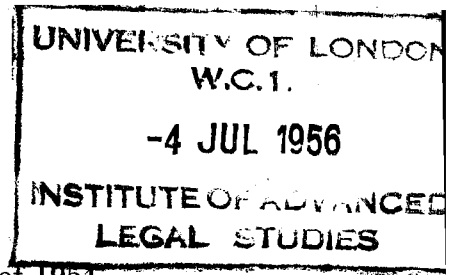


18, 1955

~~CH 9. 6. 2~~



In the Privy Council.

No. 16 of 1954.

43561

ON APPEAL FROM THE WEST INDIAN
COURT OF APPEAL

BETWEEN

HARRY YOUNG LAI Co-RESPONDENT-APPELLANT

AND

BENJAMIN CHO FOOK LUN PETITIONER-RESPONDENT

AND

ESTELLE CHO FOOK LUN RESPONDENT-RESPONDENT.

CASE FOR THE APPELLANT

1.—This is an Appeal by special leave from a Judgment and Order of the West Indian Court of Appeal dated 30th January, 1953, whereby an Order of the Supreme Court of Trinidad dated the 23rd November, 1950, dismissing with costs the petition of the First Respondent for a dissolution of his marriage with the Second Respondent on the ground of the Second Respondent's adultery with the Appellant was set aside, and the First Respondent was granted a decree nisi on the ground of such adultery and the Appellant was ordered to pay the costs of both Respondents in both Courts.

10 The Appellant, First Respondent and Second Respondent are hereinafter referred to as the Co-Respondent, Petitioner and Respondent.

2.—The Petitioner's case was that on the night of Whit Monday, the 6th June, 1949, at the Petitioner's home at 127 Coffee Street, San Fernando, Trinidad, the Respondent committed adultery with the Co-Respondent. The Respondent denied the alleged adultery and gave an account of the events of the evening of the 6th June, 1949, which differed in every material particular from that of the Petitioner. The Co-Respondent denied the adultery and deposed that on the evening of the 6th June he had been at home with his wife. His evidence was confirmed by the wife herself who
20 was called as a witness. The learned trial Judge held that even if he were to find that the Respondent committed adultery on the night of Whit

Monday, 6th June, 1949, at the premises in question he could not, having regard to the Co-Respondent's alibi and the little light which would reflect in the room where the adultery was alleged to have been observed, find that the man with whom she committed such adultery was the Co-Respondent. He further held that so much doubt was cast on the Petitioner's evidence he was not satisfied that the Respondent did, in fact, commit adultery. Having considered all the evidence he found that the Respondent did not commit adultery with the Co-Respondent.

3.—The principal grounds of appeal are as follows :—

(a) The decision of the trial Judge was a reasonable and proper one at which the learned judge was fully entitled to arrive on the evidence which had been called before him and the West Indian Court of Appeal (hereinafter referred to as " the Court of Appeal ") exceeded their legitimate function as an Appellate Tribunal in rejecting the findings of fact made by the trial judge who had seen and heard the witnesses and substituting therefor their own views of the evidence. 10

(b) It was undisputed that the Petitioner at some time on the night of the 6th June, 1949, went to the police station and made a report to a police officer. The police officer was not called at the hearing and the full contents of the report were never revealed although the Petitioner suggested in cross-examination that it related to the alleged adultery. The Court of Appeal (it is submitted wrongly) considered it " a matter of extreme significance that the policeman was not called " by either the Respondent or the Co-Respondent although neither of them had been present when the report was made. 20

(c) The judgment of the trial judge did not specifically refer to or discuss the testimony of other witnesses nor did it disclose the precise weight which the judge attached to the testimony of each witness although the judge stated that he had considered all the evidence " including evidence not specifically referred to in this judgment." The Court of Appeal held (it is submitted wrongly) that these omissions were indicative of the failure of the trial judge to give adequate consideration to the evidence. 30

(d) The decision of the Court of Appeal was itself contrary to the weight of the evidence adduced at the hearing before the Supreme Court.

