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Ladd v Marshall

COURT OF APPEAL

DENNING, HODSON AND PARKER LJJ

23, 24, 25 NOVEMBER 1954

Court of Appeal – Further evidence – Principle on which received – Evidence proferred by witness that her evidence at trial was not the truth – Whether fresh evidence presumably to be believed.

In an action by the plaintiff for money alleged to have been paid by him to the defendant on a consideration which wholly failed, the plaintiff called, among other witnesses, the defendant's wife as a witness to the payment, which was alleged to have been made on 2 April 1952. She was a reluctant witness and, on being questioned at the hearing on 12 March 1954, stated on oath that she did not remember. Judgment was given for the defendant whose evidence the judge accepted in preference to that of the plaintiff and the plaintiff's witnesses. On 6 May 1954, the defendant's wife obtained a decree nisi of divorce. Subsequently she informed the plaintiff's solicitors that she did remember the occasion on 2 April 1952, and that the money was paid by the plaintiff to the defendant in her presence. The plaintiff appealed, applying alternatively for a new trial, and sought to adduce on the appeal further evidence from the defendant's former wife.

Held – For the court to allow further evidence to be adduced in support of an appeal against a decision of fact the evidence must be such as is presumably to be believed, and, as the evidence sought to be adduced was not of that description, it would not be admitted; and in the circumstances the appeal and motion for a new trial would be dismissed.

Brown v Dean ([1910] AC 373), applied, and principle stated by Lord Loreburn LC (ibid., at p 371), considered.

Per Denning LJ: if it were proved that a witness had been bribed or coerced into telling a lie at the trial and was now anxious to tell the truth, that would be a ground for a new trial (see p 748, letter *c*, post, and cf per Parker LJ p 752, letter *b*, post); or if it were proved that a witness made a mistake on a most important matter and wished to correct it, and the circumstances were so well explained that the witness' fresh evidence was presumably to be believed, there would be ground for a new trial (see p 748, letter *d*, post).

Appeal dismissed.

Notes

As to Power of Court of Appeal to receive further Evidence, see 26 *Halsbury's Laws* (2nd Edn) 121, text and note (h); and for Cases, see *Digest*, Practice, 775–778, *3396–3420*.

Cases referred to in judgments

Richardson v Fisher (1823), 1 Bing 145, 130 ER 59, *Digest*, Practice, 603, *2443*.

Braddock v Tillotsons Newspapers Ltd [1949] 2 All ER 306, [1950] 1 KB 47, 2nd *Digest* Supp.

Brown v Dean [1910] AC 373, 79 LJKB 690, 102 LT 661, *Digest*, Practice, 602, *2431*.

Appeal

The plaintiff appealed by notice of motion, dated 3 June 1954, asking alternatively for a new trial, pursuant to leave granted by the Court of Appeal on 31 May 1954, from a judgment of Glyn-Jones J given on 12 March 1954, in favour of the defendant. The plaintiff sought to adduce on the appeal further evidence of the defendant's wife who had been called by the plaintiff as a witness at the trial.

The facts appear in the judgment of Denning LJ.

F W Beney QC and *T M Eastham* for the plaintiff.

Ewen Montagu QC and *H W Sabin* for the defendant.

25 November 1954. The following judgments were delivered.

DENNING LJ.

In 1952, Mr **Marshall**, the defendant, owned a bungalow in Ashgrove Road, Ashford, Middlesex, with a large holding attached to it. It was a new bungalow built under licence and the local authority had included a condition in the licence that if it were re-sold the limit of price was to be some £1,500. He defendant, wishing to sell the bungalow and land, put it into the hands of agents, who issued particulars offering it for sale with vacant possession at the figure of £3,600 freehold. The plaintiff, Mr James William **Ladd**, became interested in this property and negotiated with the defendant for its purchase. In the course of the negotiations the defendant told the plaintiff that he, the defendant, would sell the bungalow with the addition of two plots of ground. He also told the plaintiff that the price was controlled at £2,500. The defendant's solicitor had told him so. I suppose that was because the licence restricted the sale price of the bungalow to £1,500 and it was thought that by including the two additional plots the price might be increased to £2,500, but no more. On 2 April 1952, a document was drawn up and signed by the parties in which the property (ie, the bungalow and two plots of ground) was stated to be sold for £2,500 freehold and £50 deposit to have been paid. A two-penny stamp was put on it and it was signed by the defendant. The document was drawn up by Mrs **Ladd**, the plaintiff's wife, and was copied by Mrs **Marshall**, the defendant's wife, at a meeting in the Marshalls' bungalow. On 11 June 1952, the defendant's solicitors wrote to the plaintiff's solicitors:

> "We have to advise you that our client has instructed us that he does not wish to proceed with the sale of the above business to your client."

