Privy Council Appeal No. 55 of 1960

Sydney Hastings Dowse – – – – – – – *Appellant*

v.

Attorney-General, Federation of Malaya – – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY 1961

Present at the Hearing:

LORD RADCLIFFE.
LORD DENNING.
LORD GUEST.

[*Delivered by* LORD RADCLIFFE]

This appeal arises out of a Matrimonial Cause between the appellant and his wife, in which on the 6th November 1958 the High Court of Penang pronounced a decree nisi in favour of the appellant. On the 3rd February 1959 the respondent intervened in the proceedings to show cause why the decree should not be made absolute, alleging that on one occasion in February, 1958 and on three occasions in March, 1958 the appellant had committed adultery with one Tan Phaik Kooi. On the 22nd January, 1960 the High Court (Rigby, J.) found the adultery proved and rescinded the decree nisi, no disclosure of the facts having been made to the Court at the time of the divorce petition. The appellant appealed to the Court of Appeal of the Supreme Court of the Federation of Malaya and on the 24th February, 1960 his appeal was dismissed. He appeals from this order to their Lordships' Board.

The facts of the case are very simple, though on the critical issue they involved a direct conflict of evidence between Miss Tan and the appellant. She deposed that sexual intercourse had taken place between them on the occasions charged, he deposed that it had not. The trial judge accepted her evidence on this point and rejected the appellant's denial. He directed himself however that, considering the nature of the issue, he ought not to act on Miss Tan's evidence unless he found independent corroboration in some material particular. This corroboration he found in the appellant's conduct at and after an incident which took place on the 12th August, 1958 and which will be referred to later. The Court of Appeal, while doubting whether the trial judge had not directed himself in some degree too strictly as to his duty to find corroboration, agreed nevertheless that the only satisfactory way to try the case was to follow the line taken by the learned judge and to require corroborative evidence. This they found, as he had, in the appellant's conduct over the August incident.

It has not been disputed in argument before their Lordships that this was a case in which corroboration ought to have been required. Considering the nature of the issue, that any direct proof of sexual intercourse depended merely on Miss Tan's word against the word of the appellant, and that she was herself a witness whose evidence the trial judge was unable to accept in at least one important respect, their Lordships consider that the attitude adopted was the correct one. It is unnecessary, on this basis, to discuss the

question whether Miss Tan's evidence should be regarded as the evidence of an accomplice in the strict sense, having regard to a possible distinction between knowledge of fornication and knowledge of adultery, or to refer to the distinction between a judge's duty to advise a jury not to act upon an accomplice's evidence without proper corroboration and a jury's right not to accept that advice, if properly instructed. For those issues do not arise in this case. The only point that admits of argument in this appeal is whether the Courts in Malaya have been wrong in holding that the evidence available did afford the corroboration required.

Their Lordships turn first to the judgment of the trial judge. In their opinion it is a quite unexceptionable handling of the evidence and there is no ground upon which the appellant is entitled to claim that it did less than justice to himself or his case. Briefly the judge had to make up his mind upon two conflicting stories which were incapable of being at all reconciled with each other. Miss Tan, a young Chinese lady, gave birth to a male child on the 7th December, 1958, of which she alleged that the appellant was the father. Her story was that she had often been approached by his woman servant, Khaw Beng Seok, who lived next door to her home, with invitations to visit her at the appellant's house; that one afternoon in March, 1958 she did go there with her, and that the appellant, whom she had not met before, had come into the room, taken her with him to his sitting room and later had intercourse with her against her will in his bedroom. About six days later she came back again with the servant and intercourse again took place. There were two further visits, one about twelve days later and another about a fortnight after that, at which there were similar incidents. All of them, according to her, were against her will: she explained her various returns to the house, by saying that she had been promised that the appellant would give her medicine or pills to allay her fear of pregnancy and that she went to complain that she feared that they were ineffective.

The appellant on the other hand denied that any of these visits to him had taken place. Prior to the 12th August, 1958 he had seen her only once in his life and that was on a casual occasion when he returned to his house and saw her as she was leaving in the company of his servant's younger sister. He asked who she was and was told by Khaw Beng Seok that she was her own next door neighbour. His denials of Miss Tan's alleged visits were confirmed in detail by Khaw Beng Seok.