4.—The Petitioner is and at all material times was a shop-keeper carrying on business at No. 127 Coffee Street, San Fernando, in the Island of Trinidad. He married the Respondent on the 10th February, 1935, and lived with her at divers addresses and at 127 Coffee Street aforesaid until June, 1949. The Co-Respondent at all material times lived with his wife at Reform Village, about six miles away from Coffee Street. 40

5.—By a Petition dated 18th July, 1949, the Petitioner instituted p. 1

THE PRESENT SUIT

alleging that the Respondent had frequently committed adultery with the Co-Respondent at 127 Coffee Street aforesaid and had committed adultery with the Co-Respondent at the said address on the night of Whit Monday, the 6th day of June, 1949. By their Answers dated 23rd August, 1949, and the 26th July, 1949, respectively the Respondent and the Co-Respondent denied that they were guilty of adultery as alleged in the Petition. p. 5

6.—The Petitioner deposed that on Whit Monday, the 6th June, 1949, p. 7
 10 he went to Port of Spain leaving the Respondent at home. He returned home at 9.50 p.m. and was unable to open the door leading from the garage. He found that it was locked from the inside. He then climbed a ladder into the residential part of his premises and entered the rumshop. His evidence then proceeded as follows :—

“ There is a hole in rumshop wall between rumshop and No. 2 p. 8, l. 14
 Private Room. I looked through the hole. I saw my wife leaning on a bench. She was leaning on a table backwards. Her back was to the partition of the room. The Co-Respondent Harry Young Lai was on top of her. His hands were round my wife.
 20 They were having sexual intercourse on the bench.

“ I went back towards the garage. I came back with two clerks. Young Ping and Young Poy. I spoke to them. They looked into the No. 2 Private Room. Young Lai got up and ran towards the back door, he passed through the back gate, leading to Drayton Street. My shop is at corner of Coffee Street and Drayton Street. My wife got up and went back to the bedroom. When I saw my wife that night, she had on a night gown, I did not go to bedroom. I went back to garage I went to police station to make a report. Before I left premises with my car, somebody
 30 named Howard called out to me. I then went to the police station I returned back home. I went inside the garage. Young Poy opened the gate.

“ I did not see my wife in the garage. I did not see my wife after my return from police station. My wife left the house before my return. I slept in my house that night.”

In cross-examination this witness denied the suggestion that he wanted p. 9, l. 12
 to marry a lady named Phillipa Acham.

7.—Young Poy deposed that he had worked for the Petitioner for p. 17, l. 9
 about 2 years as a clerk. Young Ping also worked there. At about 10 p.m.
 40 on the 6th June, 1949, he opened the gate for the Petitioner who brought his car inside. After knocking at the inside door and calling the Respondent the Petitioner climbed through a window. Soon after the Petitioner called this witness and Young Ping to the hole from the rumshop to the Private Room. This witness next deposed as follows :—

p. 18, l. 5

“ I looked. Young Ping looked. I see Young Lai get up and run. I saw Mrs. Cho Lun. Young Lai was on the bench and he got up. Mrs. Cho Lun was sitting down on bench. I first saw Young Lai when he was getting up to run. Young Lai ran to Private Room door which leads to yard, which goes to gate leading to Drayton Street. I didn't see Young Lai any more. Mrs. Cho Lun went back inside, by the bedroom.”

In cross-examination by Counsel for the Respondent this witness deposed as follows :—

p. 19, l. 33

“ Not usual for Cho Lun to climb through bedroom window to get into his bedroom I was not with Cho Lun when he climbed—I was in my room. I didn't say this morning that I saw Cho Lun climb in. I didn't see Cho Lun climb through the window. I was told so. When Cho Lun arrived, I did not pay attention to lights.”

In cross-examination by Counsel for the Co-Respondent this witness deposed as follows :—

p. 19, l. 38

“ When I looked through the hole, the back door to Private Room was half closed—1 foot to 1½ feet. When I looked through the hole, Young Lai was about 10 feet from the back door. He was ready to run . . .”

p. 20, l. 9

“ . . . When I looked into the Private Room it had enough reflection of light. It is true that I did see Young Lai going to run, that night. As soon as I saw him, he got up and he ran. I did not see his face. Cho Lun told me it was Young Lai.”

