IN THE HIGH COURT OF AUSTRALIA

WILLING

v.

CUTTEN & HARVEY

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on WEDNESDAY 8 DECEMBER 1976

RM74/30574

WILLING

v.

CUTTEN & HARVEY (REG.)

ORDER

Appeal dismissed with costs.

WILLING

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JUDGMENT

BARWICK C.J.

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In this appeal, which was argued by the appellant in person, I have had the advantage of reading the reasons for judgment prepared by my brothers Stephen and Mason. The relevant facts and circumstances sufficiently appear in what they have written. I agree that this appeal fails and should be dismissed. It is plain to my mind that the trial judge made errors both as to the admissibility of evidence and as to his understanding of the evidence of the witness Henderson. But those errors do not, in my opinion, warrant an order for a new trial of the action. His Honour's verdict depended on his belief of Mr. Derrington and on his disbelief of the appellant. I am unable to accept the view that, if he had properly understand Mr. Henderson's evidence, his Honour would either have disbelieved Mr. Derrington or believed the appellant. At best, I think he would have regarded that evidence as inconclusive, to be explained by error or confusion on the part of Mr. Henderson. There existed no reason for thinking Mr. Derrington had fabricated his account of the instructions received from the appellant and much reason,

in the appellant's behaviour, to believe that account. It is quite true that Mr. Derrington was emphatic that the instructions were given in person on a particular day: this led to what I think was an undue emphasis on those aspects. The real question was whether the instructions were in truth given. Doubt as to whether they were given on that day and in person would not be sufficient, in my opinion, to warrant the conclusion, having regard to all the evidence, that the instructions were not given at all.

I share the views expressed by my brothers and would dismiss the appeal.

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JUDGMENT GIBBS J.

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I have had the advantage of reading the reasons prepared by my brother Mason in which the facts of this case are fully stated.

The appeal has caused me no little difficulty. On the one hand, if the case is to be decided on the written record, the balance of probability inclines in favour of the respondent's version of the facts. If the appellant's denials that he instructed Mr. Derrington to buy the shares are correct, it would seem that only two explanations of the established circumstances are open. The first is that Mr. Derrington on 5th September 1968 bought on his own account the shares in Cleveland Tin N.L. but recorded the purchase as having been made for L. Smith. The only possible motive that could be suggested for such a course would be a wish dishonestly to claim any profit for himself but to cast any loss on to the appellant. That would seem a rather unlikely scheme, since the benefits were dubious and the risks considerable. The second possible explanation is that Mr. Derrington bought the shares as the result of an honest mistake. That too is rather unlikely. Moreover, the appellant's failure to answer the letters which asserted that the shares had been bought on his behalf is a formidable obstacle to the acceptance of either explanation and supports the conclusion that Mr. Derrington's

story was true.

On the other hand, the question was essentially one of credibility. The learned trial judge preferred the evidence of Mr. Derrington to that of the appellant. But he was mistaken as to the effect of some of the evidence. He thought that Mr. Henderson may have been confused as to the year during which he spent a day with the appellant or as to the date on which the Adelaide Show started in that year. In my opinion the effect of Mr. Henderson's evidence, properly understood, is that he spent the day with the appellant on 5th September 1968. Further in my opinion, the effect of Mr. Derrington's evidence is that the order for the shares was placed by the appellant in Mr. Derrington's office on 5th September 1968 - not on some other day. A possible reconciliation of the evidence of the two witnesses is that the appellant was able to leave Mr. Henderson's company for long enough to visit Mr. Derrington and return without Mr. Henderson observing that he had gone. But when the appellant attempted to question Mr. Henderson on this matter, with a view to negativing that possibility, he was stopped, apparently because it was thought either that his questions were leading in form or that they did not arise out of cross-examination. This unhelpful insistence on the strict rule, as against a litigant appearing in person, meant that admissible evidence of relevant facts bearing on a vital issue was shut out. The proper course was to give leave to the appellant to re-examine, if necessary assisting him to reframe his questions and allowing the respondent's counsel an opportunity to cross-examine further. Of course, this in itself is no ground of appeal. However, in the circumstances,

it does not seem to me possible to say that Mr. Henderson's evidence was not inconsistent with that of Mr. Derrington, since the question whether the evidence of those two witnesses could stand together was not fully explored.

