MOHAMMED HAKIM KHAN *v.* DUKH BHANJAN SHARMA

[Appellate Jurisdiction (Hyne, C.J.) February 8th, 1956]

Finding of fact by Court—when appellate Court will override.

The respondent alleged he was given a cheque by the appellant for £125 which was in exchange for the same sum in money. The appellant asked that the cheque should not be presented at once and said he would pay the money into the bank within a month. The cheque was later presented and was dishonoured.

The appellant had sold a car to the respondent and he alleged that the respondent was in credit with him in the sum of £125 by reason of that transaction.

The 1st Class Magistrate at Lautoka gave judgment in the resulting action for the respondent.

On appeal from that Court.

HELD.—An appellate Court will only in rare cases disturb a finding of fact in the Court below based on verbal testimony and the Judge's observation as to the demeanor of witnesses.

Cases referred to:—
Khoo Sit Hoh v. Lim Thean Tong (1912) A.C. 323.
Yuill v. Yuill [1945] 1 A.E.R. 183.

P. Rice for the appellant.

R. Kermode for the respondent.

HYNE, C. J.—The learned Magistrate, after a careful consideration of the evidence, gave judgment on the facts for respondent for the amount claimed. In the course of his judgment he said:—

> " In giving their evidence both the defendant and his witness, Shiupal Singh, created a very bad impression on me, and I cannot place any reliance on what they said."

The appeal in this matter turns largely on the question as to how far an Appellate Court is justified in overruling findings of fact by the Court below, based on the demeanour of the witnesses who appeared before it.

There is also a further question as to the extent to which a trial Judge or a Magistrate can examine witnesses.

I have been referred to certain passages in *Yuill v. Yuill* [1945] 1 A.E.R. 183 at pp. 188 to 189, commencing from para. H. I cite so much of the passages as appear relevant to the case before me:—

> " We were reminded of certain well-known observations in the House of Lords dealing with the position of an Appellate Court when the judgment of the trial Judge has been based in whole or in part upon his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions and in circumstances where the Appellate Court is convinced by the plainest considera-

tions that it would be justified in finding that the trial Judge has formed a wrong opinion. But when the Court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an Appellate Court has no power to take this course . . . I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial Judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has beeen praised by the trial Judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the Judge as to his demeanour must necessarily lose its value. There is one further consideration which is particularly relevant to the present case. A Judge who observes the demeanour of the witnesses while they are being examined by Counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantages of calm and dispassionate observation. . . . That it is open to an Appellate Court to find that the view of the trial Judge as to the demeanour of a witness was ill-founded has indeed been recognized by the House of Lords itself. The case to which I refer was one in which I was engaged as Counsel in the Court of Appeal and in the House of Lords, and I think it right to place the matter on record as the only report of the case does not bring out the relevant circumstances. The case is that of *Hvalf Polaris and Another v. Unilever Ltd., and Others.*"

I pause here to observe that I can find nothing in the record to support learned Counsel's contention that the Magistrate " descended into the arena and that his vision was consequently clouded by the dust of conflict."

I agree with Mr. Rice that the Magistrate asked only such questions as were necessary to clarify points in the evidence and to obtain information on matters which in his view had not been adequately dealt with in examination or cross-examination. As Mr. Rice said, he did this scrupulously and fairly. In my opinion he did not at any time interpose his questions to the disturbance of Counsel.

Nor do I find that such questions were excessive or irrelevant.

Learned Counsel for appellant referred further to other passages in this judgment; namely paragraphs G and H on p. 189, which read as follows:—

" There were two issues in the case, (i.e. the case of *Hvalf Polaris and Another v. Unilever Ltd., and Others*) one of construction and one a claim to rectification. It was on the latter issue that the evidence in question was relevant and although in the House of Lords the appeal was ultimately decided on the issue of construction, the issue of rectification was fully argued and the whole of the evidence examined in the greatest detail. In the result the House was satisfied by this examination that the strictures passed by the trial Judge on the two witnesses in question were unjustified and

that their evidence was truthful. The following passages are to be found in the opinion of *Lord Atkin*, at p. 36: ' Similarly, Blom failed to recollect a telephone conversation on February 10th, 1930, testified to by Young, in which he was corroborated by the bank clerk, Bjelke. The conversation is entirely consistent with the probabilities and the business conditions proved to be in existence at the time. Blom's version of a conversation at a later date in March is not. I cannot see that Blom's recollection affords any ground for distrusting the evidence of either Young or Bjelke. The result produced on my mind is that there is no satisfactory reason shown for any imputation on the substantial accuracy or good faith of any of the witnesses called by the plaintiffs . . .' ".

Counsel laid special stress on the words " substantial accuracy ".

Finally, learned Counsel referred me to paragraphs C and D on p. 190:

" That case shows how important it is that the Judge's impression on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence. If there the trial Judge had done this as it was done in the House of Lords he could not have expressed the opinion which he did as to the demeanour of the witnesses. In the present case the Judge cannot, I think, have subjected the evidence to an adequate scrutiny before expressing the view which he did as to the demeanour of the respondent and the co-respondent."