In re-examination this witness deposed as follows :—

p. 20, l. 14

“ I always see Young Lai every week. At that time, I knew him well. I saw person running. It was Young Lai. At the moment I didn't see his face. I knew it was Young Lai, because Cho Lun said so. He said so at the same time, as soon as Young Lai had run Cho Lun said so. While the man was still running. Cho Lun said ‘ You need not run, you no need run.’ . . .”

Further cross-examined he said :—

p. 20, l. 26

“ When Cho Lun told me it was Young Lai, Young Lai had already gone.

BY COURT : “ When Cho Lun told me it was Young Lai, Young Lai was then outside of the Private Room.”

8.—Young Ping deposed that he had worked at the Petitioner's shop as a clerk for 2½ years. On the 6th June, 1949, at 10 minutes past 9 he saw the Petitioner knock and call twice at the inside door. Thereafter he gave evidence as follows :—

p. 25, l. 29

“ There is a hole. I saw Young Lai and Mrs. Cho Lun holding together. I was in rumshop. Young Lai and Mrs. Cho Lun was

sitting down on a table and bench in a private room. Mrs. Lun was sitting down."

Witness continues through interpreter: "Mrs. Cho Lun was sitting against the partition on the bench. Young Lai and Mrs. Cho Lun were sitting down together outside facing the partition. They were 'stick up.' His hands were round the madam's shoulders. They were face to face. I only see them hug together."

10 1.30 p.m. Young Ping, still on oath, states: Further examined by Mr. Hassanali: "Young Ping went away (witness motions with hands). He went by the yard. He passed behind the door. I don't know name of street yard leads to. There is a gate leading to that street. Mrs. Cho Fook Lun went by her bedroom. Cho Lun told Young Lai 'no go, no go.' I went by my room. Young Poy did likewise. Cho Lun took his car and went out."

In cross-examination this witness deposed as follows:—

20 "Young Lai's pants were light blue in colour (show colour, grey, of Mr. Butt's trousers). He had on a white shirt, no tie. When I looked through he was sitting down. Young Lai's right arm round Mrs. Cho Lun. He sit on bench. His face was to Madam's face. When Young Lai got up, his back was to me. Cho Lun said: 'no go, no go.' He didn't say the man was Young Lai. I saw the man was Young Lai. No light in private room. I saw Young Lai. Young Lai was facing Madam, right arm around her. Young Lai was there that night." p. 26, l. 30

30 9.—Sydney Howard, a chauffeur driving a hired car, deposed that he had known the Co-Respondent for 12 years and that in June, 1949, the Co-Respondent had a Vauxhall car PA 4683. He further deposed that on Whit Monday, the 6th June, 1949, at about 10 p.m., he was coming up Drayton Street approaching Coffee Street when he recognised the Co-Respondent's car parked in front of the back gate of the Petitioner's shop. He saw the Co-Respondent come out of the back gate, get into his car, start up the engine and drive away. The Co-Respondent came out of the gate in a very fast manner as if he was running away. This witness was quite sure that it was the Co-Respondent. In cross-examination this witness deposed: p. 20, l. 31

"It was not until 9th February, 1950, the Petitioner spoke to me." p. 24, l. 21

40 10.—The Respondent deposed that she had had frequent quarrels with her husband owing to the fact that she had never had a child and also to his desire to marry Phillippa Acham. He asked her to agree to a divorce p. 29, l. 8