The judge had therefore to decide between these two stories and that meant believing the one witness or the other: he could not believe both. In general he believed Miss Tan. He did not accept her statement that the intercourse that took place, at any rate after the first occasion, was without her consent; but he thought that this version of the real facts was not difficult to account for and, subject to that, he said that he was satisfied that she was speaking the truth when she said that the appellant had had sexual intercourse with her on four occasions. His general assessment of her was:—

> " Having heard this girl's testimony and watched her demeanour for several hours in the witness box, I am certainly not prepared to say that her story, in so far as it concerns the petitioner, is a tissue of lies. On the contrary, subject to what I shall later say, I formed the impression that her evidence was true ".

This finding by the judge necessarily implied that he did not regard the appellant as a truthful witness on the central issue of the case. As to the servant Khaw Beng Seok, who supported him, the judge evidently took the view, from his references to her, that she had acted as procuress for the appellant in seeking to tempt Miss Tan to enter his house. It is not possible, of course, to say how far the judge's acceptance of Miss Tan as a witness of credit was supported by the fact that he found corroboration of her story in the rest of the evidence, apart from his observation of her as a witness in the box and his testing of the evidence of all the witnesses by the probabilities of the case. A judge stating his conclusions at the end of a hearing in the course of which he has had to bring all these criteria into play is entitled to state his conclusions as a whole and does not have to analyse them as if

they formed the successive stages of a time sequence. What matters is that no appellate Court could be justified in departing from his treatment of the evidence and his findings upon it, unless there was something defective in law in his holding on the question of corroboration. To that their Lordships now turn.

Two incidents were put forward by the respondent as corroboration. One was rejected by the learned judge as neutral and therefore as affording no proof: it was, he said, entirely consistent with the appellant's defence. The other appeared to him to afford " ample corroboration in a material particular of the truth of the girl's story ". This corroboration arose out of the appellant's conduct in the incident of the 12th August, 1958.

At about 10.0 p.m. on the evening of that day Miss Tan and the two Chinese ladies she lived with, " perfectly respectable old ladies " from a Straits Chinese family, as the judge found, appeared outside the front gate of the appellant's house. One of the old ladies was Miss Tan's guardian, one the guardian's sister. They had come to see him and to ask him what he intended to do about the baby which Miss Tan had by then been advised to expect. There was a commotion, caused by altercation between them on the outside and Khaw Beng Seok on the inside. This noise roused the appellant, who was in bed, and he came down to see what it was about. In the exchanges that followed he denied that he was the father of the child, stated that he had never seen the girl before and added that to him she did not look pregnant. After much argument the old ladies asked him whether, if he did not believe her to be pregnant, he would send her to his own doctor for examination. At first he refused, saying that it was nothing to do with him, but later he promised to ring up his doctor and make an appointment for her to be examined.

The next morning he did what he had promised, though assuring the doctor that he had had nothing to do with the girl. She was escorted to the doctor's house by Khaw Beong Seok and there told after examination that she was five months pregnant. The appellant himself went down to see the doctor that day to get his report and later paid his fee.

The conduct of the appellant is certainly at first sight incriminating. It strongly suggests that he had a guilty conscience with regard to Miss Tan and that the girl whom he found at his gate that night was not the unknown girl whom he had in effect never met which his own story required that she should be. Unless therefore the appellant could offer an explanation of his having acted as he did which would remove the prima facie impression his conduct did corroborate Miss Tan's evidence in a material particular and did tend to show that her accusation against him was a true one. Now the appellant accounted for his reaction to the incident in the following way. He had suffered, he said, a great deal of unpleasant publicity from his divorce case, which had only just been heard, and he wished at all costs to avoid any further publicity. It was for this reason that he had yielded to the importunity of the women at the gate and had promised what they asked in order to get rid of them. Indeed he had the suspicion that Miss Tan's accusation had been inspired by his wife. Unfortunately for him, the judge, testing this explanation by all the probabilities of the case, found it impossible to accept it. He was ready to make every allowance for the appellant's state of mind, his desire to avoid further publicity and a genuine belief that his wife would go to any lengths to frustrate the decree nisi for which he was asking. The judge however found it difficult to account for the appellant's admitted remark to Miss Tan's guardian that the girl did not look to him pregnant, if his story was true; and, whatever the pressure upon him on the evening of the 12th August, it seemed impossible to believe that, when by the next morning he had had a chance to think over his position and had been told, he said, by his servant that the girl was a prostitute (an imputation which the judge found to be quite untrue), he should have held to his course of sending her to his doctor for examination unless he had a guilty conscience in the matter and wished to find out if she really was pregnant. Having dealt with the facts and the credibility of the respective witnesses in this way, the judge held that the appellant's conduct on this

