

18, 1955

~~CN 962~~

No 16 of 1954

In the Privy Council.

UNIVERSITY OF LONDON W.C.1. -4 JUL 1956 INSTITUTE OF ADVANCED LEGAL STUDIES

ON APPEAL
FROM THE WEST INDIAN COURT OF APPEAL.

43562

BETWEEN—

HARRY YOUNG LAI

Petitioner

— AND —

BENJAMIN CHO FOOK LUN and ESTELLE
CHO FOOK LUN

Respondents.

CASE FOR THE FIRST RESPONDENT.

RECORD.

- 10 1. This is an Appeal from a judgment of the West Indian Court of Appeal (Mathieu-Perez, C.J., Trinidad and Tobago; Collymore, C.J., Barbados; and Bell, C.J., British Guiana) dated the 30th day of January, 1953, whereby the decision of the Supreme Court of Trinidad (Duke J.) dismissing with costs the petition of the first Respondent for the dissolution of his marriage with the second Respondent on the ground of her adultery with the Appellant was set aside and the first Respondent was granted a decree nisi on the ground of the said adultery and the Appellant was ordered to pay the costs of both Respondents in both Courts. p. 62.
p. 53.
- 20 2. The now first Respondent was the Petitioner in the case and the Appellant in the West Indian Court of Appeal (hereinafter called the Court of Appeal), the now second Respondent was the Respondent in both Courts, and the now Appellant was correspondingly the Co-Respondent and Respondent. To avoid confusion the parties will be called herein Petitioner, Respondent and Co-Respondent respectively.
3. The Petitioner's case was that the Respondent frequently committed adultery with the Co-Respondent at 127, Coffee Street, San Fernando, Trinidad, and in particular that the Respondent committed adultery with the Co-Respondent at the said address on the night of Whit p. 2.
- 30 Monday the 6th day of June, 1949.
4. The Petitioner and the Respondent were married on the 10th day of February, 1935, in British Guiana. The Petitioner came to Trinidad in 1937 and the Respondent in 1938 and since that time they have lived and co-habited in San Fernando, Trinidad. The Petitioner p. 57.

carried on a provision and rum shop business in San Fernando at 127, Coffee Street; in 1948 he became a partner in the business known as the Shantung Restaurant, Port of Spain. From June, 1948 to October, 1948, he managed that business, and the Respondent looked after the business in San Fernando. The Petitioner's shop is situate at the corner of Coffee and Drayton Streets, San Fernando, and at the material time the Petitioner and the Respondent lived together on the premises. There is a galvanised gate leading to Coffee Street and through this gate access is obtained to the Petitioner's garage, the sleeping quarters of the clerks and the portion of the Petitioner's premises used by him as his residence. 10
Access to the Petitioner's residence is also obtained through a door leading to the provision shop; this door can be locked by a padlock on the outside and can be bolted on the inside. There is a door between the Petitioner's bedroom and his sitting room; there is also a door between the Petitioner's sitting room and the No. 2 private room, and there is a door from No. 2 private room into the back yard, and there is a galvanised gate leading from the back yard into Drayton Street. Between the No. 2 private room and the shop there is a hatch through which drinks can be handed and this hatch was referred to in the evidence as "the hole". 20

5. The case for the Petitioner before the Supreme Court was:—

p. 57.

On the 6th June, 1949, he left the premises at 127, Coffee Street in the morning, leaving the Respondent there and telling her that he might not come home that night but that he would try and do so. He returned home about 9.50 p.m. and one of his clerks Young Poy opened the gate and he drove his car into the garage. He went to the door leading to the provision shop which he found locked, he pulled it and could not open it, he called out and nobody answered. He saw the bedroom window open, placed a ladder on a box in the store-room, climbed the ladder, got into the bedroom, went into the sitting room and saw no one; he then passed from the sitting room into the rum-shop and then he looked through the hatch between the rum-shop and No. 2 private room and saw the Respondent committing adultery with the Co-Respondent. He returned towards the garage, called his two clerks who both looked through the hatch and saw the Respondent and Co-Respondent and as they did so the Petitioner called out "Look" and the Co-Respondent got up and ran. At that time the Respondent was wearing a night gown. The Petitioner then told the Respondent that he was going to make a report at the Police Station. The Respondent then telephoned to a mutual friend one Mrs. Yhap who arrived immediately. Mrs. Yhap gave evidence and stated that she spoke to the Petitioner and attempted to dissuade him from making a report but he insisted. The Petitioner left to go to the Police Station and as he got outside his premises he saw Sydney Howard in a car and Howard spoke to him. The Petitioner went to the Police Station and made a report. 30
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p. 58.

