[HIGH COURT OF AUSTRALIA.]

ETHEL ESTHER SAMPSON . . . . APPELLANT;
RESPONDENT,

AND

RICHARD STANLEY SAMPSON . . . RESPONDENT.
PETITIONER.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1911.

PERTH, *Oct.* 24, 25, 26.

Griffith C.J., Barton and O'Connor JJ.

Divorce—Adultery—New trial.

Consideration of the principles on which the Court will grant a new trial on a question of fact.

APPEAL from a judgment of the Full Court of Western Australia.

A suit for divorce was brought by the respondent against the appellant on the ground of adultery, and was heard before a jury, who found a verdict for the appellant. The Full Court having granted a new trial, an appeal was now had by special leave (an accidental event having delayed the institution of the appeal as of right) to the High Court.

The facts are sufficiently stated in the judgments hereunder.

Pilkington K.C. (with him *Villeneuve-Smith*), for the appellant, referred to *Dearman* v. *Dearman* (1); *Riekmann* v. *Thierry* (2).

Haynes K.C. (with him *Downing*), for the respondent, referred to *Jones* v. *Spencer* (3); *Metropolitan Railway Co.* v. *Wright* (4); *Coghlan* v. *Cumberland* (5); *Dearman* v. *Dearman* (6); *Ferrand* v. *Bingley Township District Local Board* (7); *National Mutual*

(1) 7 C.L.R., 549, at p. 553.
(2) 14 R.P.C., 105, at p. 116.
(3) 77 L.T., 536.
(4) 11 App. Cas., 152, at p. 154.
(5) (1898) 1 Ch., 704.
(6) 7 C.L.R., 549.
(7) 8 T.L.R., 70.

Life Association of Australasia Ltd. v. *Kidman* (1); *Luke* v. *Waite* (2); *Astley* v. *Astley* (3).

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

Villeneuve-Smith, in reply.

Cur. adv. vult.

Oct. 26.

GRIFFITH C.J. This is an appeal from an order of the Full Court granting a new trial in a divorce suit tried before a jury who found a verdict for the appellant who was respondent in the suit. The question is a pure question of fact, depending upon the credibility of the respective witnesses on either side. The rule as regards granting a new trial in such cases is well settled: in order that the verdict may be set aside it must be such as reasonable men, applying their minds to the evidence, could not have given. The petitioner relied upon the direct evidence of alleged eye-witnesses. It has been said that circumstantial evidence is sometimes stronger than direct evidence, and this may be an instance. The place where the adultery is said to have occurred was a very small room at the back of an old iron building behind a theatre in the centre of the City of Perth. In the back wall of this room was a small window about 2 feet 6 inches square, glazed with red glass, and working on a horizontal pivot, the lower sill being about 3 feet 6 inches from the ground. Inside was a heavy curtain nailed to the wall above the window, and coming down over it. In this small room were a piano, a chair, and a wooden stretcher with a wire mattress upon it, covered by a rug. The head of the stretcher was towards and close to the window, the foot of the stretcher extending into the room. It was not quite under the window. The front room of the building was occupied by the co-respondent as a workroom in his business of an engraver. The respondent and co-respondent went to this place about 10.30 o'clock one evening, after going together to a picture show, and they remained in the room for about twenty or twenty-five minutes. At this time the respondent was separated from her husband under a deed of separation executed at his instance, and was keeping a lodging house. The

(1) 3 C.L.R., 160. (2) 2 C.L.R., 252, at p. 265.
(3) 1 Hagg. Ecc., 714.