About a month later the plaintiff went to the police and told them that he had paid £1,000 to the defendant as part of the transaction, that he wanted the £1,000 to be returned and that the defendant would not give it back to him. He has now brought an action for the return of the £1,000. He alleged that at the meeting on 2 April 1952, when the document of sale was signed, he paid the defendant, in addition to the £50 deposit, a sum of £1,000 in notes without anything being put into writing about it. It was paid "under the table" or "under the counter", as the saying is. The reason was that although the controlled price was £2,500, the defendant wished to sell at the price of £3,600 which he had originally asked.

At the hearing of the action on 12 March 1954, the plaintiff gave evidence that he had accumulated £1,000 in notes which he kept in a tin box under his bed. He said that on 2 April 1952, he went first to a Mr Warren, a friend and former partner of his, and that together they counted out the £1,000 in Mr Warren's house. A Miss Andrews, who was Mr Warren's secretary, was there and she helped to count. The notes were done up in bundles of £100 each, then tied in two lots of £500 each, and put into a brown paper parcel and taken in a van by the plaintiff and Mr Warren to the defendant's house. On arrival there the notes were counted. The £50 deposit was counted on the table, but this £1,000 was counted on the carpet and was paid over then and there. The plaintiff said that he asked for a receipt for the £1,000, but that the defendant would not give one. The defendant's reason was that as the controlled price was £2,500, if he gave a receipt for the extra £1,000, the plaintiff could get it back from him afterwards. The plaintiff said that he had already prepared a receipt, but that the defendant would not sign it. He said: "My word is my bond". The plaintiff's evidence was supported by two witnesses. Mr Warren gave evidence to the same effect as the plaintiff, and Miss Andrews gave evidence that she was present when the money was counted out in Mr Warren's house. Moreover, they all gave evidence of an earlier occasion in the course of the negotiations when the defendant first asked for the £1,000. Those three witnesses were cross-examined and the judge seems not to have gained a good impression of them.

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Counsel for the plaintiff then called into the witness-box Mrs **Marshall**, the wife of the defendant. On the day before the hearing Mrs **Marshall** had filed a petition for divorce against her husband on the ground of his adultery. When called into the witness-box she said: "Excuse me, my Lord, I do not wish to give evidence for

or against my husband". It was pointed out that in a civil case a wife can be compelled to give evidence against her husband. Accordingly, she was sworn and told she had to give evidence. She was asked about the occasion on 2 April 1952, when she took part in the preparation of the document. She said:

> "I was called into the room … Q.—At that time was there a parcel in the room? A.—I cannot remember. Q.—Did you see any money pass on that occasion? Was £1,000 counted out? A.—I do not remember. Q.—You must remember, [and the judge said:] You cannot cross-examine your own witness. You are not to say, 'You must remember'".

and the judge did not allow any cross-examination. So she did not help the case at all. The only witness called for the defence was the defendant who denied that he had received the £1,000 at all.

The judge then gave a very short judgment in these words:

> "I strongly suspect that taking advantage of the difference between the £3,600 in the first set of particulars, and £2,500, at which the contract was actually entered into, the plaintiff and Mr. Warren endeavoured to get £1,100 or £1,000 out of the defendant, but I am not bound to pronounce any findings about that. This is a pure question of fact, and the decision of the case rests on whether or not the plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the defendant to the evidence of the plaintiff and his witnesses. There will, therefore, be judgment for the defendant with costs."

Inasmuch as the first sentence in that judgment was not altogether clear we were invited by counsel on both sides to see the judge and ask him what exactly he meant. He told us that what he meant was that he suspected that, after the defendant refused to go on with the sale on 11 June 1952, the plaintiff and Mr Warren put their heads together to try to obtain £1,000 or £1,100 from the defendant and that Miss Andrews, the secretary, was implicated. This makes the case a very serious one for all these persons.

No appeal was entered by the plaintiff within the six weeks allowed for doing so. Then on 6 May 1954, Mrs **Marshall** obtained a decree nisi of divorce from the defendant. Thereupon she apparently felt free of him and she made a statement to her solicitors (who were also the plaintiff's solicitors) in which she said that the evidence she had given at the hearing before Glyn-Jones J was false. She said that she did remember what happened at the meeting of 2 April 1952; that she was there when the money was counted; and that the £1,000 was counted and handed over by the plaintiff to the defendant. In those circumstances, an application was made on the plaintiff's behalf to this court asking for the time for appeal to be extended. It was extended: this appeal was accordingly entered. The plaintiff has also applied for leave to adduce further evidence by Mrs **Marshall** so that she can say what she now says is the truth, namely, that she was present when the £1,000 was handed over. She has made an affidavit in which she says that at the trial she was afraid of telling the truth because she was still living in her husband's house. She says he would almost certainly have resorted to physical violence and that she was in fear not only of him but also of other members of the family and it was for that reason that she did not tell the truth. There was an affidavit by a police sergeant as to another interview and

by a partner in the plaintiff's firm of solicitors, saying that he could not have got this evidence before.