The Respondent and Mrs. Yhap also went to the Police Station to find out what report the Petitioner made.

6. The Answer of the Respondent was that the story was untrue and that it was a fabrication made up in order to get rid of her so that the Petitioner would be able to marry one Phillipa Acham. p. 58.

7. The Answer of the Co-Respondent was an alibi. He gave evidence that at the material time on the evening of the 6th of June, 1949, he was at his home in Reform Village with his wife. His wife gave evidence in support of his case. p. 58.

10 8. The judgment of the Supreme Court contained the following passages:—

“No evidence whatever was led to show that, prior to the night of Whit Monday the 6th June, 1949, there were any acts of familiarity or of affection between the Respondent and the Co-Respondent.” p. 47, ll. 17-19.

“The Petitioner, according to his evidence, arrived at about 9.55 p.m. at the door leading to the provision shop, he pulled the door, and found that it was locked from the inside. Young Poy stated that the door was locked inside, but he further stated that p. 49, l. 41—
p. 50, l. 14.

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“neither he nor the Petitioner pulled at the door. Young Poy was the person who opened the Coffee Street gate for the Petitioner to enter his premises with his motor car, and Young Ping was in bed at the time. Young Ping stated that the Petitioner saw that the door was locked from the inside. The Respondent denied that she had locked the door. I am satisfied that the door was not locked from the inside.”

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“According to the Petitioner, he climbed a ladder which he placed on a box in the store-room, and thus obtained entry to the bedroom, then to the sitting room, and then to the shop. Young Poy said that the Petitioner saw the bedroom window open and climbed through it, but under cross-examination by counsel for the Respondent he stated that he was in his room when the Petitioner climbed through the window, that he didn't see the Petitioner climb through the window but that he was told that the Petitioner did so. Young Ping stated that he heard the Petitioner say that he climbed through the window. The door was not locked from the inside. There was no necessity for the Petitioner to go into the store-room to get a ladder, put it on a box, and climb through the bedroom window. I am satisfied that the Petitioner did not climb through the bedroom window.”

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“From January to March, 1949, Sydney Howard was employed by the Petitioner as a salesman in his shop at No. 127, Coffee Street, San Fernando. In examination-in-chief he said that at 10 p.m. on Whit Monday the 6th June, 1949, he was driving taxi HA4499 in Drayton Street, San Fernando in the direction of Coffee Street. He was carefully cross-examined. I have considered his evidence, together with his demeanour in the witness-box, and I am not p. 50, l. 42—
p. 51, l. 9.

“satisfied that at about 10 p.m. on Whit Monday the 6th June, 1949, Sydney Howard was driving a taxi in Drayton Street or at the corner of Coffee and Drayton Streets. The Petitioner deposed in evidence that, before he left the premises in his car to go to the Police Station, Howard called out to him. I do not believe that such was the case. I do not believe that on the night of Whit Monday the 6th June, 1949, Howard saw either Young Lai or the Petitioner. Further, he did not see the Petitioner on Thursday the 9th June, 1949, as alleged by him (Sydney Howard).”

p. 52, l. 10—
p. 53, l. 5.