I am unable to satisfy myself that the misunderstanding of Mr. Henderson's evidence did not enter into the final decision. The learned trial judge said that that evidence caused him some concern. If the learned trial judge had understood that Mr. Henderson had been with the appellant for the whole of the relevant day it is possible that he would have reached a different conclusion, particularly having regard to the fact that it was the respondent who bore the onus of proof. In these circumstances I do not think that the judgment should be allowed to stand.

I would allow the appeal and order a new trial.

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JUDGMENT

STEPHEN J.

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This appeal concerns a case in which the learned trial judge was faced with a critical conflict of testimony. It centred around an alleged conversation between the appellant, Willing, and a member of the respondent firm of stockbrokers, Derrington, which was said to have occurred at the latter's office some seven years earlier. Willing not only denied the happening of the conversation but says that he was elsewhere during the whole of the day when Derrington says the conversation took place. A third party, Henderson, supports Willing and says Willing was with him all that day. The trial judge accepted Henderson as a witness of truth but, by a palpable misunderstanding of his testimony, concluded that Henderson must have been mistaken as to the date.

The question for this Court, as it was for the Full Court, is only whether or not this error, which allowed the learned trial judge to treat Henderson's evidence as no obstacle to his rejection of Willing and his acceptance of Derrington, suffices to entitle Willing to a new trial.

I conclude that it does not. I do so because, after a consideration of all the evidence and of the learned trial judge's

reasons for judgment, I do not consider that Henderson's evidence, even had a proper view been taken of it, would have affected the outcome. In the Full Court Sangster J. put the matter both accurately and concisely when he said of the learned trial judge's reasons that they could, for present purposes, be regarded as amounting to the following:

> "I believe Mr. Derrington. That establishes the plaintiff's case. I disbelieve Mr. Willing. His evidence therefore does not stand in the plaintiff's path. I am troubled to know how Mr. Henderson's evidence fits in - he was probably mistaken as to the year.".

In these circumstances I think it is correct to conclude that, whatever view he might have taken of Henderson's evidence, the learned trial judge would nevertheless have accepted Derrington's evidence in preference to that of Willing. What is more, there were strong grounds, both circumstantial and also personal to Willing's own testimony in the box, which could justifiably have led his Honour to this view.

In these circumstances the majority in the Full Court was, in my view, correct in refusing to order a new trial despite the error made by the learned trial judge; this appeal must fail accordingly. I have had the advantage of reading the reasons for judgment of Mason J. and since I agree with all that he has said it is unnecessary for me to enter in any detail into those particular aspects of the evidence at the trial to which he there refers.

I would dismiss this appeal.

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JUDGMENT

MASON J.

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The respondent partnership is a firm of stockbrokers operating on the Adelaide Stock Exchange. It sued the appellant, who was a businessman, for the price of 10,000 shares in a company known as Cleveland Tin N.L. which it claims to have bought for the appellant on his instructions. The action was defended, the appellant appearing in person. At the conclusion of the hearing in the Local Court at Adelaide, Judge Mohr found in favour of the respondent in the sum of $11,901.63 and judgment was entered accordingly.

The appellant appealed to the Full Court of the Supreme Court against the judgment. By majority his appeal was dismissed and he now appeals to this Court against that dismissal. The appellant's notice of appeal does not spell out the relief which he now seeks. He seems to have been under the impression that if he were to succeed the judgment in his favour would be substituted for that obtained by the respondent. In this respect he is mistaken. If he were to succeed in this appeal he would obtain a new trial, not a judgment in his favour.

According to the respondent's case, which was based very largely on the oral evidence of Mr. Derrington, one of its partners who had dealings with the appellant, the appellant gave instructions in the respondent's office on 5th September 1968 for the purchase of 10,000 shares in Cleveland Tin. The appellant

asked that the respondent finance the purchase and stated that the shares were to be registered in the name of L. Smith, P.O. Box 5, Crafers, S.A., the box number, it was admitted, being the appellant's normal postal address. Mr. Derrington said that he agreed to the appellant's proposal because the respondent held a large parcel of Australian Development shares in the appellant's name. Mr. Derrington stipulated that the appellant should pay interest at bank overdraft rates. It was common ground that on the previous day, 4th September, the appellant had instructed Mr. Derrington to purchase 600 shares in Cleveland Tin in his own name and that these shares were paid for by him.

