No 18 of 1950 (9

IN THE HIGH COURT OF AUSTRALIA

WOODS

V.

WOODS AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at Melbourne,

on Tuesday, 31st October, 1950.

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

C.12280/45

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ORDER.

Appeal dismissed with costs.

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JUDGMENT

MCTIERNAN J.

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JUDGMENT (ORAL) MCTIERNAN J.

This is an appeal from a judgment of Mr. Justice O'Bryan refusing a decree for dissolution of marriage. The husband brought a suit for divorce on the ground of his wife's adultery.

His Honour was not satisfied that the adultery alleged was proved.

His Honour also said that if he had to make a positive finding, it would be that adultery was not committed by the wife with the co-respondent.

The husband challenges these findings and asks the Court to reverse them and find instead that the wife and co-respondent were guilty of adultery.

The appeal is therefore against a finding on a question of fact. The rules which the Court must apply to decide the appeal are well settled. I do not re-state them. I shall endeavour to apply them.

The onus was on the husband to prove that his wife and the co-respondent committed adultery. This is not a light onus. Adultery is a serious matrimonial offence. The situation is therefore that the appellant who had the onus of proof at the trial, asks this Court, on appeal, to find that the trial judge ought to have found that adultery was committed. The appellant has the onus of satisfying the Court that the trial judge's finding was wrong.

The evidence has been read. The reasons which Mr. Justice O'Bryan gave for his judgment set out accurately and adequately all the important facts. I adopt His Honour's statement of the facts.

The husband alleges that adultery was committed by the wife with the co-respondent on a number of occasions between September 1948 and July 1949. The wife and co-respondent met in September 1948. The evidence upon which the husband relies consisted of the numerous telephone conversations between the wife and co-respondent: the precautions which they took against being observed when they met: the suppression by the wife from her husband and her relations of the existence of her association with the co-respondent: frequent drives together in the co-respondent's car: the evidence about the session in the co-respondent's car at North Balwyn in November 1948: the interviews between the inquiry agent Scott and the wife and co-respondent.

The evidence of the session in a motor car at North Balwyn is obviously the strongest link in this chain of proof. Mr. Justice O'Bryan said it was in respect of that occasion only he hesitated to say that adultery had not been committed.

Taking the facts found by the learned judge it is obviously impossible to reverse his finding that adultery was committed on any other occasion.

Coming now to the question whether Mr. Justice O'Bryan was in error in not finding that adultery was not committed at North Balwyn.

I shall state the facts found by Mr. Justice O'Bryan which constituted what has been called the background against which this occasion must be viewed. After stating that the marriage had broken down, His Honour continued: "It was in this state of affairs, that, in September 1948, he (the appellant) employed a private enquiry agent to watch her (the respondent). At the beginning of that month he sent her on holidays to the Royal Hotel, Mornington, and he sent a woman agent down to watch her while she was there. Nothing occurred at Mornington of any consequence except that she did meet there the co-respondent, with whom she formed an immediate friendship, and from that time

on they were in frequent telephone communication with each other, and meeting each other fairly frequently in the streets. She and the co-respondent say that on two occasions only were they out together at night, and one of these occasions was the 19th November 1948, when they were seen by her husband and his enquiry agent. She admits to another night meeting when the co-respondent took her to Heidelberg so that she might attend a function there. This occasion was not known to the petitioner or his advisers. Throughout the whole period of watching from September 1948 to the following July they were only seen together at night once."

His Honour continued: "I heard the Respondent give her evidence, and the Co-respondent. I cannot say that I am prepared to accept everything they said in Court, but, having heard them, and having considered the evidence in this case, I am far from being satisfied that adultery ever took place between them. It is true that they were meeting clandestinely. It was not unnatural that, meeting as they did, each of them should hide the fact of their meeting from his or her respective spouse. I do not think that, on the occasions when the enquiry agent lost trail of them, she remained in his company after the early hours of the evening. The one occasion that gives me some hesitation is the 19th November, when they were seen to park their car at some time between 6 and 7 p.m. in a paddock in North Balwyn and to remain there until half past 10. I am not prepared to accept their evidence that the reason for their delay in that was car trouble, but, on the other hand, I am not prepared to draw the inference that misconduct took place there. I do not think there was any adulterous appetite between these two people. I think it is quite understandable why this woman, who was rendered lonely and unhappy by her husband's conduct, should seek other male companionship. I think she found consolation in the companionship which Wren was prepared to give her. She was probably flattered in her part by the fact that Wren was prepared to give up his time and attention to her, and he

was probably flattered in return by the fact that she was anxious to meet him and got consolation from his society.

When later in August, the enquiry agent, Scott, and the Petitioner waited upon each of these persons in turn, I am satisfied that each of them denied that there was anything improper in their relationship the one with the other.