but she refused. On Whit Monday, 1949, the Petitioner left the matrimonial home early in the morning without telling her where he was going. Later in the day she went to Port of Spain by taxi and called at the house of Phillippa Acham but without finding the Petitioner. She returned home at about 6 p.m. She answered a telephone call at about 9.15 p.m. and another at about 9.30 p.m. Thereafter she went round by the rumshop to the frigidaire to get a sweet drink. She saw the Petitioner who said "Where's the man you were talking to?" After that she saw Young Poy and Young Ping with him. Thereafter she heard the Petitioner's motor car start up. She rang the home of Mr. Mooksang and spoke to Mrs. Yhap who came right away in her car. The Petitioner came back shortly after Mrs. Yhap arrived. Young Ping came and called out Mrs. Yhap saying that the Petitioner wanted to see her and Mrs. Yhap went out. Thereafter Mrs. Yhap returned and spoke to this witness who decided to go to the charge room of the Police Station and make a report. She and Mrs. Yhap thereupon went to the Police Station and saw the Petitioner's car outside. The Petitioner came out of the station and this witness spoke to the police. Thereafter she and Mrs. Yhap went to the latter's home and stayed there for the night.

11.—Mrs. Milly Yhap deposed that on 6th June, 1949, she received a telephone call from the Respondent telling her to come quickly. On arrival at the Petitioner's house Young Ping opened the gate. She saw and spoke to the Respondent and was then called out to the Petitioner by Young Ping. Her evidence proceeded as follows:—

"I went to him. Cho Lun told me 'What did Kim (his wife) told me.' I said 'Just as I arrived, you called me, what happened.' Cho Lun asked me if she didn't tell me that she was only talking. I said that she did not have the chance to tell me anything. Cho Lun told me that he came to the garage way, he listened for a time and he heard a talking over his bedroom window, when he listened, he jumped over the window, looked at the bed, it was neatly made up untouched, then he got into the sitting room, from there he saw his wife in the shop, and he Cho Lun asked her where was the man she was talking to, and she said that she was talking over the telephone. I told Cho Lun 'What you want me to say, a man was talking to your wife in your house? Are you drunk, are you crazy?'"

In cross-examination this witness deposed that she had been to the Police Station with the Respondent and seen the Petitioner come out. Thereafter she saw Constable Springer with a bit of paper in his hand. The Respondent and Springer spoke but the witness could not remember if she asked what the Petitioner had reported. Springer had a piece of paper which he showed her as containing what the Petitioner had reported. The Respondent did not read it. Springer said that the Petitioner had made a

report, told him not to enter it, and that he would return and tell him what to do. The Respondent told Springer that she was afraid to go back to sleep and that she would sleep at this witness' house.

12.—The Co-Respondent deposed that on Whit Monday he spent the whole day at Wah Nam at 6 Coffee Street, San Fernando. He left at 6.30 or 7 p.m. with Sam Look Allum and drove to Allum's house at Malgre Tout. He left there at after 8 p.m. and went to his home at Reform Village. His wife was at home. He did not go out that night. He was not in the premises of the Petitioner and Respondent at any time on Whit Monday, the 6th June, 1949.

In cross-examination the Co-Respondent agreed that he had taught the Respondent to drive adding that he had done so openly. In June, 1949, he had a Vauxhall car PA 4683. When he went to see the Respondent he put the car in Coffee Street. He parked the car in Drayton Street on one occasion. It would take him 20 minutes to drive the distance of 6 miles from Reform Village to San Fernando. On the night of Whit Monday his wife went to bed first while he remained up reading.

13.—The Co-Respondent's evidence was corroborated by Sam Look Allum who deposed that the Co-Respondent had been with him at his house until about 8.30 p.m. and by his wife who deposed that on Whit Monday, 1949, her husband came home before 9 o'clock and did not go out again that night. In cross-examination she added that she went to bed after 10 p.m. and that the Co-Respondent was then reading a book. She herself was awake when he came to bed about half an hour later.

14.—After setting out the evidence of the various witnesses the learned judge held that he was satisfied that the door was not locked from the inside and was also satisfied that the Petitioner did not climb through the bedroom window. He next considered the evidence of Sydney Howard and arrived at the following conclusion :—

“ He was carefully cross-examined. I have considered his evidence, together with his demeanour in the witness-box, and I am not satisfied that at about 10 p.m. on Whit Monday the 6th June, 1949, Sydney Howard was driving a taxi in Drayton Street or at the corner of Coffee and Drayton Streets. The Petitioner deposed in evidence that, before he left the premises in his car to go to the Police Station, Howard called out to him. I do not believe that such was the case. I do not believe that on the night of Whit Monday, the 6th June, 1949, Howard saw either Young Lai or the Petitioner. Further, he did not see the Petitioner on Thursday, the 9th June, 1949, as alleged by him (Sydney Howard).”