The respondent purchased the 10,000 shares. They were not paid for by the appellant and they continued to be held by the respondent. Mr. Derrington said that in 1969 when they had risen in value he recommended to the appellant that they should be sold. The appellant said that he would consider the matter. However, he gave no instructions to sell. In 1971 Mr. Derrington discovered that the Australian Development shares had been removed from the firm's custody. He then wrote to the appellant on 8th August 1971 and 19th January 1972 requesting payment for the shares. No payment was made.

The appellant denied that he visited the respondent's office on 5th September or that he ever ordered the purchase of the shares in question. He admitted receipt of the two letters, stating that he ignored the first letter. He asserted that he went to see Mr. Derrington after receipt of the second letter but claimed that the topic of payment was not discussed between them on that or any other occasion. His case was that on 5th September 1968 he was engaged in tent-pegging practice in

connection with the Royal Adelaide Show with a Mr. Henderson, an acquaintance from the Riverina in New South Wales, who was a regular competitor in the Show. Mr. Henderson gave evidence for the appellant. His evidence and the judge's comments on it are of critical importance.

But before I turn to the judge's comments on the witnesses, including Mr. Henderson, I should refer briefly to evidence given by the appellant in cross-examination relating to share purchases which he made in the name of "Joanna Gibson". The appellant admitted that he had instructed Mr. Derrington in 1969 to invest $8,200 in the name of Joanna Gibson, P.O. Box 5, Crafers, in Lensworth Finance Debentures. He claimed that the money was provided by Joanna Gibson and that the investment ultimately found its way into her possession, but he was unable to give any details of her address, occupation or of the circumstances in which he came to be acting on her behalf in the making of investments. In passing, I should observe that the primary judge appears, without justification, to have taken over the cross-examination of the appellant on this topic, when the matter should have been left in the hands of counsel for the respondent. Except in so far as it contained some questions to which objection might have been taken by the appellant, it was not a notable cross-examination. However, despite this criticism, the appellant was given the opportunity to state fully the circumstances surrounding these transactions and this he did not do.

After commenting unfavourably on that part of the appellant's evidence which related to his conversation with Mr. Derrington following the letter from the respondent of 19th January 1972, his Honour said:

"The defendant was asked by me some question about the 'Joanna Gibson' transactions and the initial questions led to a most extraordinary line of questions and answers. The defendant maintained an almost complete ignorance of this woman not only as to her address, marital status and appearance but also as to how those two transactions had come about although he admitted they did take place. I am satisfied beyond any doubt that the shadowy figure of 'Joanna Gibson' had no substance and was an illusion created by the defendant for purposes of his own about which it would be futile to speculate although speculation as to motives and reasons spring readily to mind. It may be not unconnected with the relevant authorities. Suffice to say that in this instance at least the defendant showed himself to be willing to lie and prevaricate for his own purposes. The evidence regarding 'Joanna Gibson' serves another purpose. It shows that at about the time of the Cleveland Tin transaction alleged by the plaintiff firm, the defendant was using a pseudonym in purchasing securities and for that pseudonym using the address 'P.O. Box 5, Crafers S.A.'"

His Honour went on to say this of Mr. Henderson's evidence:

"I must admit that the evidence of Mr. Henderson caused me some concern. He gave evidence that he was in the habit of coming to Adelaide from his property near Hay, N.S.W. for the Royal Adelaide Show each year to take part in the tent-pegging events and knew the defendant as a team mate and fellow competitor. He said at the outset of his evidence that he arrived in Adelaide on Wednesday 6th September 1968, spent Thursday (which must have been the 7th September) in company with the defendant and that the show commenced on Friday (which must have been the 8th September). On hearing this evidence I adjourned for a short period and obtained calendars going back many years. The 1968 calendar showed that the first Wednesday Thursday and Friday in September 1968 were in fact the 4th, 5th and 6th. However they also showed that the only year on which those week days had fallen on 6th, 7th and 8th September was 1967 in any years remotely relevant. Although this witness was I think giving an honest recollection it turned out in the end that not only may he have been confused as to year, i.e. 1967 or 1968 because no satisfactory explanation was given for his initial statement that he arrived on Wednesday 6th September but the Royal Adelaide Show apparently could have started at a different time, i.e. later in September than he had thought. Thus although

I am satisfied that this witness spent a Thursday in September in company with the defendant I am not satisfied that he was speaking of the crucial Thursday i.e. Thursday 5th September 1968."

