

Case No. 23

18, 1961

No. 55 of 1960

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE COURT OF APPEAL

IN THE MATTER OF AN INTERVENTION BY
THE ATTORNEY-GENERAL IN DIVORCE
PETITION NO. 3 OF 1956

UNIVERSITY OF LONDON
V.C.L.

1961

BETWEEN

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SYDNEY HASTING DOWSE Appellant

63677

- and -

ATTORNEY-GENERAL, FEDERATION OF
MALAYA Respondent

CASE FOR THE APPELLANT

RECORD

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1. This is an Appeal from an Order of the Court of Appeal of the Supreme Court of the Federation of Malaya dated 24th February 1960 dismissing an Appeal by the Appellant against an Order made in the High Court of Penang by the Honourable Mr. Justice Rigby on 22nd January 1960 whereby the learned Judge, on the intervention of the Respondent in a Matrimonial Cause between the Appellant and Mary Ann Dowse his wife, rescinded a decree nisi pronounced in favour of the Appellant on 6th November 1958.

p.82

pp. 1, 2

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2. The ground for the aforesaid rescission was that the said decree was obtained contrary to the justice of the case by reason of the Appellant's failure to disclose to the Court adultery by him committed with one Tan Phaik Kooi (hereinafter referred to as Miss Tan)

p.61 ll. 5-40

RECORD

3. The Appellant appeals on the ground that there was no sufficient evidence to justify the learned Judge's finding that the Appellant had committed adultery as alleged and that the Court of Appeal and the learned Judge were wrong in law in accepting certain evidence as corroboration of the testimony of Miss Tan.

4. In the year 1958 Miss Tan was an unmarried girl living with her guardian, one Lim Im Chua at 25 Codrington Avenue, Penang.

p.6 ll. 1-10

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p.12 ll. 12-20
p.24 ll. 21-30
p.25 ll. 30-36
p.86 l. 22

5. In the month of May 1958 Miss Tan discovered that she was some two months pregnant and her condition at that time was known to her guardian, Lim Im Chua.

6. On 12th August 1958 Miss Tan, accompanied by her guardian Lim Im Chua and another woman, visited the house of the Appellant at 23 Scott Road, Penang, and accused the Appellant of being responsible for her condition, an accusation which the Appellant denied.

p.56 ll. 4-30

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7. On 22nd August 1958 Miss Tan made a report to the Police at Pulau Tikus Police Station in Penang in which she alleged that on an occasion five months earlier she had been introduced to the Appellant by one Khaw Beng Seok, a servant of the Appellant, at the Appellant's house and that on that occasion the Appellant had forced her to have sexual relations with him. The record of her report stated that since that day she had never been to the Appellant's house.

p.88

p.88 l. 25

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8. By notice of action dated 31st December 1958 a firm of Advocates and Solicitors, acting on behalf of Miss Tan, asserted against the Appellant that on an occasion about 26th February 1958 the Appellant had induced Miss Tan by a promise of marriage to have sexual relations with him in his bedroom, that as a result of this intercourse Miss Tan became pregnant and that a child was born to her on 7th December 1958.

p.91

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10 9. By a Statement of Claim for damages against the Appellant for breach of promise of marriage signed by the said Solicitors on behalf of Miss Tan and dated 16th March 1959, the same assertion was repeated and it was further alleged that on two subsequent occasions, respectively 12 and 18 days after 26th February 1958, the Appellant had sexual relations with Miss Tan.

p.90

10. The Respondent by his Plea herein dated 16th February 1959 alleged that on 26th February 1958 and on at least three other occasions in March 1958, the Appellant committed adultery with Miss Tan at the Appellant's residence at Scott Road, Penang.

20 11. At the hearing of the Respondent's intervention before the learned Judge on 19th, 20th and 21st January 1960 Miss Tan was called as a witness of the alleged adultery. She affirmed :

(a) That on the solicitation of Khaw Beng Seok she visited the Appellant's house on a day in March 1958, when she was introduced to the Appellant.

p. 7 ll. 10-30

30 (b) That on the said occasion the Appellant against her will had forcible sexual connection with her.

p. 7 l. 30 -
p. 8 l. 20

(c) That on a subsequent occasion six days later she visited the Appellant's house to procure some medicine on which occasion the Appellant again raped her.

p. 8 l. 40 -
p. 9 l. 20
p.11 ll. 18-30

40 (d) That on a third occasion 12 days later she again visited the Appellant's house and was raped for a third time.