The learned judge next held that he was satisfied, notwithstanding the denial of the Petitioner and of Young Poy and Young Ping, that an incident

between the Petitioner and the Respondent did occur by the frigidaire and that the Petitioner had it in his mind seriously to assault the Respondent. He held that the Petitioner's evidence that he never spoke to his wife or she to him was not true.

p. 51, l. 30

After considering the evidence about the light in the private room the learned judge held as follows :—

p. 52, l. 19

“ If I were to find that the Respondent committed adultery on the night of Whit Monday, the 6th June, 1949, in the No. 2 Private Room immediately before she had the conversation with her husband at the frigidaire, I could not, having regard to Young Lai's alibi and the little light which would reflect in the Private Room, find that the man with whom she committed such adultery was the Co-Respondent Harry Young Lai.” 10

The learned judge next held that he was not satisfied that the Petitioner did in fact see his wife committing adultery. He did not believe that either Young Poy or Young Ping looked through the hole between the rumshop and No. 2 Private Room. He was satisfied that they were called by the Petitioner when the Respondent was by the frigidaire and not before. He added : “ There the Petitioner spoke to his wife but he did not accuse her of adultery, he merely asked her who was the man to whom she had been talking.” 20

p. 52, l. 40

p. 52, l. 45

The learned judge accordingly found that the Respondent did not commit adultery with the Co-Respondent or other person on the night of Whit Monday, 6th June, 1949, and that she did not commit adultery with the Co-Respondent at any other time at No. 127 Coffee Street, San Fernando. He dismissed the Petition and ordered the Petitioner to pay the costs of the Respondent and Co-Respondent. An Order was passed accordingly.

p. 53

15.—From the said judgment and order the Petitioner appealed to the Court of Appeal whose judgment was delivered on the 30th January, 1953. It included the following passage :— 30

p. 55-56

pp. 59-60

“ We have asked ourselves what is the evidence that (a) the door in question was secured, and (b) the Petitioner entered by climbing a ladder. After an examination of the evidence on those points we can find no justification for the Judge's disbelief of the Appellant's story on those two matters. We are satisfied that the door was secured that night from the inside and that the Petitioner did obtain access through the window ; that being so the grounds for the Judge's disbelief of the Petitioner's evidence on the other matters fail and consequently we are of opinion that the matter is at large. 40

“ We are satisfied that the Respondent and the Co-Respondent did commit adultery in the No. 2 Private Room as alleged.

“ In coming to that conclusion we have paid particular

attention to the subsequent conduct of the Petitioner on that night for we consider that conduct to be entirely consistent with his version of the events. Immediately after the Petitioner saw what he has said he saw he went to the Police Station despite the attempts of Mrs. Yhap to dissuade him and made a report to the police. What was the nature of that report? In cross-examination he stated that he told the police 'that he looked through the hole and saw the man,' it was suggested that he made no report of that nature to the police; but the Respondent went to the station with Mrs. Yhap and spoke to Corporal Springer. The best method of proving what report the Petitioner made to the policeman would be to call the policeman. The Petitioner could not do so but the Respondent could. Why did she not call the policeman? The answer seems obvious—because his evidence would be likely to support the Petitioner's case and discredit hers. To us it is a matter of extreme significance that the policeman was not called by either the Respondent or the Co-Respondent. Although as stated the contents of the report have not been disclosed its ominous nature can be gauged by the following reply given by the Petitioner to Mr. Archbald, under cross-examination:—

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“ ‘ I went in motor car to Police Station. I don't know my wife rang up Mrs. Yhap. I made a report to the police. I think No. is 2233 Springer. I didn't tell him I saw a man lacing up his boots. I told him I looked through a hole and saw the man.’ ”

“ And by the reply given by the Respondent under cross-examination to Mr. Wooding:—

