HARRY SMITH *v.* DUKH BHAJAN SHARMA

[FIJI COURT OF APPEAL AT SUVA (Lowe, C.J., President, Sir George Finlay and R. Knox-Mawer, JJ/A), November 6, 1959]

CIVIL APPEAL NO. 53 OF 1959

(Appeal from H.M. Supreme Court of Fiji—Hammett, J.)

Credibility of parties—judicial determination of that issue—witnesses swearing with unqualified confidence to specific happenings—refusal of any measure of credence on a hypothesis—judgment founded exclusively upon apparent meaning of an exhibit—requirements as to wide issue of credibility.

Held.—(1) The primary function of a trial Judge in certain circumstances is to pass judgment on the whole wide issue of credibility ;

(2) To rely upon the apparent meaning of an exhibit in such cases is to place reliance upon an inappropriate and questionable basis ;

(3) Some questions requiring determination by a trial court cannot be decided on appeal and the Appellate Court is then bound to direct a re-hearing.

Appeal allowed ; case remitted to Supreme Court for re-hearing.

R. G. Kermode for the appellant.

K. C. Ramrakha for the respondent.

This appeal involves questions in respect of a transaction relating to the alleged disposal of certain items of property on the 15th of March, 1952. At that date the appellant was the owner of a house and its contents at Namure, Nadi. Both the house and at least some of its contents were subject to a Bill of Sale to one Chetta under which there was at that date owing the sum of £70. The security would appear to have been more than ample. The appellant having made default in the payment of the monies secured by the Bill of Sale, Chetta, the Bill of Sale holder, had instructed an auctioneer, by name Mansell, to sell by public auction the items of security comprised in the Bill of Sale. The advertisement published by the auctioneer notified the intended sale at Namure, Nadi on Saturday 15th March, 1952, of a dwelling house described as being of timber and iron and removable and also a timber and iron kitchen also described as removable. The advertisement also notified the sale of certain furniture.

The Bill of Sale contained the usual clause bringing subject to the security, any future goods brought upon the premises and all goods brought there in substitution for the goods specifically described. There may well have been goods in the house, at the date of the grant of the Bill of Sale, not specifically described in it. These would not be subject to the security.

The case for the appellant was that no *bona fide* auction was ever held by reason of an intervening arrangement between the appellant and the respondent. The case for the respondent was that there was no intervening arrangement between him and the appellant and that an auction sale was held and that it was *bona fide* and effective.

The appellant's case was that prior to the auction sale he embarked upon some negotiations with one Mehanga Singh, son and representative of the Bill of Sale holder Chetta, with a view to securing the indulgence of further time for payment. This indulgence Mehanga Singh, in his representative capacity, was not prepared to grant unconditionally. He did, however, agree that if the appellant would remove the furniture from the house the subject of the security, and store it in Mehanga's house, Mehanga on behalf of his father would allow 6 weeks further time for payment of the monies secured by the Bill of Sale and would postpone the auction. The appellant testified that the grant of this concession was made in the presence of the respondent who thereupon approached him spontaneously and offered immediately to provide on loan the money necessary to pay off what was due under the Bill of Sale and the costs of the auction. This offer the appellant said he accepted and that he, in consequence, did not accept the proferred concession made by Mehanga.

The judgment reviews certain of the evidence and proceeds :—

The auctioneer also said that as he was, in his words, " a newcomer to the auction business " he did not know where he stood legally or what was necessary for him to do to safeguard himself and to safeguard the respondent in respect of his loan. In that state of doubt he said he intimated to all those assembled that merely as a formality he would offer the house for sale. He said he limited the sale to the house alone. He did not, he said, invite separate bids. Mr. Mansell according to his evidence accepted a bid by the respondent of £100. There were he said, no other bids and he then received payment of £100 from the respondent for which he gave a receipt. The receipt reads:

> " Received from D. B. Sharma (f/n Nageshwar) the sum of £100 for house bought at public auction sold under Bill of Sale, owned by Harry Smith ".

The Court then dealt with further evidence and with the facts which had been established and continues :—

Obviously the crucial question the Judge had first to consider was whether there was a *bona fide* auction sale or not on the 15th March, 1952, when the form of an auction sale was for the reasons he gave resorted to by Mr. Mansell.

Basic to that question is the question whether or not any such arrangement for a loan by the respondent to the appellant was ever made as the appellant contended. The judge was clearly in no doubt as to the fundamental importance of these questions for he said early in his judgment—" the real issue in this case is whether or not the defendant bought the plaintiff's house and the items of furniture secured by the Bill of Sale or whether they were withdrawn from the auction and not sold ".