I have carefully noted all the grounds of appeal but I do not think it necessary to consider the grounds in detail.

Counsel's general submission is that the learned Magistrate failed to consider all the evidence critically. This, he submits, he must do if he passes strictures on the demeanour of witnesses. His contention is that strictures on the defence witnesses were unmerited, and that no careful analysis was made of the evidence of plaintiff's witnesses.

Learned Counsel for the appellant contends that the main matter in dispute is whether the appellant as part of the consideration for the purchase of car 3659, made any payment by cheque, as he said he did, when he bought the car from respondent.

It is not quite clear whether on repurchase, respondent paid for the car by cheque only or by cash and cheque. It is contended that a reference to respondent's passbook shows that at the relevant time he only had a very little over £300 in the bank and that he withdrew £300. Respondent, however, said in evidence that he often kept large sums of money with him, and in reply to the Court he said that he paid £850 for the car, and that the £300 may be part of this amount.

He had two cheques for £125 which had been given him by appellant, not, however, given to him on account of appellant's purchase of the car in December 1949. He did not hand these back when he repurchased because, as I have already observed, appellant was in need of money and so he gave him the £850. He asked for the return of the receipt he had given appellant when car 3659 was sold to appellant, but was told he had not got it. He did, however, give respondent Exhibit " B " which appellant signed.

I agree with Mr. Rice's submission that the appellant could have made a reference in Exhibit " B " to the cheques if he had so wished. In my view, if the return of the cheques was part of the consideration for the purchase of the car, it is significant that Exhibit " B " is silent on the matter.

Mr. Kermode contends that the learned Magistrate relied entirely on the evidence of Naidu, a solicitor's clerk.

The cheque, the subject matter of the present action, was the subject of a previous action in 1953, between the same parties. Much evidence was given by Naidu on this matter.

Mr. Kermode submits that Naidu's evidence as to this was based entirely on memory, and should therefore not have been given the weight the learned Magistrate gave to it.

Mr. Rice admits that it was largely based on memory but he says, and quite correctly, that Naidu did have something in writing to help him, and that was the endorsement of the writ, Exhibit " E ", namely " 4/3/53. Has to be withdrawn Hakim to pay costs and debt to D. B. Sharma four weeks."

As a result Naidu prepared Exhibit " L ", on the instructions of Ram Prasad Sharma which appellant says he refused to sign. It is common ground, however, that appellant did pay Mr. T. R. Sharma's costs and the 1953 action was struck out. No payment to D. B. Sharma was made and the present action is the result.

Mr. Rice has submitted that the issues in this matter are—

The respondent's case is: " I have possession of an admittedly unpaid cheque."

The appellant's case is: " You have the cheque but you must give credit for it against the purchase price of a car."

These are the issues as I see them, too, and on a perusal of the record and the judgment I am satisfied that the learned Magistrate was fully aware that these *were* the issues.

It has been objected that the learned Magistrate did not critically examine the evidence and as I have said that he relied entirely on the evidence of Naidu. I am unable to agree. I think he gave all the evidence the closest scrutiny. The appellant gave four different and contradictory statements as to the settlement arrived at in relation to the earlier action in respect of the cheque. In view of such evidence, how could the Magistrate believe the appellant ? And how could he come to a conclusion that the substantial accuracy of the evidence of the respondent and his witness had been adequately challenged so as not be to believed ? The Magistrate considered the evidence as a whole, decided, as I have said that he could not place any reliance on the appellant and his witness, Shiupal Singh, and found as a fact that the appellant did owe the sum of £125 to respondent and he gave judgment accordingly.

The case turned entirely on a question of fact. I have referred to *Yuill v. Yuill.* I have also been referred by Mr. Rice to the case of *Khoo Sit Hoh v. Lim Thean Tong* (1912) A.C. 323. This was a Privy Council Case and deals, as *Yuill v. Yuill* does, with the extent to which an Appellate Court is justified in reversing a judgment of the Court below, when that judgment is entirely based on fact.

At p. 325 *Lord Robson* said:—

> " The case was tried before the Judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of Counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony."

It is clearly laid down in this case and in the case of *Yuill v. Yuill* that an Appellate Court will only in rare cases disturb the finding of fact in the Court below, based on verbal testimony and the Judge's observation of the demeanour of the witnesses.

The present case is not, in my opinion one of those rare cases, nor do I think, on a careful perusal of the record, and on a full consideration of the judgment of the learned Magistrate, that he failed to take account of particular circumstances or probabilities material to an estimate of the evidence.

Learned Counsel for the appellant has submitted that this is a fit case for reference back for retrial.

I do not think so. If I sent it back it would also give appellant an opportunity of adducing fresh evidence, something which is apparently desired and which has already been the subject of an application to this Court and been refused after the fullest consideration by Carew, J.

The appeal is dismissed with costs.