MAGDA BOYKOWYCH and ALBERT GADZIALA (*Defendants*) ..... } APPELLANTS;

1954
*Dec. 6, 7
1955
*Jan. 25

AND

MICHAEL BOYKOWYCH (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Divorce—Evidence—Adultery—Standard of Proof required in Ontario—Criminal Conversation—Admission by one alleged adulterer not in presence of other—Admissibility against latter where no objection raised by him.

In a suit by a husband for divorce, joined with a claim against the co-respondent for damages for alienation of his wife's affections and for criminal conversation, the husband testified his wife had admitted to him having committed adultery with the co-respondent. The allegation was denied by both defendants. The jury found adultery to have been committed and assessed damages. On appeal it was contended that the trial judge had not properly instructed the jury as to the degree of proof necessary to prove adultery; that in an action for criminal conversation an even heavier onus rested upon the plaintiff than in an action for divorce; that the trial judge should have instructed the jury that any admission, even if made, was no evidence against the co-respondent and, in any event, that it was not evidence of the truth of the statement allegedly made.

Held: 1. That the standard of proof required in proceedings brought under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85, as to the commission of a marital offence, where no question of the legitimacy of offspring arises, is the same as in other civil proceedings, that is a preponderance of evidence, and the trial judge's charge complied with the rule laid down in *Smith* v. *Smith and Smedman* [1952] 2 S.C.R. 312.

2. That since counsel for the co-respondent had not objected that evidence as to the alleged admission by the wife was not admissible as against his client, he could not be heard on appeal to complain of non-direction on that point. *Nevill* v. *Fine Art and General Insurance Co.* [1897] A.C. 68 at 76 applied.

Per Kerwin C.J. and Cartwright J.: No substantial wrong or miscarriage of justice occurred in connection with the alleged admission of the wife.

Per Locke J.: In view of the position adopted by counsel for the co-respondent at the trial it was not open to him to complain of the admission of the evidence. *Scott* v. *Fernie Lumber Co.* 11 B.C.R. 91 at 96 approved in *Spencer* v. *Field* [1939] S.C.R. 36 at 42.

APPEAL by defendants from the judgment of the Court of Appeal for Ontario (1) affirming the judgment of

*PRESENT: Kerwin C.J. and Rand, Kellock, Locke and Cartwright JJ.

(1) [1953] O.R. 827.

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Anger J. on the answers of a jury, in an action for divorce and damages for alienation of affections and criminal conversation.

R. F. Wilson, Q.C. for the appellant, Magda Boykowych.

J. J. Robinette, Q.C. for the appellant, Albert Gadziala.

G. T. Walsh, Q.C. and *W. C. Cuttell* for the respondent.

THE CHIEF JUSTICE:—The respondent Michael Boykowych brought an action in the Supreme Court of Ontario for the dissolution of his marriage with his wife Magda and, by an order of a member of that Court, joined in the action a claim against Albert Gadziala for damages (*a*) for alienation of his wife's affections and (*b*) for criminal conversation with his wife. The action was tried with a jury who, in answer to questions submitted to them, found that adultery had been committed between the defendants and fixed the damages at $2,500. Having answered the first two questions dealing with these matters, the jury, by reason of the trial judge's direction, did not make any finding as to alienation of affections or damages therefor. In accordance with these findings a judgment *nisi* was pronounced dissolving the marriage and the respondent was awarded $2,500 damages and the costs of the action as against Gadziala.

Appeals by the defendants were dismissed by the Court of Appeal for Ontario on September 18, 1953. Gadziala immediately served notice of appeal to this Court and an order was made approving his security for costs. The defendant wife took no steps to appeal or to ask leave to appeal, apparently considering that she was barred from so doing under the decision in *Harris* v. *Harris* (1).