occasion provided the necessary corroboration of Miss Tan's story. Their Lordships can only say that in their opinion his judgment is unexceptionable and it calls for no further comment.

The Court of Appeal took substantially the same view as the trial judge. It is said however that when they came to deal with the issue of corroboration they adopted a criterion which was unsound in law and so misdirected themselves to the prejudice of the appellant. There is this much to be said for the argument that there is perhaps one passage in the judgment of the learned Chief Justice which is liable to the construction that a piece of independent evidence which is equally consistent with the story told by a witness who has to be corroborated and the contrary story told by a person accused or otherwise on the defence is capable of constituting corroborative evidence. If that was the meaning of the passage in question their Lordships would not think it a correct proposition of law, although even so its deficiency would not provide a reason for reversing the trial judge's finding and order against the appellant. Their Lordships have no doubt that evidence, to be corroborative, must be truly probative of the relevant issue; that is, it must positively implicate the accused person and positively show or tend to show the truth of the accomplice's story that the accused committed the offence. A fact which is indifferently consistent with the accomplice's story and the accused's denial of it is neutral and supplies no corroboration.

The view expressed by the Chief Justice, who gave the main judgment, was that the crucial question regarding the incident of the 12th August was, what was the appellant's state of mind? He thought that the facts showed that the appellant was more interested in the question whether Miss Tan was pregnant than in anything else. If his real anxiety was directed to this point then, in the learned judge's view, that was ample corroboration of Miss Tan's allegations. This was probably intended to be an elliptical way of saying that such anxiety, if present, supported Miss Tan's story that the sexual relations had taken place but did not support the appellant's story that he knew nothing of her and that she was a complete stranger to him.

The Chief Justice then went on to say that he guided himself by the well-known passage as to the elements of corroboration which appears in the judgment of Lord Reading CJ. in *Rex* v. *Baskerville* [1916] 2 K.B.658, an accepted authority on this point. He proceeded to sum up his view as follows:—

> " Considering the matter in the light of that passage it seems to me that evidence as to the appellant's state of mind on 12th August showing that he entertained anxiety as to whether or not Miss Tan was pregnant considered in the light of all the surrounding circumstances afforded ample independent corroboration of her story implicating him. It was not, of course, necessarily inconsistent with the appellant's innocence but it was certainly consistent with his guilt and to that extent it was available in law as corroboration ".

It is the last sentence quoted above that has caused some difficulty, since it is not easy to say with confidence what, if any, contrast is intended between the adverb " not necessarily " on the one hand and the adverb " certainly " on the other. If they were intended to convey the conclusion that the matter was equally consistent with either of the accounts given, that, as their Lordships have said, would not make it corroboration. Considering the context however and the other observations of the learned Chief Justice this does not seem to have been his meaning. Their Lordships infer that what he intended to say was that, taking the evidence as a whole, the appellant's conduct was more consistent with Miss Tan's story than his own, despite the fact that, taken in isolation, it might theoretically have been accounted for by the explanation that he gave. There is no legal defect in such a way of stating the case.

For the reasons given this appeal must fail. Their Lordships will report to the Head of the Federation of Malaya that in their opinion the appeal ought to be dismissed and that the appellant ought to pay the costs of the respondent.

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In the Privy Council

SYDNEY HASTINGS DOWSE

v.

ATTORNEY-GENERAL,
FEDERATION OF MALAYA

DELIVERED BY
LORD RADCLIFFE

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