IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL.

Royal Courts of Justice

29th November 1954

B e f o r e :

LORD JUSTICE DENNING
LORD JUSTICE HOBSON
and
LORD JUSTICE PARKER

Between:

LADD

-v-

MARSHALL

(Transcript of the Shorthand Notes of The Association of Official Shorthandwritcrs, Ltd.,
Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, WC. 2.)

MR F.W. BENEY, Q.C. and MR T.M. EASTHAM (instructed by Messrs G. Swinburne Raynes, agents for Messrs Atkins, Walter & Locke, Guildford, Surrey)
appeared on behalf of the Appellant (Plaintiff).
MR EWEN MONTAGU, Q.C. and MR H.W. SABIN (instructed by Messrs White & Catlin, Feltham, Middlesex)
appeared on behalf of the Respondent (Defendant).

LORD JUSTICE DENNING: This is a most unusual case. In the year 1952 Mr Marshall owned a bungalow in Ashgrove Road, Ashford, Middlesex, with a pig holding attached to it. It was a new bungalow built under licence and the Local Authority had put a, condition in the licence that if it were resold the limit of price was some £l,500. Mr Marshall determined to offer the bungalow and land for sale. He put it into the hands of agents, who issued Particulars offering it for sale with vacant possession at the figure of £3,600 freehold. One of the people who became interested in this property was Mr James William Ladd. He went to see it. He negotiated with Mr Marshall for the purchase of it. Mr Marshall in the course of the negotiations told him that he would sell it with the addition of two plots of ground. He further told Mr Ladd that the price was controlled at £2,500. His solicitor had told him so. I suppose that was because the licence restricted the bungalow to £l,500 and, by throwing in the two additional plots, the price might be got to £2,500, but no more. At the beginning of April, 1952, a document was drawn up and signed in which the property was said to be sold for £2,500 freehold and £50 deposit paid. A twopenny stamp was put on it and signed by Mr Marshall. The document was drawn up by Mrs

Ladd and was copied by Mrs Marshall at a meeting in the Marshalls' bungalow. The matter did not, however, go through, because on the 11th Jane, 1952, Mr Marshall's solicitors wrote to Mr Ladd's solicitors saying:

> "We have to advise you that our client has instructed us that he does not wish to proceed with the sale of the above business to your client".

About a month later Mr Ladd went to the police and told them that he had paid £1,000 to Mr Marshall as part of the deal and he wanted the £l,000 back and Mr Marshall would not give it to him. Now he has brought this action for the return of the £1,000. He says that at the meeting in April when the document of sale was signed, he paid Mr Marshall an extra sum of £1,000 in notes without anything being put into writing about it. It was paid "under the table" or "under the counter", as the saying is. The reason was because, although the controlled price was £2,500, Mr Marshall still wanted to get the price of £3,600 which he originally asked, or as near as may be. Therefore, he (Mr Ladd) paid Mr Marshall the £1,000 for which he asked.

Mr Ladd at the hearing of the action gave evidence that he had saved up £1,000 in notes. He kept it in a tin box under his bed and on the day in question he went first to a friend of his, a man who had been partner with him, Mr Warren, and they counted out the £1,000 in Mr Warren's house. Indeed, a Miss Andrews, who was Mr Warren's secretary, was there and she helped count. It was all done up in bundles of £100 each, then tied in two lots of £500 each, and all put into a brown paper parcel and taken in a van to Mr Marshall's house. Mr Ladd and Mr Warren went with it. When they got to Mr Marshall's house the money was counted out. The £50 deposit was counted on the table but this £1,000 was counted out on the carpet and was paid over then and there. Mr Ladd said that he asked for a receipt for the £1,000, but Mr Marshall would not give one. His reason was that, as the controlled price was £2,500, if he gave a receipt for the extra £1,000, Mr Land could get it back from him afterwards. Mr Ladd said that he had already prepared a receipt, bat Mr Marshall would not sign it. He said: "My word is my bond". Mr Ladd's version was supported by two witnesses. Mr Warren, his friend, who went with him, gave evidence to the sane effect as he and Miss Andrews, the secretary, gave evidence that she was present when the money was counted out in Mr Warren's house. Moreover, they all gave evidence of an earlier occasion in the course of the negotiations when Mr Marshall first asked for the £l,000. Those three witnesses were cross-examined and the Judge seems not to have gained a good impression of them.