By order dated November 9, 1953, the judgment *nisi* for divorce was made absolute and the marriage dissolved. On December 3, 1953, the wife's appeal from that order was dismissed by the Court of Appeal who, however, gave her leave to appeal therefrom to this Court. Her appeals and Gadziala's appeal from the Court of Appeal order of September 18, 1953, came on for argument together before us when it was pointed out that the wife's appeal from the

(1) [1932] S.C.R. 541.

judgment of December 3, 1953, would raise merely the question as to whether that judgment was the order the Court of Appeal should have made. As our powers would be limited to deciding that point, it was deemed advisable that we should exercise the jurisdiction given us by s-s. (1) of s. 41 of the *Supreme Court Act* to give leave to appeal from any final "or other judgment" and which jurisdiction was conferred by an amendment in 1949 subsequent to the decision in the *Harris* case. Such leave was thereupon granted.

In *Smith* v. *Smith & Smedman* (1) this Court decided that by virtue of the *English Law Act,* R.S.B.C. 1948, c. 111, the law in force in British Columbia in divorce and matrimonial causes is *The Divorce and Matrimonial Causes Act, 1857* (Imp.), as amended by 21-22 Vict. c. 108, and that under that law proceedings in divorce in that province are civil and not criminal in their nature and the standard of proof of the commission of a marital offence, where no question affecting the legitimacy of offspring arises, was the same as in other civil actions, i.e., a preponderance of evidence. The same rule applies in Ontario under the *Divorce Act (Ontario)* R.S.C. 1952, c. 85.

Applying that test to the present appeal, the trial judge charged the jury that the onus or burden of proof was upon the plaintiff to establish that adultery took place by a preponderance of credible evidence. His subsequent remarks contain nothing to detract from that statement and in fact he added that "caution is always necessary before finding that it was committed". In my opinion the trial judge's charge was correct and therefore the wife's appeals to this Court should be dismissed with the usual order as to costs in the case of a married woman.

An additional question was raised by the appellant Gadziala. The plaintiff testified that his wife had admitted to him having committed adultery with Gadziala. This was denied by the wife, but the point is made that the trial judge should have instructed the jury that any admission, even if made, was no evidence against Gadziala, and, in any event, that it was not evidence of the truth of the statement allegedly made. The trial judge did neither of these. The decision of this Court in *Welstead* v. *Brown* (2) was relied

(1) [1952] 2 S.C.R. 312.

(2) [1952] 1 S.C.R. 1.

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Kerwin C.J.

upon by the respondent, but in the view I take of the matter nothing need be said about it except that it must not be pressed too far. Having considered all the evidence, I am of opinion that the provisions of s-s. (1) of s. 28 of The Judicature Act, R.S.O. 1950, c. 190, apply since there was no substantial wrong or miscarriage of justice. The appeal by Gadziala should be dismissed with costs.

RAND J.:—This is an appeal by both the respondent and the co-respondent in an action for divorce and criminal conversation. For the respondent the substantial ground urged was that the charge was inadequate as to the degree of proof necessary to establish adultery. I agree with the reasons given by Roach J.A., speaking for the Court of Appeal, in his rejection of that ground. Although the charge, in this respect, was somewhat spare, what was stated was accurate and, if anything, more favourable to the respondent than was required.

The respondent's appeal must, therefore, be dismissed, but I think it desirable to add a few observations on the criticism by Roach J.A. of certain language in the judgment of Dixon J. (now C.J.) in *Briginshaw* v. *Briginshaw* (1), quoted in part in *Smith* v. *Smith and Smedman* (2), to this effect:—

> Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences.

Roach J.A. comments in these words:—

> With respect I prefer to state the proposition thus, that the nature of the fact in issue rather than the gravity of the consequences flowing from a finding that the fact has been proved is the determining factor which requires the tribunal to be charged as Cartwright J. says, and as I agree, it should be charged. The proposition thus stated avoids what I respectfully suggest would appear to be a conflict between the proposition as stated by Cartwright J. and the fundamental principle that the tribunal in reaching its decision should be guided by the evidence alone and not by the results of its finding.

(1) (1938) 60 C.L.R. 336. (2) [1952] 2 S.C.R. 312 at 332.

