

Cecil Waldron Andrew - - - - - Appellant

v.

Helen Andrew - - - - - Respondent

FROM

THE SUPREME COURT OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER, 1953

Present at the Hearing:

LORD OAKSEY

SIR LIONEL LEACH

MR. L. M. D. DE SILVA

[*Delivered by* SIR LIONEL LEACH]

This appeal arises out of proceedings instituted by the respondent against the appellant in the Supreme Court of Bermuda for a decree of divorce on the ground of cruelty. The appellant denied the charge and in his answer alleged adultery and cruelty on the part of the respondent. At an early stage of the trial the appellant withdrew the allegation of adultery, but persisted in the plea that his wife had herself been guilty of cruelty. The case was tried by Gilbert, C.J., who found for the respondent and dismissed the appellant's cross petition. The appellant does not complain of the dismissal of his petition and consequently the appeal is confined to the question whether the trial Court rightly found for the respondent on her petition.

The parties were married in London on the 20th July, 1946, but they had lived together as man and wife from the year 1933. There were two children of the union, namely Margo Helen, who was born on the 19th January, 1938, and Christopher Waldron, who was born on the 30th May, 1942. Up to 1946 the parties lived in England, but in September of that year they left England with their children for the United States of America and in 1949 they settled permanently in Bermuda.

In her petition the respondent alleged that after they had taken up residence in Bermuda the appellant became engrossed in business affairs and was frequently away for months at a time in the United States or other parts of the world, leaving the respondent with the children in Bermuda. Whenever he was in Bermuda he carried on a course of conduct apparently designed to break her spirit and make her completely subservient to him. He chose every opportunity to quarrel violently with her and he would continue to browbeat her for hours at a time. He had assaulted her by grasping her by the throat and throwing her violently into a chair. As the result of ill-treatment by him, her health had suffered.

The respondent gave evidence in support of the allegations in the petition and called as witnesses in corroboration Dr. H. C. Curtis, her sister Gwendolyn May Cole, who is a trained nurse, her daughter Margo and Wilfred Raymond Andrews, who had been associated in business

with the appellant. The respondent consulted Dr. Curtis in 1949 when he found her to be suffering from cystic mastitis. In February, 1951, she consulted him frequently. She was then highly nervous and irritable and showed signs of nervous tension. Worry and persecution could have given rise to the symptoms which he observed. The respondent's sister said that when she saw the respondent in 1949 she was shocked at her appearance. The respondent had lost a lot of weight and looked very unhappy. The daughter, who was twelve years of age when she gave evidence, spoke of the unhappy conditions in the home whenever her father was there and deposed to having seen her father push her mother into a chair and threaten to thrash her. The appellant required Mr. Andrews, who was then in a position subordinate to him, to spy on the respondent in order to ascertain whether she was misconducting herself. Mr. Andrews was a friend of the family and had opportunities of observing what transpired between them. The appellant was continually questioning the respondent who was frequently upset. He told the appellant that he was not doing his wife any good and that she might go crazy if he went on "like that". The witness added that the appellant's suspicions did not appear to be reasonable and became an obsession with him. From the end of 1950 Mr. Andrews reported periodically to the appellant, but observed nothing of a compromising nature in her conduct.

The case for the appellant rested on his own testimony and on certain letters which his wife had written to him. These were put to her in cross-examination as embodying confessions of infidelity on her part. The letters could be read in this sense, but her reply was to the effect that in so far as the letters could be regarded as containing admissions of misconduct the admissions were false and made as the result of duress on the part of her husband. All she wanted was to get back to the very happy relations which had previously existed between her and her husband and she thought that this was to be attained by agreeing with him in every respect. These letters were couched in the most affectionate terms and certainly showed an overwhelming desire on her part to live in complete harmony with him. There can be no doubt that the appellant was obsessed with the idea that his wife had been unfaithful.

At the conclusion of the hearing a short judgment was delivered by the learned Chief Justice, who at a later date added his reasons for the findings arrived at by him. In giving his reasons he observed :—

"I paid special attention to the significance of the letters and questioned the Petitioner closely in an attempt to discover the true answer to the obvious question :—If she had in fact been subjected by her husband to the cruel course of conduct which she described, how could she have brought herself to write such letters to him? Her explanation appears in the course of her replies in cross-examination and in her replies to my questions at the end of her evidence. It will be seen that her explanation was that she was in a most confused and morbid state of mind and that she was actuated by different co-existing motives—on the one hand fear of her husband with a desire to appease him and to fend off persecution, and on the other hand a strong and desperate desire to restore her life with her husband to its former happiness.

After observing her very closely while she was giving evidence, and after making allowance for possible exaggerations, self-centredness and histrionics, I came to the conclusion that her explanation of her remarkable letters was acceptable and that they did not negative or disprove the evidence given by her, and corroborated to a material extent by her daughter Margo and by the witness W. R. Andrews, as to the course of conduct, pursued by her husband towards her while they were together, that is a course of conduct consisting of persistent 'third degree' inquisitions, browbeating and hectoring calculated to break her spirit. As I said in the judgment delivered on the 17th March I was impressed by the frankness and honesty of the witness W. R. Andrews.