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

Griffith C.J.

co-respondent lodged with her, and had done so for two or three months. The petitioner called three alleged eye-witnesses who had gone to the yard at the back of the house to watch for the purpose of finding evidence of adultery between the respondent and co-respondent—evidence which they were not unwilling to find. One of them, the petitioner's brother, Percy Sampson, said that after the parties went into the room a light was turned up. That appears to have been an electric light in the front room, which was used as a workshop. He says that they then appeared to be having something to eat and drink, and that after that the co-respondent played on the piano. All this lasted about a quarter of an hour. Then he says that the light was extinguished, that he heard the stretcher creaking, that he heard one or two observations made by the respondent, which I need not quote, but which are of ambiguous meaning; that he then got up from the ground in the yard, lifted up the window—I suppose he means that he lifted up the lower end outwards—that another witness held the window; that he then struck a match, pulled the curtain aside, and saw the respondent and co-respondent in a compromising position, which he described in words that leave no doubt as to what he meant. He says that he then struck another match, whereupon the respondent said, "What is that?" while the co-respondent seized the curtain and said, "Get out of this." Another witness, who had been in the petitioner's employment for some years, said that a light was brought into the back room, that he heard a match struck—which I presume means he heard a match struck to light a candle in the back room—and that he heard voices. He does not say that that light was extinguished. He corroborates Percy Sampson as to seeing the parties through the window by the light of the first match that was struck, and in other particulars. The third witness also did not say that the light in the room was extinguished; he only mentioned one match as being struck by Percy Sampson; and he only heard the stretcher creak once. The only evidence given by these witnesses as to the clothing of the parties is that the co-respondent had on a light tweed suit, while the respondent had on a white blouse and a dark skirt. No white underclothing was seen, and none of the witnesses, apparently, noticed any dis-

arrangement of clothing. There was no evidence of previous familiarity of manner between the parties. The respondent and co-respondent admitted that they were in the room, and that they were sitting on the stretcher, but denied that the room was in darkness, and said that there was a lighted candle on the table in the room all the time. Their explanation as to sitting on the stretcher was that the respondent was sitting on the chair, that she got up to make way for the co-respondent to pass to the piano and then sat down on the stretcher, where he afterwards joined her. The jury viewed the premises, and they accepted the respondent's version of the facts. Now, they were the judges of the credibility of the witnesses. Credibility does not merely involve veracity, in the sense of a desire to tell the truth, but also capacity and opportunity of observing incidents which are alleged to have been seen. Without unduly speculating as to the conclusion the jury actually came to on the facts, that is, the process by which they arrived at the conclusion that they ought to accept the respondent's version of the story, this is quite apparent, that they were bound to ask themselves the question—What could these witnesses have seen inside a dark room by the light of a single wax match held outside, while that match was burning ? They might have come to the conclusion that if the room was dark inside they could only have seen the heads of the parties, and not their bodies, and, if so, the evidence as to the compromising position alleged would absolutely vanish. If, on the other hand, they believed that the witnesses really saw all that they said they saw, they must have thought that the room could not have been in darkness. In that case they must have seen any disarrangement of clothes if there had been any. They might have taken that view—it was certainly open to sensible men to do so—and if they did, the respondent's story was entirely corroborated. All these are views which they might have taken without imputing conscious falsehood to the witnesses. On the other hand, they might have disbelieved the witnesses altogether, and if they did, who is to say that they were bound to believe them ? They heard the witnesses on both sides, and saw them. How is it possible for any Court to say to a jury after verdict, "You ought to have believed one

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

Griffith C.J.

witness and not another," when it is merely a question of oath against oath, with such assistance as the jury can derive from the demeanour of the witnesses and known physical facts. It is impossible, then, for any Court to say that the jury was wrong in refusing to accept the evidence of the petitioner's witnesses. Alternatively, Mr. *Haynes* puts forward his case in this way—and really it is the only way in which it can be put—that the circumstances under which the parties were found was of such a compromising nature that the jury were bound to draw an inference of adultery. If the jury disbelieved the petitioner's witnesses, they would be all the more inclined to believe the respondent, and her story as to what actually took place is not at all improbable. It is not necessary to speculate as to the intention with which she or the co-respondent went to the room. The only question tried was one of fact, as to an event alleged to have occurred before they were disturbed by the match at the window. It seems to me that reasonable men could come to the conclusion upon the evidence that the event alleged had not occurred at that time. What may have happened before or afterwards on some other occasion is entirely irrelevant. For these reasons I think that the petitioner in this case has not brought himself within the rule governing the granting of a new trial after verdict of a jury, and that the appeal must be allowed.