p. 9 l. 20-
p.10 l. 20

(e) That on a fourth occasion a fortnight later she visited the Appellant, on which occasion he again raped her.

p.10 ll. 20-42

RECORD

12. The learned Judge, notwithstanding that he disbelieved Miss Tan's assertion that she had been raped on the 2nd, 3rd and 4th occasions, and did not accept that she had been raped on the 1st occasion, nevertheless accepted Miss Tan's evidence as establishing that sexual relations between the Appellant and Miss Tan took place as alleged in the Respondent's Plea.

p.59 ll. 2-15

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13. In accepting the said evidence the learned Judge :

(A) Failed to attach any sufficient weight to the fact that on his own findings Miss Tan had lied in the witness box.

p.59 l. 27-
p.60 l. 4

(B) Gave an explanation for Miss Tan's lies which the evidence did not sustain. The assertion by Miss Tan that she had been raped was explained by the learned Judge on the ground that she would have been ashamed to admit to her guardian Lim Im Chua that she had consented to the intercourse. In fact there was no evidence that Miss Tan had denied her consent to Lim Im Chua once the fact of pregnancy was known to the latter. No allegation of rape was made by Lim Im Chua to the Appellant at the interview of 12th August 1958. And on 31st December 1958 (on the same day and by the same solicitors as the Notice of Action referred to in paragraph 8 hereof) Lim Im Chua gave notice of Action to the Appellant claiming damages consequent on the alleged seduction of Miss Tan.

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p.91

(C) Failed to appreciate the significance of the delay which elapsed between the discovery of Miss Tan's pregnancy (May 1958) and the accusation of seduction made against the

Appellant (12th August 1958). In evidence both Miss Tan and Lim Im Chua asserted that the accusation was made a short time after the discovery. In fact there was a delay of between 2 and 3 months.

p.12 l. 30
p.25 ll. 26-36

10 (D) Failed to attach any or any sufficient weight to the inconsistency between the report made by Miss Tan to the Police on 22nd August 1958 and the evidence given by Miss Tan in the witness box that she had been raped on those occasions subsequent to the alleged rape on 26th February 1958. The learned Judge said that he attached little weight to the discrepancy. In this he misdirected himself as to the significance of the evidence and failed to give due weight to the evidence of the two Police Officers, called as witnesses by the Respondent, to the effect that the written report was an accurate recording of the statement made by Miss Tan. The evidence of the Police Officers was given after that of Miss Tan and at a time when it was known to the Respondent that according to Miss Tan the report was inaccurate in a significant particular.

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p.88

p.60 l. 20

p.30 l. 20 -
p.31 l. 30

40 (E) Failed to attach any significance to the assertions made by Miss Tan in her Notice of Action and Statement of Claim referred to in paragraphs 8 and 9 supra, which were inconsistent with the evidence given by her before the learned Judge.

pp.91, 90

50 14. The learned Judge was accordingly wrong in accepting Miss Tan as a witness of truth and in ignoring the several discrediting circumstances set out in the last paragraph. In holding that the learned Judge's conclusion as to the credibility of Miss Tan was one with which in itself no Court of Appeal could interfere, Thomson C.J. (with whom Hill J.A. and Good J.A. concurred) was wrong

p.80 l. 33

RECORD

p.76 ll. 20-30 and the Court of Appeal failed properly to weigh the discrediting factors. In particular the learned Chief Justice adopted the same explanation of Miss Tan's mendacity on the question of rape as the learned Judge without appreciating the matters set out in paragraph 13 (B) supra. And Good J.A. accepted the learned Judge's view of the discrepancies between Miss Tan's testimony and her report to the Police. He said that the Judge had given the discrepancies very careful consideration. In fact the Judge said that he attached little importance to the discrepancy. 10

p.81 l. 17-
p.82 l. 4

p.60 l. 20

p.54 l. 40-
p.55 l. 3

15. Having expressed himself satisfied that the evidence of Miss Tan was substantially true, the learned Judge directed himself that before he would act on the evidence he would have to find corroboration in some material particular tending to show that the allegations of Miss Tan were true. 20

p.56 l. 4-
p.57 l. 10

16. The learned Judge then examined the evidence relating to the occasion on 12th August 1958 when Miss Tan, accompanied by Lim Im Chua and another woman, visited the house of the Appellant and accused him of being responsible for Miss Tan's pregnancy. The Appellant, in the face of the importunities of the three women, agreed to arrange for Miss Tan to visit the Appellant's Doctor the next day for examination. He did so arrange and Miss Tan was examined on 13th August by Dr. N. K. Menon who found her to be 5 months pregnant. The Appellant paid Dr. Menon's fee. 30

