# BRITISH COLUMBIA

## COURT OF APPEAL

Before O'Halloran, Robertson and Bird, JJ.A.

Faryna (Plaintiff) Respondent

v. Chorny (Defendant) Appellant

*Defamation — Libel — Imputation of Unchastity to Woman — Letter in Foreign Language — Publication.*

Appeal dismissed from a judgment giving damages for a libel, contained in a letter in the Ukrainian language, alleged to impute unchastity to the plaintiff.

[Note up with 2 CED (CS) *Defamation*, secs. 3, 10.]

*Evidence — Credibility of Witnesses — Tests of — Duty of Trial Judge.*

*Judgments — Reasons for — Remarks Made During Hearing.*

Per O'Halloran, J.A.:

Interlocutory remarks made by a trial judge or members of an appellate court during the course of the hearing are not to be regarded as part of the judgment or the reasons for judgment. See *Rex v. Frederick* [1931] 3 WWR 747 (B.C. C.A.); *Rex v. McNab* [1945] 1 WWR 228 (B.C. C.A.).

The validity of evidence does not depend in the final analysis on the fact that it remains uncontradicted or on the fact that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to the question whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; see *Brethour v. Law Society of B.C.* (1951) 1 WWR (NS) 34, at 38-39 (B.C. C.A.).

The credibility of interested witnesses, particularly in cases of conflict of testimony, cannot be gauged solely by whether the demeanour of a particular witness carried conviction of the truth.

A court of appeal must be satisfied that the trial judge's finding of credibility was based, not on one element only to the exclusion of others, but on the fact that it was based on all the elements by which it can be tested in the particular case.

For a trial judge to say "I believe him because I judge him to be telling the truth" is to come to a conclusion on a consideration of only half the problem; and it may be self-direction of a dangerous kind. He should go further and say that the testimony of the witness whom he believes is in accordance with the preponderance of probabilities in the case and he should also state his reasons for that conclusion.

Per Robertson, J.A.: On the point as to whether a judge must believe the uncontradicted testimony of a witness, see *In re Immigration Act and Munshi Singh* (1914) 6 WWR 1347 (B.C. C.A.), and particularly the judgment of Irving, J. at p. 1353, where he cites *Berney v. Norwich (Bishop)* (1867) 36 LJ Ecc 10; and see the judgment of

Martin, J.A. (later C.J.B.C.) (dissenting) in *Rex v. Nozaki* [1926] 3 WWR 332, at 334 (B.C. C.A.). As to *Rex v. Pember* (No. 2) (1912) 3 OWN 1216, 21 OWR 915, 20 CCC 60, it is to be noted that Britton, J. said that the defendant's admission, whatever it amounted to, was not made until after conviction.

[Note up with 2 CED (CS) *Evidence*, secs. 125-127; *Judgments and Orders*, sec. 1.]

Appeal by defendant from a judgment by Wilson, J. Appeal dismissed.

*D. J. McAlpine*, for defendant, appellant.

*N. J. Bartman*, for plaintiff, respondent.

May 16, 1951.

O'HALLORAN, J.A. (orally) — We do not need to hear you, Mr. Bartman. This appeal lies from a judgment giving damages for a libel imputing unchastity to the plaintiff, respondent, Nancy Faryna. The parties belong to the Ukrainian Community in Vancouver, as does also one Shostak to whom the appellant wrote a letter containing the libel which gave rise to this litigation. Shostak and appellant Chorny are old friends dating from their native village in the Ukraine.

After nearly a year as housekeeper for the Ukrainian clergy in a residence in Vancouver the respondent Faryna went to Alberta for a holiday. During that time Shostak lived in the room she had occupied as housekeeper. He gave up the room after her return from Alberta and she reoccupied it. However, on giving up the room Shostak overlooked removing a letter that he had received from the appellant. The respondent found this letter in the room; it reflected on her chastity and she brought action accordingly.

That letter, written in the Ukrainian language, translated reads in part:

> "And the one who was cooking for the priests some say that she went visiting her sister and others say that she went for confinement, maybe perhaps you are in it because it seems you once went with her to the Park."

The appellant admitted he wrote the letter and that he sent it to Shostak; but he claimed, and is supported by the evidence of Shostak, that there was no publication of a libel, because Shostak did not know the common Ukrainian word for "confinement," as usually applied to pregnant women, and further that Shostak did not know that the woman referred to in the letter was Nancy Faryna.

The learned trial judge found against the appellant (defendant) and gave these reasons orally:

> "I find that the defendant published to John Shostak a libel imputing unchastity to the plaintiff [respondent]. I find he did so knowingly. Alternatively, if he did not do so knowingly, the words are such that any reasonable person reading them and knowing the circumstances, must consider that it was the plaintiff he was referring to as unchaste."

Unfortunately it is not at all clear that the learned judge based his decision upon his view of the credibility of the witnesses, particularly the witness Shostak. It may be argued both ways—(*a*) that disbelief of Shostak is implicit in these reasons; or (*b*) that, even if the learned judge did believe Shostak, the circumstances do not amount to a publication within the fringe of some of the decisions counsel for the appellant has brought to our notice.