Counsel for the plaintiff has put the case on two grounds. First, he says the fresh evidence given by Mrs **Marshall** is so important that either it should be received by this court or that there should be a new trial so that the matter can be fully investigated. Secondly, he says that in all the circumstances the trial was unsatisfactory.

It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible. We have to apply those principles to the case where a witness comes and says: “I told a lie but nevertheless I now want to tell the truth”. It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. If it were proved that the witness had been bribed or coerced into telling a lie at the trial, and was now anxious to tell the truth, that would, I think, be a ground for a new trial, and it would not be necessary to resort to an action to set aside the judgment on the ground of fraud. Again, if it were proved that the witness made a mistake on a most important matter and wished to correct it, and the circumstances were so well explained that his fresh evidence was presumably to be believed, then again there would be ground for a new trial: see *Richardson v Fisher*. This, however, is not a case of bribery or coercion, nor of a mistake. It seems to me that Mrs **Marshall** is not a person who in the new situation is presumably to be believed. She endeavoured to show that she was coerced by her husband, but on reading the affidavits on both sides, it seems to me that the suggestion of coercion comes to nothing. She does not seem to have been in fear of her husband at all. I am afraid it is simply a case of a witness who has told a lie at the first hearing now wishing to say something different. If would be contrary to all principles for that to be the ground for a new trial.

Next, it is said that the trial was unsatisfactory. Counsel for the plaintiff pointed out that Miss Andrews was not cross-examined as to credit. All that was said concerning her was that she was secretary to Mr Warren and that she lived in Mr Warren's house. Nevertheless the judge might disbelieve her because of the bad impression she made on him. Next, it was said that the judge should have allowed Mrs **Marshall** to have been cross-examined as a hostile witness. That, however, was a matter for the judge's discretion. If counsel had material tending to show she was hostile, he could have put it before the judge and asked to be allowed to cross-examine her. He did not make this application, probably because he had no such material. Finally, it was said that the judge gave a very short judgment. That, however, is not a serious defect; no doubt he thought there was nothing more that needed to be said.

The plaintiff admitted that he paid this £1,000 “under the counter” in order to evade the law which controlled the price of the premises. He paid the £1,000, not out of any banking account, but in notes which cannot be traced, and he paid it without obtaining a receipt. I cannot think of anything more foolish. It is for him to satisfy the trial judge that the £1,000 was paid: and, if he and his witnesses do not convince the judge that it was paid, then he has only himself

to blame, for he obviously ought to have got a receipt. I do not mean to suggest that there was any wicked conspiracy between him and his witnesses. All I say is that he did not prove his case to the satisfaction of the trial judge, and that that is the end of the matter. In my judgment this appeal and motion alternatively for a new trial should be dismissed.

HODSON LJ

stated the facts and continued. Counsel for the plaintiff in opening the appeal admitted that the question in the case being one of fact depending not on documents but on the oral evidence of witnesses, the conclusion of the judge who had seen those witnesses, was virtually unassailable, and counsel recognised that unless he could succeed in his application to call further evidence he must fail. That position was slightly altered during the course of the hearing in circumstances to which I shall return, but I think it was a well justified way of putting the case when one has regard to the following passage in the judge's judgment:

> "This is a pure question of fact, and the decision of the case rests on whether or not the plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the defendant to the evidence of the plaintiff and his witnesses. There will, therefore, be judgment for the defendant with costs."

That passage was the effective passage of the learned judge's judgment. Whether the £1,000 was paid was the only issue of fact in the case. The day now fixed for the alleged payment is 2 April 1952, when the money is alleged to have been paid over in notes by the plaintiff at the defendant's house.