“The evidence of the Petitioner and of Young Poy and Young Ping was that, although there was no light in the No. 2 Private Room or in the rumshop, they were able to see the Respondent and the Co-Respondent, and what they were doing, in the Private Room, by reason of the reflection from an electric light which was burning in the sitting room. That electric light hangs from a cord, and the Petitioner stated that the light reflected in the Private Room “not brightly but a little’. There is wire mesh at the top of the partition between the sitting room and the private room. The Co-Respondent, according to the evidence, did not speak at all. 10
“If I were to find that the Respondent committed adultery on the night of Whit Monday, the 6th June, 1949, in the No. 2 Private Room immediately before she had the conversation with her husband at the frigidaire, I could not, having regard to Young Lai’s alibi and the little light which would reflect in the Private Room, find that the man with whom she committed such adultery was the Co-Respondent Harry Young Lai. 20
“The basis of the Petitioner’s evidence was that his wife prepared herself for the act of adultery by locking from the inside the door leading to the provision shop so that, in the event of the Petitioner returning home before the act of adultery was committed or completed, her paramour would have an opportunity to get away through the door leading from the private room to the back yard before she unlocked the door to admit her husband. However, the Petitioner did not speak the truth when he said that the door by which he sought to enter his premises was locked from the inside, and he uttered an untruth when he said that he got into the bedroom by climbing a ladder. As a result, so much doubt is cast on his evidence as to the act of adultery which he says he saw committed that I am not satisfied that the Petitioner did in fact see his wife committing adultery. I do not believe that either 30
“Young Poy or Young Ping looked through the hole between the rumshop and the No. 2 Private Room. I am satisfied that they were called by the Petitioner when the Respondent was by the frigidaire and not before. There, the Petitioner spoke to his wife, but he did not accuse her of adultery, he merely asked her who was the man to whom she had been talking. 40

“Having considered all the evidence (including evidence not specifically referred to in this judgment) given by the Petitioner, the Respondent, the Co-Respondent, and the witnesses examined on their behalf, and the submissions made by counsel, I find that the Respondent Estelle Cho Fook Lun did not commit adultery with the Co-Respondent Harry Young Lai or any other person on the night of Whit Monday, the 6th June, 1949, and that she did not commit adultery with Harry Young Lai at any other time at No. 127 Coffee Street, San Fernando.

10 “The petition for dissolution of marriage, together with the claim against Harry Young Lai for damages, is dismissed, and the Petitioner will pay the costs of the Respondent and of the Co-Respondent.”

9. The judgment of the Court of Appeal contained the following passages:—

20 “The decision of this appeal involves the application of the proper principles to be applied by an appellate Court when it is asked to take a different view of the facts from those taken by a Judge sitting without a jury. Those principles were clearly enunciated by Lord Thankerton in three propositions when delivering judgment in *Watt (or Thomas) vs. Thomas* (1947) 1 A.E.R.582. The case of *Yuill vs. Yuill* (1945) 1 A.E.R.183 is also in point dealing, as it does, with the matter of the demeanour of witnesses.

p. 58, l. 21—
p. 60, l. 46.

30 “In deciding whether this case falls within any, and if so which of those three propositions we have carefully examined the evidence in the light of the critical analysis of it which was made by each of the Counsel who argued this appeal and of the several submissions made by each Counsel, keeping clearly in mind the contention of Counsel for the Respondent and Counsel for the Co-Respondent that:—

“ ‘ It can of course only be on the rarest occasions, and in circumstances where the Appellate Court is convinced by the plainest considerations, that it would be justified in finding that the trial Judge had formed a wrong opinion ’ ”) *Yuill vs. Yuill*).