Then Counsel for Mr Ladd called into the witness box Mrs Marshall, the wife of the Defendant, Mr Marshall. The hearing was on the 12th March of this year. On the previous day Mrs Marshall had filed a petition for divorce against her husband on the ground of his adultery. She was called into the witness box and this is what she said:

> "Excuse me, my Lord, I do not wish to give evidence for or against my husband".

It was pointed out that in a civil case a wife can be compelled to give evidence against her husband. So she was sworn and told she had to give evidence. She was asked about the occasion on the 2nd April when she took part in the preparation of the document. She said:

> "I was called into the room".

Then she was asked:

> "(Q) At that time was there a parcel in the room?
> (A) I cannot remember.

> (Q) Did you see any money pass on that occasion? Was £l,000 counted out?
> (A) I do not remember".

Then Counsel said:

> "You must remember",

and the Judge said:

> ""You cannot cross-examine your own witness. You are not to say, 'You must remember'",

and the Judge did not allow any cross-examination. So she did not help the case at all.

The only witness called for the defence was Mr Marshall himself, who denied that he had received the A1,000 at all.

The Judge then gave a very short Judgment in these words:

> "I strongly suspect that taking advantage of the difference between the £3,600 in the first set of particulars, and £2,000, at which the contract was actually entered into, the Plaintiff and Mr Warren endeavoured to try and get £l,100 or £1,000 out of Mr Marshall, but I am not bound to pronounce any findings about that. This is a pure question of fact, and the decision of the case rests on whether or not the Plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the Defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the Defendant to the evidence of the Plaintiff and his witnesses. There will therefore be judgment for the Defendant with costs".

Inasmuch as the first sentence in that Judgment was not altogether clear we were invited by Counsel on both sides to see the Judge and ask him exactly what he meant. He told us that what he meant was that he suspected that, after Mr Marshall refused to go on with the sale on the 11th June, the Plaintiff and Mr Darren put their heads together to try and get £1,000 or £l,100 out of Mr Marshall and that Hiss Andrews, the secretary, was implicated in it. This makes the case a very serious one for all these persons.

No appeal was entered by Mr Ladd within the six weeks allowed for doing so. Then on 6th May, 1954, Mrs Marshall obtained a decree nisi of divorce from her husband: whereupon she apparently felt free of him and she made a statement to her solicitors (who were also, as it happened, Mr Ladd's solicitors) in which she said that the evidence she had given at the hearing before Mr Justice Glyn-Jones was false. She said that she did remember what happened at the meeting of April, 1952: that she was there when the money was counted out; and that the £1,000 was counted out and handed over by Mr Ladd to her husband, Mr Marshall. In those circumstances, an application was made on Mr Ladd's behalf to this Court asking for the time for appeal to be extended. It was extended: and this appeal was accordingly entered by Mr Ladd against the decision of Mr Justice Glyn-Jones and Mr Ladd has also applied for leave to adduce further evidence by Mrs Marshall so that she can say what she now says is the truth, namely, that she was present when the £l,000 was handed over and that it was in fact banded over. She has made an affidavit in which she says that at the trial she was afraid of telling the truth because she was still living in her husband's house. She says he would almost certainly have resorted to physical violence and. that she

was in fear not only of him but other members of the family and it was for that reason that she did not tell the truth. There was an affidavit by a notice sergeant as to another interview and by the solicitor, saying that he could not have got this evidence before.

Mr Money, arguing the case for Mr Ladd, has put it on two grounds. First, he says the fresh evidence by Mrs Marshall is so important that it should be received by this Court or a new trial had so that the matter can be fully investigated. Secondly, he says that in all the circumstances the trial was unsatisfactory.

It is very rare that application is made to this Court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to tell the truth". It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance: and good ground given for thinking the witness will toll the truth on the second occasion. If it was proved that the witness had been bribed or coerced into telling a lie at the trial, and is now anxious to tell the truth, that would, I think, be a ground for a new trial and it would not be necessary to resort to an action to set aside the judgment on the ground of fraud. Again, if it was proved that the witness made a mistake on a most important matter and wished to put it right, and the circumstances were so well explained that his fresh evidence was presumably to be believed, then again there would be ground for a new trial, see Richardson v. Fisher, reported in 1 Bingham at page 145. But this is not a case of bribery or coercion, nor of a mistake. It seems to me that Mrs Marshall is not a person who in the new situation is personally to be believed. She endeavoured to show that she was coerced by her husband, but on reading through the affidavits on both sides, it seems to me that the suggestion of coercion comes to nothing. She does not seem to have been in fear of her husband at all. I am afraid it is simply a case where a witness who has told a lie at the first hearing now wants to say something different. It would be contrary to all principle for that to be the ground for a new trial.