The plaintiff gave evidence himself and called as a corroborative witness present at the time a Mr Warren, who said that he saw the payment of £1,000 made in notes; the plaintiff also called as a witness a young woman, Miss Andrews, who, although not actually present when the money was paid over, was present when the money was said to have been counted in Mr Warren's house. Finally, the plaintiff called as a witness the then wife of the defendant, who, as my Lord has mentioned, was a very reluctant witness. It was clear from what she did say that she was present on the material occasion when this money is alleged to have been paid over, but when she was asked the specific question by counsel examining her in chief, "Did you see any money pass on that occasion or £1,000 counted out?", she answered "I do not remember". That answer, I suppose, in so far as any answer can be so described, was manifestly untrue. The judge would not allow her to be cross-examined. Counsel did not follow up the judge's intimation that he would not allow cross-examination by a specific application to treat her as a hostile witness, and counsel for the plaintiff therefore closed his case in the position that he had called the plaintiff, Mr Warren and Miss Andrews, who, if their evidence was believed, had helped him and also a witness who had certainly not helped him. The defendant denied that there had been any mention of £1,000, much less that £1,000 had been paid. His evidence, as I have already indicated, was accepted fully and the evidence of the plaintiff and his witnesses in so far as it was in conflict with the defendant's, was rejected.

This, however, left out of account the evidence of Miss Andrews. She had not come directly into contract with the defendant, having been called to prove that there had been at any rate the counting of £1,000 in notes. On this point being raised, on the invitation of counsel on both sides we saw the learned judge in order that he might explain to us what exactly he had meant in his judgment, particularly in the first paragraph to which my Lord has drawn attention. He made it clear to us that he intended to say that his view was that he did not accept Miss Andrew's evidence any more than he accepted that of the plaintiff and Mr Warren. Counsel for the plaintiff, on being informed of this, argued that it made

it difficult to say that the learned judge's judgment was satisfactory, because there was nothing in the cross-examination of Miss Andrews to lead to the conclusion that it was being suggested to her that she was a party to a wicked conspiracy to prove a payment of £1,000 which had never been made. Moreover, he pointed out that there was nothing against her, that there was nothing sinister to be inferred from the fact that she lived in the same house as Mr Warren and had been described as his secretary. That, of course, was a serious consideration, which counsel has reinforced in his reply by the argument that, looking at this case as a whole, it ought to be the view of this court that the learned judge had taken a premature view in deciding this question of fact. It is contended that having regard to the unfavourable view which the judge took of the plaintiff's evidence and Mr Warren's evidence, the tendency of his mind had become hostile to the plaintiff at an early stage, and that the evidence of Miss Andrews, which on the face of it should be regarded as credible, should induce this court to order a new trial. I do not accept that contention.

So far as this question of conspiracy is concerned, I think the learned judge was very careful, as the first paragraph of his judgment[a] shows, not to allow himself to arrive at, or even appear to arrive at, a conclusion whether these particular persons had been involved in a criminal conspiracy. Counsel in the exercise of his discretion in cross-examining the witnesses did not specifically suggest to them that they had been engaged in a criminal conspiracy. It was sufficient for his purposes to make it clear that he was challenging their evidence, including that of Miss Andrews, and to ask the judge to reject their evidence. The learned judge took the view, having seen the witnesses and being guided by their demeanour, that he should reject their evidence. At the end of the case he heard the final speech on behalf of the plaintiff, although, of course, the fact that he did not call on the defendant was a strong indication to the plaintiff that, this being a question of fact, his mind was affected by the evidence he had heard and he was not likely to be moved by the final speech of counsel from the conclusion at which he had arrived. I think that there is no basis for the contention that this trial was unsatisfactory and that there ought to be a new trial.

[a] This paragraph is set out at p 747, letter *c*, ante

That brings me to the matter which really brought this appeal into existence. The wife of the defendant, the reluctant witness who said she did not remember anything, having divorced her husband, now says that she told lies at the trial, that she now wants to tell the truth, the truth being, as she says, that she was present when this £1,000 was handed over. I think it is somewhat bold to ask this court to allow fresh evidence to be adduced in circumstances of that kind, because, as counsel for the plaintiff, as one would expect, recognised, she is a woman who, on her own admission, has told lies, and if there were a hearing of her evidence by this court or at a fresh trial she could never be better than a discredited witness on whom it would be very difficult for any court to place reliance. Counsel says that RSC, Ord 58, r 4, is wide in its terms and that there is a complete discretion in this court which ought not to be fettered to receive further evidence if the justice of the case requires it. That discretion, however, has been always exercised in the light of the maxim interest reipublicae ut sit finis litium. One might envisage no end to litigation if people who had given evidence were allowed to return to court and say “I told lies last time. I want to tell the truth now”.

The principles on which further evidence is admitted have been recently discussed by this court in *Braddock v Tillotsons Newspapers Ltd*. I wish to make only a brief reference to the well-known case of *Brown v Dean* where the House of Lords affirmed to decision of the Court of Appeal and gave guidance on this topic. The passage which is often discussed and may be said,

perhaps, to have been modified in part, is the portion of the speech of Lord Loreburn LC where he says ([1910] AC at p 374):

> "When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive."