p.57 ll. 35-45

17. The explanation offered by the Appellant was that he was already the victim of a great deal of unpleasant publicity as a result of bitterly contested divorce proceedings which were going on and which were not yet completed, and he wished at all costs to avoid further publicity. The 40

learned Judge accepted that the Appellant, who had had an earlier decree nisi pronounced in his favour set aside, was convinced that his wife would resort to any steps to prevent the present decree from being made absolute and was profoundly anxious to avoid any unpleasant publicity which might further delay the final dissolution of his marriage. The learned Judge continued: "But be that as it may, and making every allowance for the state of mind of the Petitioner, his anxiety to avoid further unpleasant publicity and his belief - and I am satisfied that it was a genuine belief - that his wife would resort to any steps to prevent him from obtaining the decree nisi for which he was asking, I cannot and do not believe that his sole reason for sending the girl to his Doctor for examination was to avoid publicity at all costs. As I have said, his conduct, in my view was wholly consistent with the girl's story that he had had sexual intercourse with her and that he was fully prepared to accede to the request of these women that he should send the girl for examination in order that he might find out for himself whether or not the girl was in fact pregnant". The learned Judge accordingly found that the Appellant's conduct in arranging for Miss Tan to be examined by Dr. Menon amounted to corroboration of Miss Tan's evidence.

p.57 l. 45-
p.58 l. 25

p.58 ll. 25-42

18. In the Court of Appeal the Learned Chief Justice, with whom the other members of the Court concurred, when dealing with the question of corroborative evidence, said this:

p.78 l. 46-
p.79 l. 16

"My own view is that the crucial question regarding this episode is, what was the Appellant's state of mind? The facts, the proved facts, certainly are consistent with the proposition put forward by Mr. Rintoul that the Appellant lost his head, that he was obsessed by the need to avoid publicity of which he had already had too much and that he clutched to any straw to put an end to a disturbance which might well have attracted the attention of the

Police and thus had to move publicity and possibly to some extent to abut an unpleasant allegation. On the other hand the Appellant's conduct is consistent with the proposition that he had a bad conscience, that he feared his wrong doing had had consequences which in the course of nature could not be concealed for very much longer and which would involve him in many years of expense and embarrassment and that he hoped that his fears might be unjustified." Inter, having directed himself with reference to R v Basherville (1916) 2 K.B. 658, 667, the learned Chief Justice said ..

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"It seems to me that evidence as to the Appellant's state of mind on 12th August showing that he entertained anxiety as to whether or not Miss Tan was pregnant considered in the light of all the surrounding circumstances afforded ample independent corroboration of her story implicating him. It was not, of course, necessarily inconsistent with the Appellant's innocence but it was certainly consistent with his guilt and to that extent it was available in law as corroboration".

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19. In holding that evidence pointing either to an innocent or a guilty state of mind can amount to corroboration simply on the ground that the evidence is consistent with a guilty state of mind the Court of Appeal was wrong in law.

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20. The Appellant accordingly humbly submits that this Appeal should be allowed and that the order of Mr. Justice Rigby dated 22nd January 1960 be set aside for the following (among other)

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REASONS

- (1) Because there was no evidence upon which the learned Judge could find that the Plea of the Respondent should be allowed.
- (2) Because the learned Judge and the Court of Appeal failed to give any or

any sufficient weight to certain matters operating to the discredit of the Respondent's principal witness.

- (3) Because the Court of Appeal were wrong in law in their finding of corroboration.
- (4) Because the matter relied on as corroboration was no more consistent with a guilty mind in the Appellant than with an innocent state of mind.
- 10 (5) Because the learned Judge's finding in favour of the Respondent was against the weight of the evidence.

P. COLIN DUNCAN

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE SUPREME COURT OF THE
FEDERATION OF MALAYA

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IN THE MATTER OF AN INTERVENTION BY
THE ATTORNEY-GENERAL IN DIVORCE
PETITION No. 3 OF 1956

B E T W E E N

SYDNEY HASTING DOWSE ... Appellant

- and -

ATTORNEY-GENERAL,
FEDERATION OF MALAYA ... Respondent

CASE FOR THE APPELLANT

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Appellant's Solicitors.