BARTON J. I also think the appeal must be allowed. Before considering the circumstances under which the verdict of a jury, given as in this case, should be disturbed, it is as well to mention the principles which should guide a Court of Appeal where there is a judgment upon facts by a Judge in a Court of first instance, not assisted by a jury. I shall then point out the greater stringency with which an appellate tribunal must consider itself bound when the facts have been dealt with by a jury. In *Dearman* v. *Dearman* (1) decided by this Court, which in a measure resembles the present case, the Chief Justice said:—"There is, perhaps, a distinction between a case where the Judge has found in favour of a plaintiff, or the party upon whom the onus of proof lies, and a case where he has found in favour

(1) 7 C.L.R., 549, at p. 553.

of the other party. If the Judge has found in favour of the party upon whom the burden of proof lies the Court of Appeal may review the case with greater freedom, for instance, in the case of an application to enter a nonsuit on the ground that, though there was some scintilla of evidence, there was nothing upon which reasonable men ought to act. But if the tribunal of first instance, having seen and heard the witnesses, comes to a conclusion in favour of the party upon whom the burden of proof does not lie, it is almost hopeless to try to induce a Court of Appeal to interfere with that finding unless it has clearly proceeded upon a wrong principle." This issue having been found against the party upon whom the onus of proof lay, the rule enunciated by the learned Chief Justice might well have applied to this case had it been decided by a Judge without a jury. But, whether a Judge sitting without a jury has found for or against the party which carries the burden of proof, the Court of Appeal feels itself bound to act with the caution on which *Lindley* L.J. laid so much stress in the often-cited case of *Coghlan* v. *Cumberland* (1):—"When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the Judge who saw the witnesses."

In the case of *Dearman* v. *Dearman* (2) the findings of fact were by a Judge of first instance, not assisted by a jury, and the principles above stated were applied to the decision of that case. In the present instance the appellant is faced with a much greater difficulty. For here we have the additional element of the jury assisting the Judge by their findings of fact, and in such a case the remarks of Lord *Halsbury* L.C. in *Riekmann* v. *Thierry* (3) may well be referred to:—"It may also be that where a jury has

(1) (1898) 1 Ch., 704, at p. 705. (2) 7 C.L.R., 549.
(3) 14 R.P.C., 105, at pp. 116-7.

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

Barton J.

found a fact, it" (*i.e.*, the appeal) "is not a rehearing of such a fact, because the Constitution has placed in the hands of the jury, and not in the hand of the Court, the jurisdiction to find the fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty; short of that, the Court is bound to accept the finding of the jury, though they may think they would have found a different verdict." When his Lordship says:—"The Court can only disturb the verdict where, in their judgment, the jury have not done their duty," it seems to me that he means by not doing their duty a failure to apply their minds to the questions before them, and to decide in a manner at least within reason; that is to say, a failure to do their duty evinced by a conclusion which is out of reason; and the question is whether the jury in this case have acted in a manner which is out of reason. Now, it must also be recollected that, in any case turning upon the credibility of witnesses, the mere written record which comes before the Court of Appeal is not all that has taken place in the Court below. A hundred circumstances take place which it is impossible to record in a transcript which comes before another Court; not only the action and demeanour of witnesses, but many incidents which are not the subject of notes by a Judge, yet ought to influence the minds of the jurors. As *Isaacs* J. put it in *Dearman* v. *Dearman* (1):—"The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material, unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal. So far as their judgment may depend upon these circumstances they are not in a position to reverse the

(1) 7 C.L.R., 549, at p. 561.

