

Jeffrey Christopher Astwood - - - - - *Appellant*

v.

Joyce Margaret Astwood - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR BERMUDA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL DELIVERED THE 28TH JULY 1981**

Present at the Hearing :

LORD DIPLOCK

LORD EDMUND-DAVIES

LORD ROSKILL

SIR JOHN MEGAW

SIR OWEN WOODHOUSE

[*Delivered by* SIR OWEN WOODHOUSE]

The parties to this Appeal are a husband and wife who married in Hong Kong in January 1955 and who then went to live in the husband's home island of Bermuda. There were strains in their married life and finally, in December 1978, the husband petitioned for divorce in the Supreme Court of Bermuda. The petition was presented on the ground defined by section 5(1) of the Matrimonial Causes Act 1974 "that the marriage has broken down irretrievably". That statutory concept requires proof of one of the facts outlined in the following subsection and the husband undertook to satisfy the Court in terms of paragraph (b) of subsection (2) "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent".

The petition was defended and on 9th and 10th July 1979 Mr. Justice Barcilon heard evidence from both husband and wife and one other witness called on behalf of the husband. On 30th July he delivered a considered judgment in the course of which he expressed a clear preference for the evidence given by the husband and he announced that he would grant a decree nisi.

The wife then appealed to the Court of Appeal for Bermuda. In effect her grounds were that the evidence did not justify the findings of fact of the trial Judge particularly insofar as they bore upon any material issue relevant to section 5(2)(b). A majority of the Court accepted those arguments and on 28th March 1980 the appeal was allowed (Blair-Kerr P. and Summerfield J.A., Duffus J.A. dissenting). The present appeal by the husband is from that decision; and in the end the question raised is really whether this is one of those rather

unusual cases where an appellate court may properly interfere with the factual findings of a trial judge who has had the advantage of evaluating conflicting evidence after hearing and seeing the critical witnesses. In order to answer that question brief reference needs to be made to the history of the marriage and a few of the issues between the parties.

It seems that soon after they had arrived in Bermuda in 1955 the wife felt disappointed with her new environment and according to the husband she urged him to go with her to settle in Hong Kong where her own family still lived and where she had been brought up. But they remained in Bermuda and then a year or two later she suffered a degree of ill health which left her uncertain and depressed. As time passed the husband complained that she had become increasingly withdrawn from his active business and community interests and would take little part with him in the social activities of the island. In 1967 it was necessary for her to travel to England for surgical treatment and while she was there he wrote to her complaining in effect that by her attitude she had virtually brought their married life to an end and that she should not return to the matrimonial home. She did rejoin him, however, but in 1970 he himself left their home for a period of six or eight weeks. He returned, so he said, for the sake of the children and in response to her undertaking to try with him to make something of their marriage. He has complained nonetheless that when he became a Member of Parliament in 1972 she was quite disinterested in his new life and responsibilities and this is something which added to his general feeling of frustration and resentment.

And then, according to the husband, all these problems came to a head. As the wife agreed, he found the discarded draft of a letter she had written in affectionate terms to a man she had met during one of the journeys she had been accustomed to make from time to time away from Bermuda. She denied in evidence that there had been any sexual impropriety with this man but the Judge took the view that it carried an inference that was irresistible (as he put it) that a sexual relationship had existed between them; "and it is not surprising" said the Judge "that the husband drew the same inference". That opinion was shared by all three Judges in the Court of Appeal and no more need be said about that aspect of the document. But what became a central feature of the case was the conflict of evidence as to when the document was discovered by the husband and its effect upon him in relation to the marriage. It carried a notation in his own hand which reads "14th September 1976" and an endeavour was made in cross-examination to have him admit that this was a reference to the time he had found it despite his claim that he had done so in 1977. He gave what the majority of the Court of Appeal regarded as unsatisfactory explanations as to why he had put the year 1976 upon it but throughout his evidence he held to the position that it was in September 1977 that he had discovered the draft letter, that he then challenged his wife concerning its implications and that because it had a decisive and final effect upon him he soon withdrew permanently from their common bedroom. On the other hand the wife contended that he had discussed the matter with her not in 1977 but in November 1976 and even so had continued to share their bedroom until 1978.

The significance of all this was described by Mr. Justice Barillon on the basis that

"The date of the move out of the bedroom was obviously of great importance to the Defence. If the letter had been found by the husband on 14th September, 1976, and he only moved out of the bedroom over a year later, he could not be heard to say (with any chance of success) that the finding of the letter was the last straw that had broken the back of the marriage."

Then, after an express reference to the wife's version of these matters, the Judge said:

“Taking into account all the evidence on this issue I am satisfied that the husband moved out of the matrimonial bedroom soon after the finding of the letter.”

And later:

“This letter must have dealt the death blow to the marriage, and I am satisfied that from the date of the discovery of that letter (and I place that at September 1977) the marriage had irretrievably broken down.”

Those are the critical findings in the case and they are explained in the judgment both by the impression formed by the Judge as to the probable reaction of this husband to the finding of such a document in “the very fragile state of the marriage and its past history”; and also his clearly stated impression that unlike the wife “the husband was trying to tell the truth to the best of his ability”—something which persuaded the Judge that he should accept the husband's evidence where it was in conflict with that of the wife.

It is clear that in the Court of Appeal both the President and Mr. Justice Summerfield were troubled in particular by what they felt were threadbare explanations which had been given by the husband when challenged in cross-examination concerning the significance of the date he had placed upon the draft letter. At first the husband had said that probably it represented the date when he found it and later that it was no more than “doodling”. And neither Judge was impressed by the reasons which had persuaded Mr. Justice Barcilon to express in terms of veracity so strong a preference for the evidence of the husband. In the end, however, after referring to several well-known decisions of high authority concerning the necessarily limited powers of an appellate court to overrule findings of fact of a judge sitting without a jury the President did accept that the trial Judge's findings “as regards the primary facts” must stand. Where he differed from the decision was in the area of the Judge's conclusion that the letter had created such a final situation in the marriage that the husband could not reasonably be expected to live with the wife. That kind of issue, the President considered, left an appellate court “in a stronger position than it is when asked to review a trial judge's findings of primary fact”.