Lord Shaw of Dunfermline doubted in the same case whether he could accept the word "conclusive", and the more modern cases have proceeded on the view that perhaps "conclusive" is too strong a word. But none of their Lordships dissented in any way; in fact, they agreed with the earlier part of the Lord Chancellor's proposition that new evidence must at least be such as is presumably to be believed. It seems to me from the facts which I have already recounted, that the evidence of Mrs **Marshall** is, on the face of it, not such as is presumably to be believed. In addition she says, in effect, in the affidavit which she has made in support of this motion, that the defendant, who is a retired boxer, has on several occasions treated her with violence and attacked her with clenched fists and that she has been obliged to seek the protection of the police. I suppose the only object of these statements was to suggest that she refused to give this evidence in the first instance because she was afraid of her husband. There is no suggestion, however, that she did not give this evidence because of any threats that her husband had made to her, nor was there any request for protection made by her at any time. In a further affidavit which she has filed in reply to affidavits put in by the other side she has admitted that since the date when she made this affidavit, 26 May 1954, she has been with her husband. She has been seen with him on apparently friendly terms and has gone to a public house and spent the night in the same house with him and other people. The story that she was acting under the duress of her husband has become exceedingly thin. In my judgment, there is no ground for allowing this fresh evidence to be admitted.

I have already indicated on the general facts of the case that the question was one of fact and, notwithstanding what has happened since the opening of the case, I remain of the opinion that the judge's decision on the facts were arrived at properly after a full and patient hearing and could not be disturbed in this court. Moreover, I think it right to say that there is on the face of the evidence a good reason why the evidence of the plaintiff and, indeed, of Mr Warren, should be scrutinised very closely, if not disbelieved. Counsel for the defendant pointed out to us that when this claim was first formulated in a letter it was said that the money was handed over in February, 1952. Then the writ was issued and the date is given on the indorsement of the writ as January, 1952. Finally 2 April 1952, was selected as the date on which this payment was made. Moreover, I think there is great force in the facts elicited from the plaintiff by counsel for the defendant and the learned judge as to the existence or non-existence of a receipt and that these had an effect on the credit of the plaintiff. I am referring to the supposed receipt for £1,000. He did not mention it in his examination in chief. If such a document, prepared by him for the defendant to sign, existed, one would have thought it would have been an essential part of his case. Eventually he said that there was such a document and he had it with him. The way in which that evidence about the receipt was elicited appears to me to be of a kind which must lead anyone to scrutinise the matter very closely. On this matter of the receipt, the same considerations apply to the evidence of Mr Warren. He was very fully cross-examined about it and gave a rather remarkable account as to its existence, first with apparent uncertainty, and then with apparent certainty.

I shall say nothing more about the other matter which has been touched on in this action, namely, the aspect of illegality. As my Lord has said, the plaintiff

on his own admission knew what he was doing in trying to pay an additional £1,000 "on the side" because the law would not allow the defendant to receive more than the controlled price of the house. In my judgment, this appeal fails and should be dismissed.

PARKER LJ.

I agree. I would add only one word on the application for leave to call further evidence. The further evidence which it is desired to call in this case is the evidence of one of the plaintiff's witnesses, Mrs **Marshall**, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances in which the court on such an application will grant leave to adduce that further evidence must be very rare, for the very good reason that such evidence on the face of it does not comply with the test laid down by Lord Loreburn LC in *Brown v Dean*, where he said that new evidence must at least be “such as is presumably to be believed.” It may be that if it could be shown that the witness told a lie originally because he or she had been bribed or because he or she had been coerced, it could be said in those circumstances that her evidence was such as is presumably to be believed. In this case, however, there is no suggestion that the defendant bribed or coerced his wife to give the evidence which she gave at the trial. All that is said is that Mrs **Marshall**, whose relations with her husband were strained, was afraid of his physical violence. As to that, the one thing which the further affidavits clearly show is that this woman was not as afraid of her husband as she has alleged, and she has utterly failed to satisfy me that the reason for her original evidence was fear of her husband. As she has failed to prove any such ground, it is impossible, in my view, for any court to say that her further evidence would be presumably credible. In those circumstances, I would refuse the application and dismiss the appeal.

Appeal dismissed.

Solicitors: *G Swinburne Raynes* agents for *Atkins, Walter & Locke*, Guildford (for the plaintiff); *Owen White & Catlin*, Feltham (for the defendant).

Philippa Price Barrister.