But what is the "nature" of the fact in issue? That fact may have physical, religious, moral, ethical, social, legal or other characteristics and implications and its "nature", in the sense in which acts are weighed and judged by a community, cannot escape the influence of most of these constituent senses of the civilized human intelligence by which judgment is made. The physical act in question here, in the absence of the other qualifying factors, would be denuded of its significance to the law; and it is only in relation to these norms and the consequential effects of their operation that its character or nature can be fully apprehended. Our everyday judgments are reached after weighing circumstances on the scales of experience, but in the presence of these characterizing consequences; and the heavier they are, the clearer must be the evidence to tip the scale into persuasion. This is by no means the same as permitting one's decision on a fact to be affected by a belief, say, as to the nature of a particular punishment annexed to it or by taking into account the latter as itself an item of the circumstances. But to say that the degree of social consequence does not indirectly reflect the quality and characteristics of the act given it by these factors and thus influence the degree of proof we demand for decision seems to me to contradict our daily experience.

The ground raised on behalf of the co-respondent is that certain oral admissions by the respondent which the husband testified to have been made to him and which, admissible against the wife, were not evidence against him, had not been the subject of a direction to the jury to that effect. To this there are two answers: a repetition of the evidence of these statements was brought out in cross-examination of the husband by counsel for the co-respondent; and no request was made to the trial judge to give any such direction, although ample opportunity had been afforded counsel to do so. On this latter point it is sufficient to cite *Thompson* v. *Fraser Companies Ltd.* (1) following what was said in *Nevill* v. *Fine Art & General Insurance Co.* (2), by Halsbury, L.C. at p. 76; and there are no circumstances here calling for a discretionary indulgence to the co-respondent.

(1) [1930] S.C.R. 109 at 118. (2) [1897] A.C. 68.

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Rand J.

It seems to be uniformly accepted that such admissions cannot be used against the co-respondent: *Harris* v. *Harris* (1); *Morton* v. *Morton et al.* (2). In *Welstead* v. *Brown* (3), Cartwright J., speaking also for Taschereau and Locke, JJ., on the authority of the *Aylesford Peerage* case (4), held similar statements by a wife to be admissible and this was referred to by Roach J.A. as supporting the admission of those made in this case. But there, the wife, as a witness, had confirmed her admissions, which thereupon became evidence of consistency and so far corroborative. I do not take that decision as an authority here. I may observe, also, that it should be kept in mind that to the hearsay rule there are special exceptions in pedigree cases and that it is unsafe to rely upon them in other proceedings.

The appeal of the co-respondent must, likewise, be dismissed, and in both cases, with costs.

KELLOCK J.:—In my opinion, the charge of the learned trial judge is not open to the objection that it does not comply with the decision of this Court in *Smith* v. *Smith and Smedman* (5). I therefore think that the appeal of the female appellant fails.

As to the appeal of Gadziala, what is complained of is failure on the part of the learned trial judge to charge the jury on that issue with respect to the evidence of the respondent as to admissions made to him by his wife, in respect of which counsel for Gadziala cross-examined. Whether or not counsel went beyond what is allowable within the principle followed in *Gabriel* v. *Eliatamby* (6), need not be determined, as no objection was made on behalf of Gadziala to the learned judge's charge. In the light of the judgment of Lord Halsbury L.C., in *Nevill* v. *Fine Art and General Insurance Company* (7), at 76, the appellant is not entitled to a new trial. The appeal should be dismissed with costs.

LOCKE J.:—In this action the respondent claimed a divorce from his wife on the ground of her adultery with the appellant Gadziala and damages against the latter for

(1) [1931] 4 D.L.R. 933.
(2) [1937] P. 151.
(3) [1952] 1 S.C.R. 1.
(4) (1885) 11 App. Cas. 1.
(5) [1952] 2 S.C.R. 312.
(6) [1926] A.C. 133.
(7) [1897] A.C. 68.

alienation of her affections and for criminal conversation. The joinder of these causes of action was authorized by an *ex-parte* order made under the powers conferred by Rule 1 of the Matrimonial Causes Rules. Upon the issues raised by the pleadings, the jury found in favour of the respondent and the appeals made to the Court of Appeal were dismissed.

There was ample evidence upon which, if they chose to believe it, the jury might properly find that the wife had committed adultery with the appellant Gadziala.