conclusion which has been arrived at by the primary tribunal. Now it may be that in some cases the effect of what I call the unrecorded material is very small, indeed insignificant, and utterly outweighed by other circumstances. It may be, on the other hand, that it guides, and necessarily guides, the tribunal to the proper conclusion. If that is the case, as I have said before, the Court of Appeal cannot say that the conclusion is wrong without disregarding the material which it knows must have been existent before the tribunal below, and is necessary to a just conclusion." I agree with every word of that passage, whether it is applied to a trial by a Judge alone or to one by both Judge and jury, and I think it puts forward considerations to which sometimes too little weight is given in reviewing decisions of fact, decisions often given under circumstances which it is impossible to reproduce before another Court. It is obvious that, in a case like the present one, such circumstances as those which were referred to by my learned brother *Isaacs* were likely very strongly to influence the minds of the jury. Up to a certain point the facts are common to both sides, but after that point is reached there is a complete dissonance here between the witnesses for the petitioner and those for the respondent, and obviously it is open to the jury to say which side they believe, and equally open and proper for them to decide that question not only upon the spoken word, but upon circumstances surrounding the giving of evidence and also upon the demeanour of witnesses, attaching to that word the wide sense which it occupies in the passage I have just quoted. There seems, then, every reason why we should not disturb the jury's verdict in this case unless there can be found upon the depositions something which in itself demonstrates beyond question that that verdict is wrong. I say without hesitation that it is impossible to find that in the evidence which has been read to us. The circumstances, too, under which the case came before the Court were such as would justify the jury in giving more than usual importance to the incidents of the case, so far as they consisted of demeanour. Three of the witnesses were, as has been correctly put in the argument, emissaries of the petitioner; one was a brother, another an employé, another a great friend of his brother's. Now, when witnesses go to a place on the prompting

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

Barton J.

of one of the parties with the obvious intention of endeavouring to see something which will confirm certain suspicions and justify a probably intended cause of action, the jury are not only justified in subjecting such evidence to the very narrowest scrutiny, but they are, I think, to be commended when they do so. The suspicion with which that class of evidence is regarded is not a narrow prejudice, but is justified in reason, because the circumstances under which such testimony is procured are such as would naturally incline the witnesses, from the tendency with which they approach the scene, to think that they have observed more than has actually presented itself; and therefore their evidence is not always given with that entire independence and freedom from bias which is the best security for the implicit acceptance of any class of testimony. The circumstances here are also such as would justify the closest scrutiny by the jury, and I might add that there was such scrutiny, because they saw the scene of the alleged occurrence, which this Court, of course, has not been able to do. One of the most salient features in the evidence seems to me to be that about the candle. It was obviously open to the jury to believe whichever side impressed them most with its truthfulness. The respondent said there was a candle on the table at the time of the alleged occurrence. First, if a lighted candle was really there it is very unlikely that the alleged misconduct occurred, and secondly, if it really was there, then the story about the lighting of matches becomes a mere fabrication, because we know that a light inside the room would enable those outside in the darkness to distinguish what went on in the room with more or less clearness. They would see better without the aid of matches. On the other hand, matches struck outside a dark room would have very little, if any, illuminating effect, unless it were to enable the occupants to distinguish the persons outside. And when the question is whether there was a lighted candle inside or matches outside, if a jury having heard the witnesses, and seen them tested under cross-examination, came to the conclusion that the testimony as to the candle was to be accepted, they must not only reject that of the matches, but they might properly come to the conclusion that the story about them is an entire fabrication; and if they

come to that conclusion they are justified in rejecting the whole of the evidence of those who gave it. I shall not go through the evidence at any greater length. I make no imputation on any witness. It is sufficient to point out that we cannot call the verdict unreasonable because the jury accepted the version of the respondent and co-respondent. Had the verdict been the other way, there would have been as little justification for any interference by us. Among all the cases in which it is difficult to disturb the verdicts of juries, the difficulty is of the greatest in a case like this. Simply because these two people have on their own admission been in a room under certain circumstances which, even if truthfully explained, may, on the part of the woman, show a disregard of propriety, we cannot from that alone say that adultery has been committed; and, it being a matter obviously of credibility, and the jury having seen the manner of giving the evidence in a way which it is impossible to reproduce here, and having had the opportunity of making use of their knowledge of the world, and of the little lights and shades arising throughout the hearing, I do not think we should disturb their conclusion, and send the case back for a new trial, and, perhaps, if a similar verdict were recorded, again set it aside, because it would perhaps be our duty to do so if we ordered a re-hearing on this occasion. On these considerations, then, I wholly agree that the verdict should not be disturbed, and that the appeal should be allowed.