30
“ ‘ I told Cpl. Springer what my husband had done. He came outside with me by door of Station. I don't know if he wrote it down. I told him I would like to know what report my husband made. Springer was coming out. Springer told me my husband said that if he had a gun in hand he would shoot me. I asked him if I should go home, or stay out. He advised me to stay with Mrs. Yhap if I am afraid. I told Police Corporal Springer that my husband had threatened me. Springer never told me my husband had said he found Young Lai in shop.’ ”

The learned judges were further of opinion that Mrs. Yhap's whole behaviour was suggestive of the fact that she was well aware that the Petitioner had cause for grave displeasure with his wife on the night of 6th June, but that she was anxious to persuade him not to pursue the matter. The evidence of Sydney Howard did not appear to them to be open to serious objection. They believed that he made a genuine mistake as regards the date he gave of his conversation with the Petitioner but that even if his evidence was put aside as it was put aside by the trial judge the adultery of the Respondent and the Co-Respondent was established on the

p. 60, l. 16
p. 60, l. 22

rest of the evidence. As regards the evidence called on behalf of the Co-Respondent the learned judges said :—

p. 60, l. 32

“ We are of the opinion that the alibi is open to serious criticism in that it is not co-extensive with and does not cover the entire material time. The Co-Respondent is vague as to the times and the evidence of his wife does not disclose that she had any reason to pay particular attention either to the time of his return on that night or his movements on that night and in fact it was not until two weeks after the alleged act of adultery that she knew that her husband was suspected. How can she throw her mind back two weeks and remember with certainty in these circumstances what her husband did that night ? 10

“ We are of the opinion that the evidence establishes with all the certainty that can be required that the Respondent did commit adultery with the Co-Respondent as alleged and it follows that this appeal is allowed. There will be a decree nisi and the Co-Respondent will pay the costs of the Petitioner and Respondent here and in the Court below.”

p. 61, l. 12

An Order was passed accordingly.

p. 63

16.—Special Leave to Appeal to Her Majesty in Council was granted by 20 an Order in Council dated 1st August, 1953.

17.—The Co-Respondent respectfully submits that the judgment and order of the West Indian Court of Appeal should be set aside and the judgment and Order of the Supreme Court of Trinidad restored for the following among other

REASONS

- (1) BECAUSE the issues involved were entirely issues of fact and the Court of Appeal were not justified in substituting their own view of the facts for those formed by the trial judge.
- (2) BECAUSE the trial judge was fully entitled to reject the 30 evidence called for the Petitioner and to accept the evidence called for the Respondent and Co-Respondent and, in the absence of any mistake of law, the West Indian Court of Appeal erred in setting aside his findings.
- (3) BECAUSE even if the Court of Appeal were justified in setting aside the finding of the trial judge in relation to the Respondent they were not entitled to set aside his finding in relation to the Co-Respondent.
- (4) BECAUSE the Court of Appeal erred in attaching significance to the fact that neither the Respondent nor the Co-Respondent 40 had called the police officer to whom the Petitioner had made his report.

- (5) BECAUSE the Court of Appeal erred in holding that the trial judge had failed to give adequate consideration to the facts.
- (6) BECAUSE even if it was proper for them to substitute their own view of the evidence for that of the trial judge the Court of Appeal erred in holding that the Respondent and Co-Respondent committed adultery.
- (7) BECAUSE the Court of Appeal erred in holding that the Co-Respondent's alibi was open to serious criticism and did not cover the entire material time.
- (8) BECAUSE the judgment and order of the trial judge were right and should be restored.

10

DINGLE FOOT.

In the Privy Council.

No. 16 of 1954.

ON APPEAL

FROM THE WEST INDIAN COURT OF APPEAL.

BETWEEN

HARRY YOUNG LAI
CO-RESPONDENT-APPELLANT

AND

BENJAMIN CHO FOOK LUN
PETITIONER-RESPONDENT

AND

ESTELLE CHO FOOK LUN
RESPONDENT-RESPONDENT.

CASE FOR THE APPELLANT

J. N. MASON & CO.,
Temple Chambers, E.C.4,
Solicitors for the Appellant.