Then it is said that the trial was unsatisfactory. Mr Beney pointed out that Miss Andrews was not cross-examined as to credit. All that was said against her was that she was the secretary to Mr Warren and that she lived in Mr Warren's house. But nevertheless the Judge might disbelieve her because of the bad impression she made on him. Next it was said that the Judge should have allowed Mrs Marshall to have been cross-examined as a hostile witness. But that was a matter for the Judge's discretion. If Counsel had material to show she was hostile, he could have put it before the Judge and made a request that he should be allowed to cross-examine her. He did not make this application, probably because he had no material. Finally it was said that the Judge gave a very short Judgment, but that is not a serious defect. No doubt he thought there was nothing more that needed to be said.

I would only add this: Mr Ladd on his own showing paid this £1,000 "under the counter" in order to get round the law which controlled the price of the premises. He paid the £1,000, not out of any banking account, but in notes which cannot be traced: and he paid it without obtaining a receipt. I cannot think of anything more foolish. It is for him to satisfy the trial Judge that the £1,000 was paid: and, if he and his witnesses

do not convince the Judge that it was, then he has only himself to thank: for he obviously ought to have got a receipt. I do not mean for myself to suggest that there was any wicked conspiracy between him and his witnesses. All I say is that he did not prove his case to the satisfaction of the trial Judge, and that is the end of the matter. In my judgment, this appeal should be dismissed and the motion should be dismissed also.

LORD JUSTICE HODSON: This is an appeal from a Judgment of Mr Justice Glyn-Jones given on the 12th March in favour of the Defendant. This Court on the 31st May gave leave to appeal out of time and also gave the Plaintiff leave to seek to adduce fresh evidence. Mr Beney in opening the appeal had first put it in this way. The question in the case being one of fact depending not on documents but on the oral evidence given by witnesses, the Judge's conclusion, having seen those witnesses, was virtually unassailable. He recognised that unless he could succeed in his application to call further evidence he must fail. That position was slightly altered during the course of the hearing in circumstances to which I shall return, but I think, as one would expect, it was a well justified way of putting the case when one has regard to the Judge's Judgment, the second paragraph of which is as follows:

> "This is a pure question of fact, and the decision of the case rests on whether or not the Plaintiff and the witnesses whom he has called have persuaded me that it is true that £1,000 was paid to the Defendant. I am not so persuaded. I prefer on every point where the evidence is in conflict the evidence of the Defendant to the evidence of the Plaintiff and his witnesses. There will therefore be judgment for the Defendant with costs".

That really was the effective paragraph of the learned Judge's Judgment. The payment of this £1,000 was the only issue of fact in this case. The day now fixed for the payment is the 2nd April, 1952, when the money is supposed to have been paid over in notes by the Plaintiff at the Defendant's house. The Plaintiff gave evidence himself and called as a corroborative witness present at the time a Mr Warren, who said that he saw the payment of £l,000 made in notes; the Plaintiff also called as a witness a young woman, a Miss Andrews, who, although not actually present when the money was paid over, was present on a previous occasion in Mr Warren's house when the money was said to have been counted. Finally, the Plaintiff called as a witness the then wife of the Defendant, who was a very reluctant witness, as my Lord has mentioned. It was clear from what she did say that she was present on the material occasion when this money is supposed to have been paid over, but when she was asked the specific question by Counsel examining her in chief:

> "Did you see any money pass on that occasion or £1,000 counted out?",

she answered

> "I do not remember".

That answer, I suppose, in so far as any answer can be described as such, was manifestly untrue. The Judge would not allow her to be cross-examined. Counsel did not follow up the Judge's intimation that he would not allow cross-examination by a specific application to treat her as a hostile witness, and the Plaintiff therefore closed his case in the position that he had called himself, Mr Warren and Miss Andrews, who had helped him, if their evidence was believed, and a witness who had certainly not helped him. The Defendant denied that there had been anything said about £1,000, much less any £1,000 paid. His evidence, as I have already indicated, was accepted fully and that of the Plaintiff and his witnesses rejected in so far as it was in conflict with his. That left out of account Hiss Andrews, because hiss Andrews was not

directly in contact with the Defendant, she having been called to prove that there had at any rate been the counting of £1,000 in notes.

