955, and in particular on the 7th August, 1955, 10th August, 1955, 12th August, 1955, 14th August, 1955, and the 15th August, 1955, at 942 Balmoral Road, in the City of Victoria, Province of British Columbia". At the trial, counsel for the petitioner abandoned these charges, other than those asserted in respect of the dates August 7 to August 14, 1955, both inclusive.

[1] (1957), 21 W.W.R. 193.

In the reasons for judgment delivered by the learned trial judge, the evidence given at the trial is carefully reviewed and it need not be here repeated. The evidence upon which the petitioner relied, apart from some circumstances which, it has been argued, amounted to confirmation of their evidence, was that of two private investigators or detectives by name Dunnett and Fiddick. If the evidence of these two witnesses had been believed by the learned judge, I think there can be no doubt that he would have granted a decree. Mrs. Little lived in a small four-room suite at the address mentioned, which she rented from one Haigh. The latter occupied a lower or basement suite in the house. There was but one door giving entrance to the premises occupied by Mrs. Little from the outside. According to these two witnesses, they saw McDonald on the verandah of Mrs. Little's suite on the evening of August 7 and while they watched the premises at night he did not leave and his car remained standing outside the house until the following morning. While they did not see McDonald on the evening of August 10 or 12, when they swore that they watched the premises at night, they said that his car stood outside the premises during both nights. On the evening of August 14, they said that they saw McDonald enter the suite about 9.30 and that he did not leave the premises until the following morning.

It is clear from the record that the learned trial judge was very doubtful of the honesty of these paid investigators when their evidence was being given. He had the great advantage, which the Court of Appeal had not and we have not, of observing the demeanour of these men in the witness-box, with all the advantage that seeing and hearing a witness give evidence affords in coming to a conclusion as to his truthfulness. Having had this advantage, the learned trial judge said as to Dunnett:

> There is certainly nothing about this man to commend him as a reliable witness.

And again:

> Of the two of them I should say that Fiddick is the more reliable, but I shall also say, with emphasis, that any confidence in the sworn testimony of either of them would be misplaced in the circumstances disclosed by the evidence here . . . Without going into a detailed examination or account of the discrepancies in evidence of these respective key witnesses

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called by petitioner (which a transcript of their evidence will disclose) I shall say, simply, that at conclusion of petitioner's case I did not believe either of them and that had I been pressed for immediate decision upon the motion for nonsuit then made by learned counsel for the corespondent I should have granted it. Similarly, a motion for nonsuit if then made on behalf of the respondent would have succeeded.

Mrs. Little gave evidence on her own behalf and denied categorically that McDonald had spent the night in her suite at any of the times mentioned, or that there had ever been any marital misconduct with him. As to her evidence, the learned judge said:

> I accept her evidence without qualification as against the evidence of her husband and as against the evidence of his paid "investigator" witnesses. There was nothing in her husband's evidence to refute in respect of the marital misconduct charged against her . . . My acceptance of her evidence as against that of the "investigators" Dunnett and Fiddick means that I have found confirmation therein of the opinion previously come to, namely, that both of these witnesses committed perjury before the Court.

As pointed out in the judgment at the trial, there were a number of discrepancies between the evidence of the two investigators who claimed that they had been together watching the premises throughout the four nights in question. In addition, their evidence was contradicted in a most material particular by the evidence of the landlord Haigh. This witness was by occupation a boilermaker's helper and left his home for work every morning at 7.30. According to Dunnett and Fiddick, the corespondent's car had been standing on the roadway in front of the premises throughout the four nights and when they discontinued their observation in the morning. Haigh, who could not possibly have avoided seeing the car if it was there, said that it was not there at any time during the week ending August 14 when he left for work or on the morning of August 15. According to him, the investigators had come to his suite at about midnight on August 14 and, representing that they were police officers, asked him to assist them in obtaining access to Mrs. Little's suite. He had come to the door of his apartment and refused their request and said, contrary to the evidence of the investigators, that McDonald's car was not parked outside the premises at that time.

There were, in addition, contradictions in the evidence given by the petitioner and the respondent at the trial. The latter had sworn that before moving from Victoria to

Halifax he and his wife had had a serious dispute and that he then accused her of infidelity with McDonald. Mrs. Little flatly denied this or that there had been any suggestion of this nature before they arrived in Halifax. The learned judge said in terms that he believed her evidence and disbelieved that of her husband.

It appears from the evidence that McDonald had an interest in an electrical supply business in Victoria and that, prior to the time when the present respondent and his family left for Halifax, McDonald had obtained for him part-time employment there. Mrs. Little said in describing the treatment to which she was subjected by her husband when they were in Halifax (which the learned trial judge found became unbearable and forced her to leave him as she finally did in February 1955), that he had made threats against McDonald, threatening to kill him or have him assaulted by friends of his in Victoria, at the same time saying that he intended in some way to get possession of McDonald's share in the electrical business. The husband was not called to give evidence in rebuttal, a circumstance which may have appeared significant to the learned trial judge.

In *Watt or Thomas v. Thomas*[1], an appeal to the House of Lords in a divorce action which had been dismissed at the trial by the Lord Ordinary, whose judgment had been set aside in the Court of Session, Lord Thankerton, in delivering one of the judgments which allowed the appeal and restored the judgment at the trial, said that an appellate Court in such cases may be satisfied that it unmistakably appears from the evidence that the trial judge has not taken proper advantage of his having seen and heard the witnesses and that then the matter would become at large. He said further that it could hardly be disputed that consistorial cases form a class in which it is generally most important to see and hear the witnesses, and particularly the spouses themselves, and quoted with approval what had been said by Lord Shaw of Dunfermline in *Clarke v. Edinburgh and District Tramways Com-*

[1] [1947] A.C. 484, [1947] 1 All E.R. 582.