On a review of the whole of the evidence I was satisfied that the course of conduct complained of had been established by the evidence and that it amounted to such cruelty as to entitle the wife to a decree."

Having taken their Lordships through the record Mr. Simon, on behalf of the appellant, applied for leave to put in evidence further letters written by the respondent to the appellant. The application was supported by an affidavit. It was said that these letters had been misplaced and had only been found after the trial had concluded, notwithstanding that search had been made for them before the hearing. It was contended that if these further letters were put in they would show that the respondent's confessions of infidelity in the letters already exhibited were true confessions, that they would negative her statement that she had written the letters under duress and that her ill health was not caused by her husband's conduct towards her.

An application for the admission of fresh evidence on appeal is one which requires very careful scrutiny. The granting of such an application lies in the discretion of the appellate court, but of course the discretion must be exercised in accordance with established principles. Two recent cases were quoted in argument and their Lordships consider that it will be useful to refer to them at this stage. The first is *Leeder v. Ellis*, [1953] A.C. 52, and the second is *Corbett v. Corbett* [1953] 2 W.L.R. 1124.

In *Leeder v. Ellis*, which was an appeal to Her Majesty in Council from the High Court of Australia, the Board held that the principles which should guide an appellate court when considering an application for leave to adduce fresh evidence in order to obtain a retrial before a jury were of general application and applied to an appeal from a judge sitting alone.

In *Corbett v. Corbett*, Evershed, M.R., said it was not in doubt that in general the rule of the Court of Appeal laid down in *Shedden v. Patrick*, (1869) L.R. 1 Sc. & D. 470, and since followed in many cases is that fresh evidence on appeal will not be permitted unless two conditions are satisfied. The first is that the new evidence was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it so available. The second condition is that the fresh evidence, if true, would have had, or would have been likely to have had, a determining influence on the court below. *Corbett v. Corbett* was a matrimonial suit and it was submitted that the general rule is not or should not be so strictly applied in such cases, but the Court of Appeal rejected the suggestion. Their Lordships can see no ground for differentiation and find themselves in agreement with the Court of Appeal.

Mr. Simon did not dispute that the acceptance of the appellant's application depended on the fulfilment of the two conditions stated by Evershed, M.R., in *Corbett v. Corbett*, but he contended that the conditions were fulfilled in this case. With regard to the first condition he said that the additional letters had been discovered in a house in Arizona where a nephew of the appellant was living. The appellant had written twice to the nephew asking him to search for the letters and the nephew had reported that they could not be found. After the trial the appellant himself travelled to Arizona and found some of the letters in a receptacle in a store room and the others in the pocket of an old overcoat which he had left in the house.

It was not necessary for their Lordships in adjudicating on this application to decide whether in the circumstances stated the first condition could be deemed to be fulfilled because they were of the opinion that the admission of the additional letters would not have proved a determining factor had they been produced at the trial. Counsel had indicated to the Board the purport of the most important of the new letters and they did not add appreciably to those already in evidence. Their Lordships accordingly rejected the application and the appeal proceeded on the basis of the printed record.

The observations of Lord Macmillan in *Watt or Thomas v. Thomas*, 1947 A.C. 484 have particular application in the present case. Lord Macmillan said :—

“ My Lords, a court of law provides at the best an imperfect instrument for the determination of the rights and wrongs of the most personal and intimate of all human relationships, that of husband and wife. No outsider, however impartial, can enter fully into its subtle intricacies of feeling and conduct. But when a case involving such questions arises the court must do its best to judge dispassionately between the parties though it may sometimes be left with a doubt whether with the imperfect means at its disposal it has achieved perfect justice, especially where the evidence is widely conflicting. The case now before the House provides a typical example of the difficulties I have indicated but it is also a typical case for the application of the well established rule defining the proper approach of an appellate court to the consideration of a decision on fact by the court of first instance, a rule which, in my opinion, is of special force in matrimonial disputes. The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong.”

It was contended by Mr. Simon that the learned Chief Justice had misdirected himself on the evidence when considering whether the respondent was speaking the truth and that there was not sufficient evidence to justify the finding that the appellant's conduct had affected the respondent's health. Their Lordships do not agree. There is no indication of any misdirection and there is evidence to support the findings. It may be mentioned that in addition to the oral testimony which the trial Court believed the letters exhibited include one which the appellant wrote to the witness Andrews giving indication of an intention to resort to duress, if necessary, and letters from the respondent to her husband pointing to the fear which she had of him.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant will bear the costs.



In the Privy Council

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CECIL WALDRON ANDREW

v.

HELEN ANDREW

DELIVERED BY SIR LIONEL LEACH

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