Mr. Justice Summerfield went further. He was of opinion that the Court was not dealing with a situation “where the truth lies as between one witness and another—where the judge's ringside seat gives him an advantage denied to this court. We are dealing with the resolution of conflicts in the evidence of a witness he finds convincing, where that resolution appears to defy the inherent probabilities, is founded on highly suspect explanations and is unsupported by any reason in the learned judge's judgment”. Nonetheless, like the President (and of course Mr. Justice Duffus who was not persuaded that the Court could or should interfere at all with the decision of the Supreme Court) Mr. Justice Summerfield did accept that this marriage had broken down in fact. And he said that “there can be no doubt that serious misconduct could be inferred from that letter. It could reasonably lead the husband to conclude that the wife had an illicit relationship” with the other man. Those last conclusions would logically seem to involve the rejection by Mr. Justice Summerfield of one part of the wife's evidence concerning the letter (her clear-cut denial of sexual impropriety) while accepting the other portion of it referable to the time in November 1976 that she claimed it had been found by her husband.

But their Lordships do not propose in the context of this case to embark upon a close analysis of the evidence or the reasons given in

the various judgments in order to decide the appeal now before them. Indeed the issue just mentioned may serve to point up the doubtful task that is faced by any appellate tribunal whenever it seems necessary to review the findings of a trial judge. An important and often decisive element in assessing what weight should be given to conflicting pieces of oral evidence must always be the opportunity he will enjoy of directly observing the witnesses in person in his own court. It is difficult enough for an appellate court to feel confident that its own evaluation of the facts should be substituted for those of the trial judge when, for example, the record of oral evidence is supplemented in a substantial way by contemporary documentary material. But in reversing the trial Judge on credibility in this case the Court was working not on the transcript of a shorthand note of what had been said but on a necessarily incomplete note taken by the Judge in his own hand. In addition the only writing adverse to the husband's evidence is a slight notation on the wife's document which, despite the inconclusive character of his explanations, could still provide a wrong reason for regarding the date as an accurate pointer to the time the letter was actually discovered. Be this as it may their Lordships find themselves entirely in agreement with both the President and Mr. Justice Duffus in the Court of Appeal that the findings of primary facts that were made in the Supreme Court by Mr. Justice Barcilon cannot be overruled. In that situation it remains only to consider the final conclusions of the President which persuaded him that the appeal should be allowed.

In essence this part of the President's judgment really depends upon his view that an objective assessment could properly be made of the primary facts in order to decide whether or not it was unreasonable to expect the husband to live with the wife. As to that he was not prepared to agree with Mr. Justice Barcilon that implications arising from the draft letter sufficiently strengthened the husband's case, "even accepting that the husband found the letter in 1977, and not in 1976 as alleged by the wife"; and he added as a reason for his own opinion—"the parties have continued to live under the same roof".

Their Lordships find some difficulty with this part of the President's judgment. He felt obliged to accept that in the real sense the marriage had broken down. So any practical reasons which had persuaded the parties to remain virtually at arm's length in the same house do not seem to provide much support for holding that the husband could still reasonably be expected to go further and resume his married life with the wife. Then there is a wider question. It seems to be inherent in the President's view that when an appellate court is estimating the significance of a respondent's behaviour for the purposes of section 5(2)(b) it is in a stronger position than when it is asked to review what he referred to as findings of primary fact. In some special circumstances it may be so. But if that opinion was intended to express a concept of general application then their Lordships are unable to agree with it. There are two principal reasons. First, it is really not possible to put in contrast the kind of evidence that is needed to assess the issue raised by section 5(2)(b) on the one hand against other evidence which would lead to so-called primary findings of fact. In each case there is quite likely to be a conflict between parties or other witnesses which will demand careful direct evaluation. The second reason is related to the first. To the extent that there are the important advantages already mentioned that are given to a trial judge who hears and sees the witnesses so must those advantages be present when he attempts to decide a section 5(2)(b) issue. Nor would it be right in the view of their Lordships to approach such an issue as something to be answered by some objective or abstract test of reasonableness. It is not the special gravity of the behaviour of a respondent that is the

question so much as its effect in the particular context of the very marriage upon the particular petitioner; and that involves taking into account all their personal attributes and failings, of mind, temperament and character, together with the quality of the marriage at the relevant time. The advantage of approaching such an assessment after direct personal observation of the individuals concerned can hardly be doubted. It is for reasons of this kind that their Lordships are of opinion that the trial Judge was entitled to arrive at the conclusions which led him in this, as in the other areas of the case, to hold in favour of the petition.

Before parting with the appeal some brief reference should be made to certain reasons which may have had a part in persuading the Court of Appeal to grant leave to appeal to this Board. They relate to what are referred to as the consequences of a decree of divorce in relation to property and other rights. Such matters in themselves are of course important and will deserve consideration accordingly. But those consequential issues cannot be regarded as having any direct relevance when the Court is dealing with a petition for dissolution of marriage in the sense that they could influence the decision in one direction or the other.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of Mr. Justice Barillon restored. The respondent must pay the appellant's costs before this Board and in the Court of Appeal.

In the Privy Council

JEFFREY CHRISTOPHER ASTWOOD

v.

JOYCE MARGARET ASTWOOD

**DELIVERED BY
SIR OWEN WOODHOUSE**

Printed by Her Majesty's Stationery Office
1981