IN THE HIGH COURT OF AUSTRALIA

SALON

v.

EVANS

ORAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on MONDAY, 14th AUGUST, 1950

H. E. Daw, Gov. Print., Melb.

C.12280/45

SALON v. EVANS

REASONS FOR JUDGMENT (ORAL).

LATHAM C.J.
McTIERNAN J.
WILLIAMS J.
WEBB J.
KITTO J.

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ORDER.

Appeal dismissed with costs.

J.G.R.

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REASONS FOR JUDGMENT (ORAL). LATHAM C.J.

This is an appeal from an order of the Full Court of the Supreme Court of New South Wales dismissing a motion by the defendant for a new trial in an action for malicious prosecution.

The plaintiff and the defendant made an oral agreement to undertake an enterprise which involved the manufacture of a needling machine and the utilisation of that machine in the manufacture of pads to be used in the making of mattresses. The dispute between the parties related to the terms of that agreement and to the course of conduct pursued by the plaintiff under the agreement. In fact the plaintiff received the moneys which were earned by the new enterprise (which was, in my opinion, a partnership) and paid them into his own bank account, which was in the name of Transausco, the trade name under which he traded. He then used these moneys as he thought proper. It is objected on behalf of the defendant that he should have kept the moneys separate and should not have used them for other than partnership purposes. When the defendant found that the plaintiff was not doing this he went to the police authorities and obtained a warrant for the arrest of the defendant upon a charge of stealing partnership moneys. The plaintiff was arrested and was committed for trial but a nolle prosequi was entered. He then brought this action for malicious prosecution. The question which arose after His Honour had ruled that there was no reasonable or proper cause for the criminal proceedings against the plaintiff was whether the defendant did honestly and reasonably believe that the plaintiff had stolen partnership moneys. That question was presented to the court naturally and almost necessarily as depending upon the determination of the nature of the relationship between the new partnership and the already established business of Transausco. His Honour referred to the effect of the evidence given by the plaintiff as being that

the pad manufacturing business was to be run as a department of Transausco. If it was so to be run, then it would be difficult for the defendant to object to the moneys going into the Transausco account and being used, for a period at least, in the Transausco business.

The first ground of appeal is that His Honour was in error in directing the jury that the effect of the plaintiff's evidence was that the pad manufacturing business was being run as a department of Transausco. After hearing Mr. Jenkyn and giving due weight to what Mr. Asprey has said, both in his opening address and in his reply, it does appear to me that it was assumed throughout the case that the effect of the plaintiff's evidence was that the pad manufacturing business was to be run as a department of Transausco. It was not put that there had been an agreement in those precise words between the parties, but that the business result and consequence of their agreement was that the pad manufacturing business was to be run as a department of Transausco and it was in fact so conducted. Further, I think it may fairly be said that it was not clearly denied at the trial, as an objection to the summing up, that this was the effect of the plaintiff's evidence. As I have said, the learned judge's proposition describing the effect of the plaintiff's evidence is not found in the account of the conversation between the parties, but when one is considering the effect of the plaintiff's evidence one considers it in its whole setting as a business transaction.

The second ground of appeal is this - that His Honour was wrong in directing the jury that if the jury accepted the plaintiff's evidence then there was nothing at all wrong or irregular in the plaintiff paying moneys received from the sale of pads into the Transausco account and using them for the latter business. If the plaintiff's evidence, understood in the manner which has been stated, was accepted by the jury, then this was a perfectly correct direction. That of course depends upon the acceptance of the plaintiff's evidence interpreted in the manner which I have stated.

The third ground of appeal is that His Honour was wrong in directing the jury that if the jury accepted the evidence of the plaintiff the defendant should not have thought there was anything sinister in the fact that on occasions the Transausco bank account was not sufficiently in credit to cover the full amount of the profits of the needling department. Reference to His Honour's charge to the jury will show that His Honour did not give such a direction to the jury but that he did state in his summing up that this was a contention which was submitted to the jury. That of course is a very different thing from directing the jury that the contention was right.

Accordingly, in my opinion the appeal fails and should be dismissed with costs.

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JUDGMENT (ORAL). McTIERNAN J.

I agree. I would only add that in my opinion it was open to the jury to find upon the evidence of the plaintiff, which apparently they accepted, that he and the defendant agreed in effect that the needling venture was to be conducted as a section or department of Transausco. The arrangement was informally made and was a loose one. It was fairly open to the jury to find that it did not mean that there was to be a separate banking account and no mixing of the finance of this venture with that of the plaintiff's business. If that be so there was nothing wrong in what His Honour told the jury about the regularity of the plaintiff's conduct in not keeping a separate banking account of the venture and using for the purpose of Transausco the moneys in the account which he kept. It would not be improper for the plaintiff to mix the finance of the needling business with the finance of his own business and to use the moneys in connection with the business of Transausco. Were the arrangement that the needling venture was to be a section or department of Transausco, as the jury could fairly find, and that is to be regarded as the arrangement which the defendant made with the plaintiff, the fact that the plaintiff did not open a separate banking account for the needling venture and was drawing on the mixed proceeds of the venture and of Transausco indiscriminately for the purposes of either, could not reasonably have afforded any ground for the defendant to entertain an honest belief, or, rightly suspect, that the plaintiff was stealing the profits of the needling section. I agree that there was no misdirection.

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JUDGMENT (ORAL). WILLIAMS J.

I also agree and only wish to say a very few words. In the first instance I wish to say that, having listened carefully to the whole of Mr. Asprey's argument, I am not satisfied that the statements of His Honour complained of in the summing up were intended to be or could reasonably have been regarded by the jury as a direction in law. It seems to be sufficiently clear that all His Honour was doing was indicating to the jury his own opinion of the effect of the plaintiff's evidence. It was not put to the jury as a direction. His Honour was simply expressing an opinion on the facts, and he made it perfectly clear at the commencement of his summing up that the jury were quite entitled to disregard any opinions which he might express on the facts.

Secondly, even if the jury did accept what His Honour said as a direction in law, having read the whole of the plaintiff's evidence, it seems to me that what His Honour said was the only construction which could be reasonably placed upon the effect in law of the plaintiff's evidence. It was therefore a perfectly good direction because it directed the jury as to the only reasonable conclusion to which they could come on the facts if they accepted the plaintiff's evidence, which they evidently did.

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JUDGMENT (ORAL). WEBB J.

I agree and have nothing to add.

JUDGMENT (ORAL) KITTO J.

I agree and have nothing to add.