A second visit to the wife after their interview with the Co-respondent produced the same result. I do not think that I was given an accurate account of these conversations by any of the witnesses. At any rate, I am not prepared to accept in full what any of them said about these interviews, but I am satisfied that neither the Respondent nor Wren said anything which amounted, inferentially or otherwise, to an admission of misconduct."

His Honour added this: "The result of this case is that if I had to make a positive finding in regard to these two people, I would say that, in my opinion, adultery did not take place between them. It is not necessary for me to go that far. I am certainly far from satisfied that it did take place, and the Petition therefore must be dismissed."

There was therefore no evidence given by the husband or his enquiry agent to prove what the wife and the co-respondent were doing in the car. It is not a case in which there is a conflict of evidence given by them on the one hand and any other persons who observed what they were doing. The respondent and the co-respondent each gave evidence and denied that adultery was committed. The learned trial judge saw the wife and the co-respondent in the witness box and they were thoroughly examined and cross-examined. He had an advantage which we have not had. His Honour did not entirely accept their evidence. What is very important is that he did believe the evidence which each gave denying that adultery was committed between them in the motor car while parked at North Balwyn or on any other occasion.

We are asked to hold that His Honour was in error in believing either of these persons on his or her oath on the issue of adultery.

It is submitted that the probabilities are so strong that adultery was committed that His Honour was mistaken in believing either the respondent or co-respondent. The denial of the commission of adultery is not inconsistent with any fact established by the evidence. It may be conceded that His Honour's statement that he was not prepared to accept their evidence that the car had broken down detracts from the reliability of the denial of adultery. That was the explanation given for the length of time the car remained at North Balwyn. Taking all the facts of the case, however, there is nothing inherently improbable in the evidence of the wife and co-respondent as to their behaviour in the car on that occasion and at other times, or in the findings of His Honour negativing the issue of adultery. I confess that considering all the facts of the case I consider that it is very probable that they did not commit adultery.

In my opinion the trial judge did not misdirect himself in considering the evidence and arriving at his finding on the issue of adultery. Mr. Joske has made a strong and well reasoned attack on His Honour's finding. I think that it fails. I am not satisfied that His Honour's finding is wrong.

I should dismiss the appeal.

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JUDGMENT (ORAL) WILLIAMS J.

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I agree. It is clear, I think, that the evidence gives rise to a grave suspicion that adultery was committed. But there is no direct evidence of the offence. It is necessary to draw the inference from all the circumstances of the case. On one view of the circumstances it seems to me that it would have been open to His Honour to find that the offence was proved. But it was also open to His Honour to find that the relationship of the respondent and the co-respondent did not go beyond a decidedly risky and osculatory flirtation. It has been contended, however, that the circumstances are such that His Honour was bound to find that adultery had been committed, although the respondent and co-respondent both entered the witness box and denied it. To my mind the evidence of compromising circumstances would have to be very definite and unequivocal before an appellate court could say that a trial judge who saw and heard the parties could not reasonably believe their denials. Here the compromising circumstances consist broadly of the secretiveness of the relationship, the somewhat loose moral standards of the participants, and the opportunities of committing the offence. But none of these are compelling circumstances. They are at most important circumstances to be carefully weighed by the trial judge in deciding where the truth lies. It is evident from a fair reading of His Honour's judgment that His Honour gave all these matters careful consideration and I can see no ground whatever on which an appellate court would be justified in overruling his decision. In my opinion, therefore, this appeal should be dismissed with costs.

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I also am of opinion that this appeal should be dismissed. All the matters which Mr. Joske has so strongly pressed upon us could have been urged with great force, and doubtless were urged with great force, before the learned trial judge. But, in a case of this kind, where adultery is denied on oath, the possibility of reaching the truth must depend to a vital extent on the judge's view of the witnesses and his estimation of their character and their evidence. Where adultery has been denied on oath, and a court of first instance has felt unable to find that adultery was committed, I think it is only in very rare circumstances that a court of appeal can be justified in interfering, and I think that this is very far indeed from being such a case. It is perhaps not desirable that I should say anything about the case of Boileau v. Boileau (unreported) to which Mr. Joske referred, but I feel bound to say that I myself regard that decision as a decision of very doubtful correctness. It is not, of course, necessary to decide whether I should have taken the same view as the learned trial judge took in this case. There are a number of circumstances in the case which lead me to think that a wise court might well hesitate long before arriving at an affirmative finding that adultery was committed. I think it not unlikely that I should have taken the same view as Mr. Justice O'Bryan, but it is enough for me to say that I think it out of the question that a court of appeal should make an affirmative finding here. The appeal, in my opinion, should be dismissed.