His Honour concluded by saying:

"This matter falls to be decided on credibility in the final analysis and I am confronted with in effect two witnesses. Firstly Mr. Derrington. If he is not to be believed the only possibility, as I can see the matter, is that in September 1968, he decided to purchase shares in Cleveland Tin on his own behalf and used the pseudonym 'L. Smith' and the defendant's address to cover up the transaction. Not only this but he has persisted not only in his initial misdoing but has asserted a lie (and deliberately) to sheet home the loss arising from the transaction to the defendant. This is a possibility (aside as I see it apart from a remote possibility of mistaken identity or misunderstanding) which is the only feasible explanation if Mr. Derrington is lying. It was not put to Mr. Derrington by the defendant nor by me. The latter coming about because it did not occur to me until the last day of the hearing long after Mr. Derrington had left the box. It is irrelevant to my decision and I mention it because it was discussed during argument.

The plain fact of the matter is that I accept Mr. Derrington's evidence without hesitation where it conflicts with that of the defendant. I found the defendant a thoroughly unreliable witness on any matter vital to the issues arising for decision. He was prepared to prevaricate, and I am satisfied tell untruths, when he thought either course would advance his interests and when he considered he could do so with impunity. I could quote at length from the evidence but in view of my opinion of the defendant's credibility as a whole find it unnecessary to do so."

In the Supreme Court the Chief Justice (who dissented) and Sangster J. rightly pointed out that the primary judge misapprehended the burden of Mr. Henderson's evidence. When his evidence is examined it is apparent that he was saying that he arrived in Adelaide on the Wednesday before the Friday on which the Show began in 1968. He wrongly identified that Wednesday as 6th September. However, he reiterated at all times that he

was uncertain as to dates but was adamant that the Show began on a Friday and that he arrived on the preceding Wednesday. Consequently the first reason which his Honour assigned for concluding that Mr. Henderson might be mistaken as to the year cannot be supported.

The issue is whether the existence of this misapprehension on the part of the primary judge justifies an order for a new trial. In the Supreme Court the majority (Hogarth and Sangster JJ.) thought that the misapprehension did not affect the result because in their view the learned judge would not have decided the case differently had he correctly understood Mr. Henderson's evidence.

I agree with the majority in the Supreme Court that a new trial should be refused. I do so because in my opinion the error on the part of the primary judge did not affect the result. The order in which his Honour dealt with the credibility of the witnesses, commencing as he did with the appellant, passing to Mr. Henderson and concluding with Mr. Derrington, might perhaps suggest that the assessment of Mr. Derrington's credibility turns in part at least on the conclusions reached in relation to the witnesses whose evidence was considered earlier.

None the less it is reasonably plain that the judge disposed of Mr. Henderson's evidence by reference to its inherent deficiencies as he saw them without being driven to weigh his evidence in the balance against that of Mr. Derrington. The issue, as his Honour perceived it, came down to a choice between Mr. Derrington and the appellant. The judge regarded the former as a most impressive witness and the latter as a witness whose

evidence could not be accepted unless it was confirmed by incontrovertible evidence. Had his Honour been confronted with the choice of accepting Mr. Henderson or Mr. Derrington, there can be little doubt that he would have accepted Mr. Derrington. Although Mr. Henderson was held to be an honest witness and the judge expressed himself as being satisfied that he had spent a Thursday in September in the company of the appellant, Mr. Henderson's evidence was not so cogent or compelling as to induce the judge to discard the evidence of Mr. Derrington once the testimony of the two witnesses was weighed in the balance. Despite the judge's misapprehension of what Mr. Henderson said, there remains a real doubt that the witness was speaking of what occurred in 1968.