Counsel for the appellant submits that the learned trial judge based his decision upon disbelief of Shostak's evidence, and relies upon observations made by the learned judge during the course of the trial, while the evidence was still incomplete. But interlocutory remarks made by a trial judge or members of a court of appeal during the course of the hearing are not to be regarded as part of the judgment or the reasons for judgment. That is referred to by the late Chief Justice Martin in *Rex v. Frederick* [1931] 3 WWR 747, at 751-2, 44 BCR 547, at 552, and see also *Rex v. McNab* [1945] 1 WWR 228, at 232-3, 61 BCR 74, at 79. I am indebted to my brother Bird for the reference to the clear-cut observations of Viscount Simon, then Lord Chancellor in [1942] WN 89—perhaps I had better read it:

> "During the hearing of an appeal Viscount Simon, L.C., referring to reports which might be made of the case, said that it was well understood that interlocutory observations of members of the Board or of a Court were not judicial pronouncements. They did not decide anything, even provisionally. They were made to elucidate the argument, to point the question, or to indicate what were the matters which the judicial spokesman thought needed to be investigated, and that was all. It would be a very great pity, and a profound error, if anybody, foreigner or fellow subject, supposed that interlocutory observations were anything more."

Counsel for the appellant further argued that since Shostak remained uncontradicted by evidence when he testified that he did not know the common Ukrainian word for confinement and

that he did not know that the woman referred to in the letter referred to Nancy Faryna his evidence ought to be accepted, and in that event he submitted there was in law no publication of the libel. But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; see *In re Brethour v. Law Society of B.C.* (1951) 1 WWR (NS) 34, at 38-39.

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, see *Raymond v. Bosanquet Tp.* (1919) 59 SCR 452, at 460. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial judge and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be

quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth," is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial judge with a divine insight into the hearts and minds of the witnesses. And a court of appeal must be satisfied that the trial judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

Mr. Justice Stephen put it another way: He said (*General View of the Criminal Law,* 1890, p. 191):

> " * * * that the utmost results that can in any case be produced by judicial evidence is a very high degree of probability * * *. The highest probability at which a court of justice can, under ordinary circumstances, arrive is the probability that a witness or a set of witnesses tell the truth when they affirm the existence of a fact."

There is high authority to support the foregoing, namely, a case in the House of Lords in 1933 to which Lord Greene, M.R. referred in *Yuill v. Yuill* [1945] P 15, 114 LJP 1, and described it as inadequately reported. The case was *Hvalfangerselskapet Polaris v. Unilever Ltd.* (1933) 46 Ll L Rep 29, 39 Com Cas 1. In that case the trial judge had disbelieved material witnesses and found that their evidence was invented on the spur of the moment.

In the Court of Appeal Scrutton, L.J. giving the leading judgment said the trial judge had seen the witnesses and heard the conflicting testimony and because of that it was impossible for the Court of Appeal to interfere with the trial judge's finding on credibility. But the House of Lords did interfere. It said that the strictures cast by the trial judge on the two winesses were unjustified and that the evidence of these two witnesses ought to have been received. The House, Lord Atkin presiding, came to that conclusion because it was satisfied that the evidence of the witnesses disbelieved by the trial judge was entirely consistent with the probabilities and the business conditions proved to be in existence at the time.

Commenting on the *Unilever* case in *Yuill v. Yuill, supra;* Lord Greene said that it showed how important it is that a trial judge's impressions on the subject of demeanour should be carefully checked by a critical examination of the whole of the evidence, and added that, if the trial judge in the *Unilever* case had done so, as was done in the House of Lords, then he could not have disbelieved the witnesses as he did.

In the present case before this court it would require far more evidence than exists in the record to convince me that Shostak did not know the common word for "confinement" in the Ukrainian language. Confinement of women due to pregnancy is one of the well-known facts of life in any race or language. To my mind, to ask this court to believe that Shostak did not know the common word for confinement in the Ukrainian language is equivalent to asking it to place its stamp of approval upon a proposition that places too great a strain upon one's sense of the realities of life. In addition, Shostak's evidence that he did not know that the statement in the letter referred to Nancy Faryna clashes violently with the preponderance of probabilities disclosed in the surrounding circumstances.

I am forced to the conclusion that the evidence of Shostak is entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in the case, and therefore the conclusion reached by the learned trial judge cannot be disturbed. The appeal should be dismissed.

ROBERTSON, J.A. (orally) — I would determine this case on the ground that the evidence fully justified the finding of the learned trial judge.

On the point as to whether or not a judge must believe the uncontradicted evidence of a witness, I refer to *In re Immigration Act and Munshi Singh* (1914) 6 WWR 1347, 20 BCR 243, a decision of this court, and particularly to the judgment of the late Mr. Justice Irving at 1353, where he cites a decision of the Privy Council, namely, *Berney v. Norwich (Bishop)* (1867) 36 LJ Ecc 10, and also to the judgment of the late Chief Justice Martin (then Martin, J.A.) in his dissenting judgment in *Rex v. Nozaki* [1926] 3 WWR 332, at 334, 37 BCR 305, at 308.

As to the case referred to by Mr. McAlpine, *Rex v. Pember* (No. 2) (1912) 3 OWN 1216, 21 OWR 915, 20 CCC 60, I point out that at p. 61 Britton, J. said that the defendant's admission, whatever it amounted to, was not made until after conviction.

I would dismiss the appeal.

BIRD, J.A. (orally) — I would dismiss the appeal.