The appeal of Gadziala is based upon the failure of the learned trial judge, when charging the jury, to instruct them as to the admissibility and the relevance of evidence given by the respondent at the hearing as to admissions made to him by his wife.

The respondent gave evidence that she had orally admitted to him that she had committed adultery with Gadziala and had referred to the latter as her real husband. The wife and the appellant Gadziala were each represented by counsel and while, of course, there could be no objection to the evidence on behalf of the wife, counsel for Gadziala did not object that it was either wholly inadmissible as against Gadziala or at least admissible only for a limited purpose. The respondent, a Ukrainian who spoke broken English, was thereafter cross-examined by counsel for Gadziala and was asked what he had intended to do with the room in his house which had been occupied by Gadziala up to the time when the latter moved elsewhere, and to this question the answer made was:—

> My wife moving one back (sic) in his same place, and I say "what is the idea?", and my wife says, "I am going to sleep in the same place where my true husband sleep", and I said, "Who is your husband?" and she said, "Albert Gadziala."

Later the respondent was questioned, apparently on the issue of alienation, whether he had been happy with his wife until the time the respondent had moved away, to which he answered:—

> I am not happy because my wife say I am not husband; Albert Gadziala her husband. How am I going to be happy that time? (sic) My life is broke—breaking to pieces.

No objection was made to either of these answers as being not responsive to the question.

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Locke J.

Both of the appellants gave evidence, both denying the allegations of adultery, and the wife denied having made the admissions to which reference has been made above.

When the learned trial judge delivered his charge to the jury, he commenced by informing them as to the nature of the issues which they were required to consider. In charging them upon the issue between the respondent and his wife as to his right to a divorce, he said, referring to the evidence, that the respondent relied in part on his wife's admission that she had slept with Gadziala and that she had said that the latter was her husband. After reviewing the evidence directed to that issue, he charged the jury upon the issue of criminal conversation and alienation of the wife's affections. In the course of this portion of the charge no reference was made to the admission of the wife.

After the jury had withdrawn, counsel were asked if they had any objections to the charge. Counsel for Gadziala objected to part of the charge but said nothing on the question of the admissibility or the effect of the admissions by the wife to which I have referred.

In a situation such as arose at the trial, it was an obvious disadvantage to the appellant Gadziala that the causes of action asserted against him should be tried together with that asserted against the wife. There is, however, nothing in the record to suggest that any application was made prior to the hearing for a severance or a direction that there be separate trials. Any risk that the joinder entailed was assumed by the appellant Gadziala. I think that the proper inference to be drawn from the course of the trial and the failure to draw the attention of the trial judge to what is now complained of as non-direction is that counsel for Gadziala was willing to have the issues against the latter decided upon the evidence as it stood, relying upon the denials of both appellants as to the truth of the alleged admissions.

In these circumstances, it is, in my opinion, not open to the appellant Gadziala to complain of the alleged non-direction. I think the principle to be applied is that referred to by Duff J. (as he then was) in *Scott* v. *Fernie Lumber Co.* (1) at p. 96 where, referring to the long standing rule

(1) (1904) 11 B.C.R. 91.

which holds a litigant to a position deliberately assumed by his counsel at the trial, that learned judge said:—

> The rule is no mere technicality of practice; but the particular application of a sound and all important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

The rule thus stated was approved in the judgment of the majority of this Court in *Spencer* v. *Field* (1).

As the objection on the part of the appellant Gadziala is as to non-direction, the principle stated by Lord Halsbury L.C. in *Nevill* v. *Fine Art and General Insurance Company* (2), is, in my opinion, also applicable.

I would dismiss these appeals with costs.

CARTWRIGHT J.:—The nature of this action and the orders granting leave to appeal to the appellant Magda Boykowych are described in the reasons of my Lord the Chief Justice.

The grounds of appeal relied upon in the Court of Appeal (3) are summarized in the reasons of Roach J.A. as follows:—

> 1. That the learned trial judge erred in his charge to the jury as to the degree of proof necessary to prove adultery.
>
> 2. That there was insufficient evidence to prove adultery, and the jury's finding of adultery was perverse.
>
> 3. That evidence of admissions of adultery made by the wife, not in the presence of the defendant Gadziala were not admissible as against him, and the trial judge erred in not so directing the jury.