An analysis of the judgment discloses the process of reasoning by which the result achieved by it was reached. A noteworthy feature is that despite a tribute of equal candour and sincerity paid by the Judge to the appellant and the respondent and a tribute to the independence and credibility of Mr. Mansell, nevertheless, on crucial questions he was not prepared to accept the testimony of any of them. Indeed in respect of Mr. Mansell he expressed some degree of disbelief. The oral testimony of all of them was dismissed on the hypothesis that their memory of detail must have been blunted and

dimmed by the passage of time, whilst actual disbelief is expressed in the evidence of Mr. Mansell in at least one respect because his evidence that the transaction was a loan was inconsistent with his conduct in putting the house up for sale and presumably inconsistent too with the terms of the receipt he gave. The Judge also, during the trial, expressed some degree of disbelief in the respondent when referring to what he called the false value given by the respondent to the house in the insurance proposal.

Where witnesses swear with unqualified confidence to specific happenings however old, it is going very far to refuse them any measure of credence on a mere hypothesis that their memories have become blunted or dimmed. That comment has greater weight in respect of the evidence of Mr. Mansell for the incidents of the day of the sale being incidents in his early career as an auctioneer and being the source of particular conscientious anxieties to him must have left an indelibly accurate record on his memory. Then again to dismiss from consideration all the verbal evidence to any extent to which that evidence did not accord with the *prima facie* meaning of the receipt was productive of the curious result that the receipt was accepted by the Judge as expressing the whole true relationship between the parties when in fact neither party intended it should do so or accepted that it did so ; the appellant case was that the receipt was merely the culmination of a pretentious auction and the respondent's case was that the sale comprehended both the house and the chattel whereas the receipt referred only to the house. In the result therefore, a character and importance was given to the receipt which neither party agreed that it bore.

In its almost total reliance upon the receipt the judgment would on its face appear to rely upon an inappropriate and too questionable a basis. The receipt could never be anything more than one element in the sum of the evidence upon which the Judge had to decide the action. It could, of course, according to the character he attributed to it provide a test for determining the credibility of either party or of any witness. By founding his judgment upon the receipt alone and disregarding all the oral testimony of both parties and of all the witnesses, the Judge in effect abdicated his essential judicial function of determining the whole question of credibility. The probative effect of the receipt could only be determined in the light of the oral testimony relating to it. In that connexion it is pertinent to observe that if Mr. Mansell's evidence is accepted there is in it nothing conflicting with what is stated in the receipt. The evidence merely explains the receipt. The same observation is not true of the evidence of the respondent in relation to the receipt, for the respondent claims that both house and furniture were sold whereas the receipt is limited to the house.

In the result it seems to us that one inadequate feature of the evidence was made the basis of the judgment and that the true judicial function of the Judge to determine the issue of credibility as between the parties was either totally disregarded or avoided for purely suppositious and insufficient reasons. This statement might be thought to be in conflict with a statement in the judgment that after considering the evidence as a whole the Judge formed the opinion that Mr. Mansell's memory could not be relied upon in the face of his own receipt. In its reference to consideration of the whole of the evidence at that point the judgment is a little inapt because of the expressly limited association of the whole of the evidence with the mere conflict between Mansell's recollection and what appears on the face of the receipt. On the other hand a careful perusal of the judgment discloses that it was founded and founded exclusively, upon the apparent meaning of the receipt.

That was, for the reasons we have given, an unsatisfactory way of deciding the case in that not only was the judgment put upon an insufficient and inapt basis but the primary function of the Judge to pass judgment on the whole wide issue of credibility was disregarded.

As an appellate tribunal, this Court can do no other than set aside the judgment and refer the case back to the Supreme Court for re-hearing. That would have been necessary in any event for early in the case the Judge quite properly directed that evidence should not be given concerning particular items of the claim, in so far as the claim extended to chattels. As he pointed out, what was first essential was a decision as to what the rights of the appellant were. In the result he directed, and counsel agreed, that the question of what chattels were involved in the proceedings and their respective values should be left to a separate inquiry. Despite this and despite the fact that no evidence relating to particular chattels was ever given, the Judge took up the question of chattels at the end of his judgment and heard counsel on the question of values. Later some kind of agreement between counsel was reached with respect of what were called " special damages ". There were no special damages properly pleaded.

Before this Court both parties complained of injustice accruing from the course adopted. The appellant because he said the judgment wrongly assumed (and he had no chance of giving evidence to the contrary) that all the goods not specifically described in the Bill of Sale had been handed over to his representative ; the respondent because he wanted to address some argument as to the point of time at which the values ought to be assessed.

These questions could only be dealt with on a new trial, and the new trial we are directing on the primary ground will afford the parties the fullest opportunity of presenting their cases on every question involved in the action. Needless to say there is no reason why any qualified member of this Court should not sit on the case when it is re-heard. The effect of this judgment is that the appellant has succeeded, and for that reason the respondent is to pay appellant's costs.