40 “The trial Judge stated that he was of opinion that the Petitioner did not speak the truth when he said (a) that the door by which he sought to enter his premises was locked from the inside and (b) that he got into the bedroom by climbing a ladder, and as a result of the above declared that so much doubt is cast on his evidence as to the act of adultery which the Petitioner says he saw committed that he the Judge is not satisfied that the Petitioner did in fact see his wife committing adultery. The Judge has also stated, without giving any reason that he did not believe that either Young Poy or Young Ping the Chinese clerks of the

“Petitioner who gave evidence that they looked through the hole
“between the rum shop and the No. 2 private room and saw the
“adultery being committed did in fact look through that hole. It is
“to be noted that the Judge nowhere comments unfavourably on
“the demeanour of either of these clerks or of any other witness with
“the single exception of Sydney Howard.
“We have asked ourselves what is the evidence that (a) the door in
“question was secured and (b) the Petitioner entered by climbing
“a ladder. After an examination of the evidence on those points
“we can find no justification for the Judge’s disbelief of the 10
“Appellant’s story on those two matters. We are satisfied that the
“door was secured that night from the inside and that the Petitioner
“did obtain access through the window; that being so the grounds
“for the Judge’s disbelief of the Petitioner’s evidence on the other
“matters fail and consequently we are of opinion that the matter
“is at large.
“We are satisfied that the Respondent and the Co-Respondent did
“commit adultery in the No. 2 Private Room as alleged.
“In coming to that conclusion we have paid particular attention to
“the subsequent conduct of the Petitioner on that night for we 20
“consider that conduct to be entirely consistent with his version of
“the events. Immediately after the Petitioner saw what he has said
“he saw he went to the Police Station despite the attempts of Mrs.
“Yhap to dissuade him and made a report to the police. What was
“the nature of that report? In cross-examination he stated that he
“told the police ‘ that he looked through the hole and saw the man ’,
“it was suggested that he made no report of that nature to the police;
“but the Respondent went to the Station with Mrs. Yhap and spoke
“to Corporal Springer. The best method of proving what report the
“Petitioner made to the policeman would be to call the policeman. 30
“The Petitioner could not do so but the Respondent could. Why
“did she not call the policeman?, The answer seems obvious—
“because his evidence would be likely to support the Petitioner’s
“case and discredit hers. To us it is a matter of extreme significance
“that the policeman was not called by either the Respondent or
“Co-Respondent. Although as stated the contents of the report
“have not been disclosed its ominous nature can be gauged by the
“following reply given by the Petitioner to Mr. Archbald, under
“cross-examination:—
“ ‘ I went in motor car to police station. I don’t know my 40
“ ‘ wife rang up Mrs. Yhap. I made a report to the police. I
“ ‘ think No. is 2233 Springer. I didn’t tell him I saw a man
“ ‘ lacing up his boots. I told him I looked through a hole and
“ ‘ saw the man.’ ”
“And by the reply given by the Respondent under cross-examination
“to Mr. Wooding:—

“ ‘I told Cpl. Springer what my husband had done. He
“ ‘came outside with me by door of Station. I don’t know if
“ ‘he wrote it down. I told him I would like to know what
“ ‘report my husband made. Springer was coming out.
“ ‘Springer told me my husband said that if he had a gun in
“ ‘hand he would shoot me. I asked him if I should go home
“ ‘or stay out. He advised me to stay with Mrs. Yhap if I am
“ ‘afraid. I told Police Corporal Springer that my husband
“ ‘had threatened me. Springer never told me my husband
“ ‘had said he found Young Lai in shop.’ ”

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“It has been submitted in effect by Counsel for the Respondent and
“Counsel for the Co-Respondent that Mrs. Yhap was a friend of
“both the Petitioner and the Respondent; that she was a completely
“neutral witness, and one upon whose character no attack was made;
“that it was open to the Judge to accept her testimony and that if it
“was accepted it was quite inconsistent with the adultery having
“taken place. The trial Judge has nowhere in his judgment com-
“mented upon the evidence given by Mrs. Yhap or given any
“indication as to what reliance he placed upon her evidence. We
“have come to the conclusion that Mrs. Yhap’s whole behaviour is
“suggestive of the fact that she was well aware that the Petitioner
“had cause for grave displeasure with his wife on the night of the
“6th June, 1949, but that she was anxious to persuade him not to
“pursue the matter. We have considered her evidence against the
“rest of the evidence in this case in coming to our conclusion that
“the adultery complained of was in fact committed. We have had
“regard to all that has been said by way of criticism of the evidence
“of Sydney Howard and it does not appear to us to be open to serious
“objection. We believe that he made a genuine mistake as regards
“the date he gave for his conversation with the Petitioner; but even
“if his evidence is put aside as it was put aside by the Judge the
“adultery of the Respondent and the Co-Respondent is established
“on the rest of the evidence.