Before us counsel for the appellants relied chiefly upon the first and third of these grounds.

As to the first ground of appeal, the applicable law is concisely stated in the following paragraph in the judgment of my brother Locke, speaking for the majority of the Court in *Smith* v. *Smith and Smedman* (4) at 330:—

> The question we are to determine in the present matter is restricted to the standard of proof required in divorce proceedings in British Columbia, where the issue is as to whether adultery has been committed. No question affecting the legitimacy of offspring arises. The nature of the proof required is, in my opinion, the same as it is in other civil actions. If the court is not "satisfied" in any civil action of the plaintiff's right to recover, the action should fail. The rule as stated in *Cooper* v. *Slade* (5), is, in my opinion, applicable.

(1) [1939] S.C.R. 36 at 42.
(2) [1897] A.C. 68 at 76.
(3) [1953] O.R. 827 at 829.
(4) [1952] 2 S.C.R. 312.
(5) (1858) 6 H.L.C. 746.

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Cartwright J.

In my opinion there is no difference between the law of British Columbia and that of Ontario in this matter, and the fact that in the case before us a claim for damages for criminal conversation was joined with that for divorce does not alter the standard of proof required. The charge of the learned trial judge in so far as this first point is concerned appears to me to have been a sufficient statement of the law.

As to the second ground of appeal, the relevant evidence is summarized in the reasons of Roach J.A. and I agree with his conclusion that it was sufficient to support the jury's finding that adultery had been committed.

As to the third ground of appeal, the respondent testified:—(i) that after he had given Gadziala notice to quit and Gadziala had moved out, the respondent's wife went to sleep alone in the room which Gadziala had previously occupied and said to the respondent:—"Don't bother me no more. You are not my husband. My husband is Albert Gadziala"; (ii) that on the same occasion she said:—"I lay down and I put my back in the same place as my husband sleep—Albert Gadziala"; (iii) that after his wife had gone to live in the same house with Gadziala she telephoned him and said:—"I want to tell you something. Don't bother me any more because my husband be Albert Gadziala. I live with him and I sleep with him like man and wife." The appellant wife denied having made any of these statements. The appellant Gadziala was not present when they were said to have been made.

The evidence of the respondent that these statements were made was, of course, admissible for all purposes as against the appellant wife. In my opinion, it was admissible against the appellant Gadziala but for a limited purpose only, that is as forming part of the *res gestae* and constituting relevant items of circumstantial evidence accompanying and of assistance in explaining the acts of the appellant wife in leaving her husband's bed and in leaving his home and going to live in that of Gadziala. The evidence appears to me to fall within the reasoning of the judgment of the majority of the Court in *Welstead* v. *Brown* (1), at pages 19 and 20, dealing with the first of the

(1) [1952] 1 S.C.R. 1.

two grounds on which the statement of the plaintiff's wife in that case was held to be admissible although made in the absence of the defendant.

As this evidence was, as against Gadziala, admissible for this limited purpose only, it was the duty of the learned trial judge to make this clear to the jury and particularly to point out to them that if they believed the statements were made they were not to take them as direct evidence of the truth of the statement of fact that the appellant wife had slept with Gadziala. With the greatest respect, I am unable to agree with the view of Roach J.A. that the learned trial judge adequately performed this duty. However, notwithstanding the failure to give a proper direction on this point, on a consideration of the whole record, I agree with the conclusion of my Lord the Chief Justice that there was no substantial wrong or miscarriage.

I would dispose of these appeals as proposed by my Lord the Chief Justice.

Appeals dismissed with costs.

Solicitors for the appellant, Magda Boykowych: *Day, Wilson, Kelly, Martin & Morden.*

Solicitors for the appellant, Albert Gadziala: *Chappell, Walsh & Morrison.*

Solicitors for the respondent: *Jackson & Cuttell.*

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*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Abbott JJ.