When he gave evidence in December 1975 he was speaking of events which took place not less than seven years before, events which occurred in the course of a day which was by no means singular or distinctive in his experience. He was a regular competitor at the Adelaide Show; he had competed in all but three or four years between 1965 and 1975; and on each of these occasions he had spent a considerable time in the company of the appellant. There was therefore sound reason, apart from the erroneous reason assigned by the judge, for thinking that Mr. Henderson could be mistaken in saying that the events of which he spoke took place on the Thursday which preceded the opening of the Show in 1968. There is nothing in Mr. Henderson's evidence which convincingly or persuasively excludes the possibility that he had in his mind associated with that day events which occurred on another day.

Moreover, there may have been some ground for viewing

with circumspection the claim that Mr. Henderson's evidence accounted for the appellant's movements during the whole of the day so as to leave him with no opportunity of calling upon Mr. Derrington in his office. However, I would feel some diffidence in basing any conclusion on this score because the appellant was not permitted to clarify this aspect of the evidence in his re-examination of Mr. Henderson, his question being disallowed when objected to, on the ground that it did not arise out of cross-examination. The question should have been allowed subject to the respondent's counsel being afforded the opportunity of further cross-examination.

But enough has already been said to show that Mr. Henderson's evidence lacked that cogent and compelling quality which it would need to have in the eyes of the primary judge to displace or throw into serious question the evidence of Mr. Derrington which was otherwise found to be impressive. Indeed, I find it extremely difficult to conceive how a tribunal of fact could prefer Mr. Henderson to Mr. Derrington. It is scarcely to be supposed that the respondent's case was an invention on the part of Mr. Derrington and there is nothing in his cross-examination which would support such a finding. It is perhaps conceivable that Mr. Derrington was mistaken as to the date on which the appellant gave instructions for the purchase of the shares. It is common ground that on 4th September the appellant placed an order for the purchase of 600 Cleveland Tin shares in his own name and Mr. Derrington's statement that the transaction sued on took place on 5th September seems to be based largely on the fact that the shares were purchased on that day. But even if Mr. Derrington was mistaken as to the date this would serve

only to deprive the appellant of such support as he derives from Mr. Henderson's evidence.

And in assessing the comparative worth of Mr. Derrington's evidence we cannot overlook the fact that the appellant received the two letters requesting payment and that his denial of Mr. Derrington's version of the conversation which took place after the receipt of the second letter and his version of that conversation are quite unconvincing. These considerations indicate that the appellant's case should not be accepted in preference to the respondent's case.

In the result it is my opinion that the learned judge's misapprehension does not affect the result. His Honour's view of the witnesses was such that it is unreasonable to think that he would have accepted Mr. Derrington had he been under no such misapprehension.

In conclusion I should mention that in the Supreme Court some attention was given to the propriety of the primary judge's rejection of a booklet entitled "Royal Adelaide Show September 6 - 14, 1968". The Chief Justice considered that it should have been admitted in evidence under the provisions of s. 45(b) of the Evidence Act, 1929-1974 (S.A.). This is a question which I do not find it necessary to decide. On the view which I take of the case I am prepared to assume that in 1968 the Show commenced on Friday, 6th September. However, for the reasons which I have given, this does not entitle the appellant to a new trial.

The appeal should be dismissed.

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JUDGMENT

MURPHY J.

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The appellant, who appeared in person here and as defendant in the trial in a South Australian District Court, seeks a new trial.

He complained that the trial judge (who sat without a jury) told him that there were only two issues (whether he was in the respondent's office on 5 September 1968 and whether he had ordered certain shares) and then, in order to discredit him, cross-examined him at great length about other transactions with the stockbroking firm of which the respondent was a member, although the respondent had previously admitted that the appellant had been a valued client of the firm for over 20 years and that all his transactions had been carried out properly.

He also complained that the judge had made a serious error on the question of the date in September of the day the appellant had spent with his witness. The respondent conceded this error. We are dealing with the case on the basis that the day was 5 September and there was quite credible evidence that the appellant did not go to the

respondent's office on that day. The trial judge's assessment of credibility should not be accepted as it was affected by this error. This was obvious from the way in which he dealt with the evidence of the appellant's supporting witness.

I agree with the conclusion reached by the Chief Justice of South Australia. There should be a new trial. The appeal should be upheld.