DHARAM RAJ

v.

ABDUL HAMID

[SUPREME COURT, 1966 (Hammett Ag. C.J.) 5th, 26th August]

Appellate Jurisdiction

Evidence and proof—civil claim—standard of proof—preponderance of probability —standard not constant—commensurate with gravity of matter in issue and the subject matter.

A civil claim is to be established by proof of a preponderance of probability, but the standard of such proof is not constant but variable and the degree required in any case depends on the subject-matter and must be commensurate with the gravity of the matter in issue.

Cases referred to: *Bater v. Bater* [1951] P.35; [1950] 2 All E.R. 458: *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247; [1956] 3 All E.R. 970: *Blyth v. Blyth and Pugh* [1965] 2 All E.R. 817; [1965] P.411; (on appeal — [1966] A.C. 643.)

Appeal from a judgment of the Magistrate's Court in favour of the plaintiff for the sum of £200. The facts sufficiently appear from the judgment of the learned Acting Chief Justice.

R. I. Kapadia for the appellant.

H. A. L. Marquardt-Gray for the respondent.

HAMMETT Ag. C.J.: [26th August, 1966]—

The plaintiff respondent obtained judgment in the Court below on his claim that he had on 2nd August, 1965, lent the sum of £200 to the defendant appellant. The defendant appellant has appealed on two grounds. The first ground of appeal is that the verdict is unreasonable and cannot be supported having regard to the evidence. The second ground was abandoned at the hearing of the appeal.

The brief facts are that the defendant appellant came to Suva as a witness in a court case in which a relative was a party. He did not before then know the plaintiff respondent who is a taxi owner-driver but was introduced to him, used his taxi and stayed in his house at Suva. The respondent says that on 2nd August, 1965, whilst the appellant was staying with him the appellant borrowed £200 from him, on a temporary basis until he returned to Labasa. The appellant flatly denied he had borrowed any money from the respondent.

The respondent produced no documentary evidence to support his claim and called no witnesses who were present at the Suva Market Stand where it was that he said he handed this £200 in

cash to the appellant. He did, however, call as his witness a Mr. McNally who says the appellant told him that at some unspecified date in 1965 at Nausori Airport he would send him "the money" for the respondent.

A

The appellant denied telling Mr. McNally this but the learned trial Magistrate did not accept the appellant's evidence which he held was false. The appellant said, on the contrary, that the respondent tried unsuccessfully to borrow money from him and that this action has been brought maliciously because he would not lend him any money.

B

For the appellant a letter dated 12th September, 1965, was produced, which the respondent admitted having had sent to the appellant. In this letter the respondent asked the appellant for a loan of £300 to buy a truck. The respondent did not, however, refer in this letter to the loan of £200 he said he had made to the appellant the previous month nor ask for repayment thereof. This was despite
C the fact that the respondent says the loan was still outstanding at the time he wrote his letter and that repayment was then overdue.

Under cross-examination the respondent, having admitted sending this letter in which he asked for a loan of £300 to help him buy a truck, denied that he had ever asked for the loan of £300 to buy a truck. He insisted that all he asked for was a loan of £200.
D This was clearly in express contradiction to his own letter to the appellant. What was even more strange was the fact that if all the respondent wanted was £200, there was no need for him to borrow anything from the appellant — all he had to do was to ask the appellant to repay the alleged loan of £200, which was then overdue, if in fact the respondent had lent the appellant this sum of £200. The respondent failed to give any satisfactory explanation
E of his conduct in this respect.

In his judgment the learned trial Magistrate found that the respondent had not told the truth in denying he had asked the appellant to lend him £300 to buy a truck and also that the appellant had not told the truth in denying the truth of the evidence of Mr. McNally. He then said—

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> "If I had simply to choose between the plaintiff's case (even fully accepting Mr. McNally's evidence) and defendant's own evidence, in view of that letter I would probably have found for the defendant."

It is clear, therefore, that the significance of this letter, which on
G the face of it was damning to the respondent's case, for no creditor would be expected to borrow from his debtor in such circumstances, was appreciated by the learned trial Magistrate. He did, however, consider that the inferences to be drawn from the appellant's false denial of the truth of Mr. McNally's evidence turned the scales in favour of respondent.

H

I have given careful consideration to the inferences drawn by the learned trial Magistrate and his findings of fact thereon. These were largely, if not entirely, based on his findings that the appellant

had not told the truth in his evidence. But neither had the respondent. The Court below was therefore faced with the problem of deciding which of the two cases put up by the appellant and respondent, respectively, both of whom were not witnesses of truth, should be believed. If the stories given in evidence by both the appellant and respondent are thereby discounted as coming from unrealiable witnesses, the Court's finding must be based on the affirmative testimony of other witnesses. It was by implication however held by the learned trial Magistrate that the evidence of Mr. McNally alone was insufficient to justify a decision in favour of the respondent. In my view, a false denial by the appellant of the truth of Mr. McNally's evidence did not take the matter any further. It still remained a case where there was a direct conflict of evidence on the essential issue, namely an alleged loan of £200, by the two principals involved, both of whom were untruthful witnesses. There was still no affirmative evidence by any witness believed by the learned trial Magistrate to be a witness of truth, which supported the otherwise uncorroborated allegation of the respondent, who on his own evidence was clearly not entirely a witness of truth, that he had in fact lent the appellant the sum of £200.

The learned trial Magistrate considered that upon the appellant being discredited as a witness inferences could be drawn which were not only adverse to his defence but were also in favour of the respondent's claim. The respondent was, however, by his own letter self discredited. Is not this situation comparable to the thirteenth stroke of a crazy clock which is thereby not only self discredited but has doubts cast on all its previous utterances?

The learned trial Magistrate held that he was satisfied that the respondent's case had thereby, or at least as a result thereof, been proved on the balance of the probabilities. I do not think the evidence goes as far as that.

In the judgment of Denning L.J. in *Bater v. Bater* [1950] 2 All E.R. 458 he indicated that there is not a constant but a variable degree of such a standard of proof, and that the degree of proof required in any case, must be commensurate with the gravity of the matter in issue. He then said—

> "The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else. It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would

require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

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This view has been adopted on at least two subsequent reported occasions by the Court of Appeal in *Hornal v. Neuberger Products Ltd.* [1956] 3 All E.R. 970 and again in *Blyth v. Blyth and Pugh* [1965] 2 All E.R. 817.*

B In this case the claim is for the sum of £200. This is not a trivial claim. It is a claim for a substantial sum of money. The standard of proof required was proof on the balance of the probabilities but the degree of proof on that standard which was required had to be commensurate with the occasion and this I do not think was attained.

I have given careful consideration to the matter and I have come C to the conclusion that on this evidence the plaintiff respondent was not entitled to succeed in his claim in the Court below. In my view his claim should either have been dismissed or possibly he should have been non-suited.

In these circumstances I shall allow the appeal. I set aside the judgment of the Court below and in lieu thereof I enter judgment for the defendant appellant with no order as to costs. I reserve the D question of the costs of the appeal.

Appeal allowed; judgment entered for appellant.

* The appeal from this decision to the House of Lords is reported at [1966] A.C. 643. —Ed.