No. 29 of 1958

IN THE HIGH COURT OF AUSTRALIA

SERGEANT

V.

SERGEANT AND ANOTHER

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on MONDAY, 27TH OCTOBER, 1958

W. M. Houston, Govt. Print., Melb.

SERGEANT

v.

SERGEANT AND ANOTHER

JUDGMENT
(ORAL)

DIXON C.J.
KITTO J.
WINDEYER J.

SERGEANT

v.

SERGEANT AND ANOTHER

DIXON C.J.: This is an appeal from a decree of Mr. Justice Barry dismissing a petition in divorce. The petition was that of the husband and was based upon a charge of adultery with the co-respondent. The appeal involves nothing but a question of fact but the case has some unusual and curious aspects. It is not the first proceeding between the parties in the matrimonial jurisdiction. There was a prior petition which was that of the husband based on a charge of adultery with another co-respondent. In that suit, the wife counter-petitioned on the ground of adultery. The petition came before Mr. Justice Barry who after a hearing, dismissed both the petition and the counter-petition. The facts out of which this petition grows seem to have occurred before that petition was completely disposed of, or at least the incidents relied on began at that date.

The learned judge's finding was expressed with hesitation and doubt and he, in the course of his judgment, made it quite clear that he depended in no degree on the personal veracity of either the respondent or the co-respondent. As far as the co-respondent is concerned, he condemned his testimony, so far as its reliability went, in no uncertain terms. But his Honour, in the end, was left without that degree of satisfaction which is required in a case of a serious allegation such as that of adultery and he dismissed the petition.

The parties are not what is commonly called young, although that is an epithet which depends upon the age of the person who uses it. They had two children, one of whom is sixteen years of age and the other a little younger. They separated apparently late in the marriage and at the period

with which this suit is concerned they appear to have been living in houses which were back to back, facing streets running parallel to one another. At the time at which we take up the story there seem to have been pending at least summonses relating to the custody of the children, and it is even possible that the decree dismissing the prior divorce suit had not been pronounced.

At a date possibly in March 1957, or possibly a little later, an advertisement appeared in a newspaper the terms of which are not certain, but it invited communication from a woman or women to a man in his forties who would be interested in the companionship or friendship of a woman. An advertisement was read to the co-respondent, which may be the right one. It was on 16th March 1957, and said that a gentleman of 45 would like to meet a sincere lady friend of 35 or 40. The respondent wife answered the advertisement. A correspondence arose between her and the co-respondent as a result. Apparently the co-respondent inserted the advertisement but it is possible that it may have been put in by some friend of his who handed him one or some of the letters which were received.

Her conduct, the wife in a subsequent letter to her husband, describes as "silly to most people". One can at least concur in that description of it. The co-respondent went down, so he says, to a shop in which the respondent's husband had installed her where she sold knitted goods. He is supposed to have taken a view of her. As a result he wrote to her and brought about a meeting. There is evidence that they went out at least on six occasions together in a Triumph sedan which he owned. At one stage after they had begun to go out together, the petitioner intercepted a letter which had been written by the co-respondent to the respondent. The

letter was delivered to his house by mistake. He opened it - that is, he steamed it open - he had the letter inside photostated, he resealed it and put it in the post again, and it was delivered to the respondent. The letter was in most endearing terms and suggested a strong interest in her. One could have very little doubt that it was the co-respondent's object to form an adulterous relation with her if that had not already been formed.

Having obtained this information, or letter, the petitioner employed a private inquiry agent and they were followed on the last three occasions that they went out, namely, 20th August 1957, 29th August 1957 and 2nd September 1957. On the first two of those occasions it seems to be conceded that nothing was discovered which would prove adultery whether by direct or circumstantial evidence. On the third occasion the evidence was much more definite and might have implicated them in an act of adultery, but having heard the evidence in detail the learned judge found that no act of adultery had then and there taken place.

He took the view which was certainly open and indeed was probably the view to which the evidence pointed that either the inquiry agent had struck too soon or there were other reasons why they had not engaged in an act of adultery.

His Honour therefore came to the conclusion that he could not and ought not to find adultery against the co-respondent and the respondent because, to use the expression which he repeated, he did not feel that comfortable satisfaction which he thought was necessary before such a finding could be reached.

From that conclusion this appeal is brought by the petitioner. The petitioner invites us to say that

the learned judge ought to have been satisfied on those facts that adultery had been committed, even although he was unable to specify the time or place or indicate the circumstances.

The case has caused us some hesitation, but having gone through the Appeal Book we think that his Honour dealt with the case adequately. It is suggested by counsel for the appellant that his Honour confined himself in his whole consideration of the case to the three instances, the three dates which I have given, and that he did not allow his examination of the case and of the probabilities of adultery to go outside those occasions.

Having examined the Appeal Book I do not think that is altogether correct. I think that during the course of the hearing of the case his Honour was very much alive to the possibility of finding that adultery had been committed apart from those occasions.

The petition was expressed in general terms, particulars had not been delivered confining the issues to those three occasions. But by the time his Honour came to the end of the case counsel for the petitioner had concentrated on those three occasions as the occasions on which there was direct evidence of clear association and opportunity.

The judgment of the learned judge was indeed attacked on the broad ground that his Honour had not given consideration to the whole issue which was open on the petition. That view I am unable to accept. No doubt it is correct enough that towards the conclusion of the case his Honour was not unnaturally turning his attention to those three occasions which were stressed by the petitioner's counsel as the occasions on which it was attempted to prove specific acts of adultery.

The result of my consideration of the judgment and of the facts is to leave me unable to say with that

certainty which is demanded of a Court of Appeal before it reverses a finding of fact, that his Honour was wrong in refusing to be assured that adultery had been committed by the respondent and co-respondent then or at any time. The case is a singular one, no credit whatever can be given either to the respondent wife or to the co-respondent for the manner in which they conducted themselves, but the view which his Honour adopted, that it was not certain that they had yet committed adultery, seems to me to have been fairly open to him on the evidence and one which this Court cannot say was wrong.

I am therefore of the opinion that the appeal should be dismissed.

KITTO J.: I am of the same opinion and I have nothing to add.

WINDEYER J.: I agree and I have nothing to add except that, his Honour having seen and heard the witnesses, I feel that this Court should not disturb this finding, but in so far as one can judge from the transcript of evidence alone I do not doubt that his doubts were justified.

DIXON C.J.: The appeal will be dismissed with costs.