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“The Judge without expressly stating whether or not he believed
“it has allowed the alibi put forward by the Co-Respondent to
“influence him in deciding that even if adultery was committed on
“the night of the 6th June, 1949, by the Respondent it was not com-
“mitted with the Co-Respondent. We are of the opinion that the
“alibi is open to serious criticism in that it is not co-extensive with
“and does not cover the entire material time. The Co-Respondent
“is vague as to the times and the evidence of his wife does not
“disclose that she had any reason to pay particular attention either
“to the time of his return on that night or his movements on that
“night and in fact it was not until two weeks after the alleged act
“of adultery that she knew that her husband was suspected. How
“can she throw her mind back two weeks and remember with

“certainty in these circumstances what her husband did that night?
 “We are of the opinion that the evidence establishes with all the
 “certainty that can be required that the Respondent did commit
 “adultery with the Co-Respondent as alleged and it follows that
 “this appeal is allowed. There will be a decree nisi and the
 “Co-Respondent will pay the costs of the Petitioner and Respondent
 “here and in the Court below.”

10. The Petitioner respectfully submits that the judgment of the Court of Appeal is correct and ought to be affirmed. The judgment of the Supreme Court was based on a finding that the Petitioner did not speak the truth when he said that the door leading to the provision shop was locked on the inside. The Court, therefore, did not believe the Petitioner when he said that he had to climb in through a bedroom window nor when he and his clerks gave evidence of seeing the Respondent and the Co-Respondent committing adultery. The Petitioner submits that his evidence supported by that of his clerk Young Poy did not justify the finding that the door was not locked from the inside and that consequently the whole basis of the judgment of the Supreme Court disappeared and that the case thereupon became at large for the Court of Appeal. The Supreme Court also allowed itself to be too much influenced by the alibi of the Co-Respondent which was not supported by any independent evidence. The Petitioner further submits that the Court of Appeal was correct in placing reliance upon the Petitioner's subsequent actions in visiting immediately the Police Station and making a report as being consistent with what he alleged he had just seen. Further, the witness Mrs. Yhap tried to dissuade the Petitioner from visiting the Police Station and making a report and both she and the Respondent followed the Petitioner and enquired at the Police Station the nature of the Petitioner's report. Either the Respondent or the Co-Respondent could have called Corporal Springer to have given evidence as to the contents of the Petitioner's report had it been helpful to their case but the Petitioner could not have called him. And the Petitioner submits that his evidence supported by that of his two clerks proved strictly that the Respondent and the Co-Respondent did commit adultery together at his premises on the night of the 6th of June, 1949, and that he is entitled to the relief given to him by the Court of Appeal.

11. The Petitioner therefore respectfully submits that this appeal should be dismissed with costs for the following amongst other

REASONS.

- (a) BECAUSE the Supreme Court based its judgment on a finding of fact which the evidence did not support.
- (b) BECAUSE the Supreme Court allowed itself to be influenced by the alibi of the Co-Respondent.

- (c) BECAUSE the Supreme Court was wrong in rejecting the evidence of the Petitioner supported by his two clerks.
- (d) BECAUSE the Court of Appeal was right in holding that the case became at large for them.
- (e) BECAUSE the weight of the evidence proved that the Respondent did commit adultery with the Co-Respondent.

L. I. STRANGER-JONES.

No 16 of 1954

In the Privy Council.

ON APPEAL

FROM THE WEST INDIAN COURT OF APPEAL.

BETWEEN—

HARRY YOUNG LAI - - Petitioner

— AND —

**BENJAMIN CHO FOOK LUN and
ESTELLE CHO FOOK LUN Respondents.**

CASE

FOR THE FIRST RESPONDENT.

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