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pany, Limited[1], which was quoted with approval by Viscount Sankey L.C. in *Powell et ux. v. Streatham Manor Nursing Home*[2], in part as follows (p. 488):

> In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

In the reasons delivered by Lord Simonds in *Watt's Case,* the following passage appears which I consider to be particularly applicable to cases such as the present one (pp. 491-2):

> My Lords, I must venture to say with all deference that they [the Court of Session] appear to me to have disregarded the principles laid down in this House for the guidance of courts of appellate jurisdiction, where the appeal is against a finding of fact by a lower court. Applying those principles to this case I am satisfied that an appellate court having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his. Nor do I find in the judgment of Lord Mackay any real appreciation of the weight that should be given to the trial judge's own estimate of the value of testimony. I suppose that if ever there was a class of case, in which an overwhelming advantage lies with the judge who has the witnesses before him, it is in the area of connubial infelicity and discord. To me, as I read through those many pages of evidence, once and again the reflection occurred: would that I could have seen the witness and heard his voice as he said this or that. I do not think that with only the cold written word to guide me I should have come to a different conclusion from that of the Lord Ordinary. Much less do I think that there is any justification for doing so when he has enjoyed the important advantages denied to an appellate court.

The fact that the corespondent had elected not to give evidence at the trial is commented upon in the judgments delivered in the Court of Appeal[3]. The explanation of his failure to do so appears from the record to have been that, at the conclusion of the petitioner's case, counsel for the corespondent moved for a nonsuit and elected to rely upon this. As appears from the judgment at the trial, if this motion had been pressed the learned judge would have granted it. Judgment on the motion was, however, reserved. In my opinion, no inference adverse to the corespondent should be drawn from this occurrence.

[1] [1919] S.C. (H.L.) 35 at 37. [2] [1935] A.C. 243 at 250.
[3] (1957), 21 W.W.R. 193 at 197, 201.

Attention is also directed in the judgment of Sidney Smith J.A. to the fact that when the Littles had moved to Halifax Mrs. McDonald had found some letters which, she said, had been written to her husband by Mrs. Little and that when he found she had taken them he took them from her by force. No steps had been taken to obtain the production of these letters at the trial or to show that they had been either lost or destroyed, and secondary evidence of their contents was rejected. Mrs. McDonald had had a conversation with her husband at the time about the letters but claimed privilege from disclosing what he had said and the evidence was not given. Sidney Smith J.A. considered that it was a fair inference that these letters "disclosed the intrigue between the two". Significance was further attached to the fact that Mrs. McDonald, who gave evidence on behalf of the petitioner, had said that around the second week of August her husband had not come home on two nights. Mrs. Little said that McDonald had told her that he slept at his store fairly frequently. There was undoubtedly ill-feeling between McDonald and his wife as a result of his friendship with Mrs. Little and this may have been the explanation of his absences from home.

I have examined very carefully the evidence given in this case. There is no doubt that the learned judges of the Court of Appeal, even in cases where the issue depends upon the veracity of the witnesses, are not only empowered but that it is their duty to overrule the findings at the trial if, bearing in mind the principles to which I have above referred, they are satisfied that the trial judge has failed to use the advantage afforded to him of having seen the witnesses and observed their demeanour in the witness-box in coming to his conclusion and that it is clearly wrong. This has been done in this Court in the case of concurrent findings of such a nature in *The North British & Mercantile Insurance Company v. Tourville et al.*[1]

In the present case, with the greatest respect for the contrary opinion of the learned judges of the Court of Appeal, I can find no support for a contention that the learned and experienced trial judge who heard this case failed to utilize what Lord Simonds referred to as the

[1] (1895), 25 S.C.R. 177.

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overwhelming advantage which he had in seeing the witnesses and observing their demeanour in the witness-box in forming his estimate as to their truthfulness. In my opinion and with deference to contrary opinions, eliminating the evidence of the witnesses Dunnett and Fiddick, there was nothing but suspicion and no evidence to support a decree of divorce. As to these two witnesses it should be borne in mind that, for a very long time indeed, the Courts having jurisdiction in matrimonial cases have very closely scrutinized the evidence of paid detectives. As to this, I refer to the judgment of Dr. Lushington in *Ciocci v. Ciocci*[1], and of the Judge Ordinary in *Sopwith v. Sopwith*[2]. The effect of the authorities is summarized in Rayden on Divorce, 7th ed. 1958., p. 136, and in 12 Halsbury, 3rd ed. 1955, at p. 238.

Sullivan J. clearly scrutinized the evidence of these investigators with great care: there is no justification, in my opinion, for concluding that he overlooked any of the relevant evidence in the case, and to say that he was so clearly wrong that the judgment of the Court of Appeal on the facts should be substituted for his I consider to be error.

I would allow this appeal, set aside the judgment of the Court of Appeal and restore the judgment at the trial, with costs against the present respondent throughout.

Appeal allowed with costs throughout, RAND *and* JUDSON JJ. *dissenting.*

Solicitors for the respondent and corespondent, appellants: Straith, O'Grady, Buchan & Smith, Victoria.

Solicitors for the petitioner, respondent: Harman, Sloan, & McKenzie, Victoria.

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[1] (1854), 18 Jur. 194 at 198.
[2] (1859), 4 Sw. & Tr. 245 at 246, 164 E.R. 1509.