O'CONNOR J. I am of the same opinion, and I have very little to add. The rule to be applied in dealing with a jury's verdict is well settled, and has been stated in the judgment of my brother the Chief Justice. The duty of the Supreme Court was to determine whether the verdict was such as a jury of reasonable men, applying their minds to the evidence, could have given: the determination of that question depended entirely upon the facts. Besides the inference to be drawn from the facts in evidence there was certain direct evidence of eye witnesses from which, if believed, it would be difficult to avoid drawing the conclusion that adultery had been committed. Mr. *Haynes*, in putting his case before this Court, very properly relied upon the inference which he said the jury were bound to draw from what he described as

H. C. OF A. 1911.

SAMPSON v. SAMPSON.

O'Connor J.

admitted facts. Now, I have no hesitation in saying that if the jury had thought fit, having regard to the admitted facts and leaving out of consideration the evidence given by the three witnesses, Sampson, Dalziell and North, to draw the inference that adultery had been committed, it would have been impossible for this Court to interfere with their decision. But it is to my mind equally plain that if, after having heard the evidence of those witnesses, the jury refused to believe it, it would be impossible for the Court to say that that conclusion was one to which reasonable men, considering and applying their minds to the evidence, could not have come. The question, therefore, which we have to determine really turns upon how the Court is to regard the evidence of these three witnesses whose names I have mentioned. There may be cases in which, on the question of credibility of witnesses, the Court would be entitled to say that no reasonable jury ought to have refused credence to certain witnesses in proving certain facts. Those are cases in which, either from the number of the witnesses, or the corroboration of circumstances, it would be impossible for reasonable men not to believe the witnesses. But that certainly is not this case. If there is one class of evidence more than another which a jury are entitled to consider with the greatest care and scrutinize with the utmost jealousy it is evidence of the class given by these three witnesses. It is often necessary that evidence of that kind should be obtained, and it is sometimes impossible to prove facts amounting to a crime in any other way. Also it may be impossible to prove the facts upon which a man's right to have a divorce from an unfaithful wife depends without the aid of witnesses of this kind, but it is for a jury in all such cases to consider the evidence carefully, and to take care that no credence is given to it unless they are completely satisfied of its reliability. In considering the evidence of these three witnesses the jury had to remember that they were employed to see what was going on on this occasion, not in any impartial spirit, but with a view to obtaining evidence of that having occurred which they swore did take place. It is not part of my duty to say whether they were telling the truth or not. They may have been telling the truth. But the jury have disbelieved them, and the jury were entitled to

view their evidence in the light of the considerations to which I have referred. Having regard to the whole of the circumstances under which the witnesses saw that of which they gave evidence, it seems to me that it was not unreasonable for the jury to come to the conclusion that the evidence was not to be believed. Whether I myself would have come to the same conclusion it is unnecessary for me to say. All we are concerned with on this appeal is the determination of the issue as to whether reasonable men could have arrived at the verdict which the jury found. On that issue I regret I am unable to agree with the Supreme Court of Western Australia. It appears to me that the case is peculiarly one in which the jury were entitled to take the view they did. I think, therefore, that this appeal should be allowed.

Appeal allowed. Order appealed from discharged. Motion for new trial dismissed with costs, and judgment at trial restored. Respondent to pay costs of appeal including costs of motion for special leave.

Solicitors, for the appellant, *James & Darbyshire.*
Solicitors, for the respondent, *Downing & Downing.*

J. H.