Upon this point being raised, on the invitation of Counsel on both sides we saw the learned Judge in order that he might explain to us what exactly he had meant in his Judgment, particularly in the first paragraph to which my Lord has drawn attention. He made it clear to us that he intended to say that his view was that he did not accept Miss Andrew's evidence any more than he accepted that of the Plaintiff and Mr Darren. On that being pointed out to Mr Beney, he argued that that really-made it difficult to say that the learned Judge's Judgment was satisfactory, because there was first of all nothing in the cross-examination of this young woman to lead to the conclusion that it was being suggested to her that she was a party to this wicked conspiracy to prove a payment of £1,000 which had never been made. Moreover, he pointed out that there was nothing against her, nothing really sinister to be inferred from the fact that she lived in the same house as Mr Warren and had been said to be his secretary. That, of course, was a serious consideration, which Mr Beney has reinforced in his reply by the argument that, looking at this case as a whole, it ought to be the view of this Court that the learned Judge had taken a premature view in the matter in deciding this question of fact having regard perhaps to the unfavourable view which he took of the Plaintiff's evidence in the first place, followed by the unfavourable view which ho took of Mr Warren's evidence; the tendency of his mind had become hostile to the Plaintiff at an early stage and the evidence of Miss Andrews, which on the face of it ought to be regarded as credible, ought to induce this Court to order a new trial. I do not accept that contention.

So far as this question of conspiracy is concerned, I think the learned Judge was very careful, as the first paragraph of his Judgment shows, not to allow himself to arrive at, or even appear to arrive at, a conclusion as to whether these particular persons, or any of them, had been involved in a criminal conspiracy. Counsel in the exercise of his discretion in cross-examining the witnesses did not specifically suggest to them that they had been engaged in a criminal conspiracy. It was sufficient for him to make it clear that he was challenging their evidence, including in that challenge this young woman, Miss Andrews, and to ask the Judge to reject their evidence. The learned Judge took the view, having seen them and being guided by their demeanour, that he should reject the evidence of all those witnesses. At the end of the case he heard the final speech on behalf of the Plaintiff, though, of course, it is true that the fact that he did not call on the Defendant was a strong indication to the Plaintiff that, this being a question of fact, as indeed the learned Judge indicated to Counsel, his mind was affected by the evidence he had heard and he was not likely to be moved by the final speech of Counsel from the conclusion at which he had at that moment arrived. I think that there is no basis for the contention that this trial was unsatisfactory and that there ought to be a new trial.

That brings me to the matter which really brought this appeal into existence, that is the fact that the wife of the Defendant, the reluctant witness who said she did not remember anything, has now said very shortly after the trial, having divorced her husband, that she told lies at the trial and she now wants to tell the truth, the truth being, as she says, that she was present when this £1,000 was handed over. I think it is somewhat bold to ask this Court to allow fresh evidence to be adduced in circumstances of that kind, because Mr Beney, as one would expect, fairly recognised that here is a woman who, on her own showing, has told lies, and if there was a hearing of her evidence by this Court or at a fresh trial at which her evidence could be heard again she could never be better than a discredited witness on whom it would be very difficult for any Court to place any reliance. But Mr Beney says that Order 53, Rule 4, is wide in its terms and that there is a complete discretion in this Court which ought not to be fettered to receive further evidence if the justice of the case requires it. But that discretion has been always exercised in the light of the maxim interest reipublicae ut sit finis litium. This seems to me to be particularly a case where one might envisage no end to litigation if people who had given evidence were allowed to come again and say "I told lies last time. I want to tell the truth now". The principles

on which further evidence is admitted have been recently discussed by this Court in Braddock v. Tillotsons Newspapers Limited, reported in 1949, 2 All England Reports, page 306. I would only make a brief reference to the well-known case of Brown v. Dean (1910 Appeal Cases at page 375; where the house of Lords affirmed a decision of the Court of Appeal and gave guidance on this topic. The passage which is often discussed and may be said perhaps to have been modified in part is the portion of the speech of Lord Loreburn where he says:

> "When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive".

With regard to the word "conclusive", Lord Shaw, who also made a speech in the same case, was doubtful whether he could accept the word "conclusive", and the more modern cases have proceeded on the view that perhaps "conclusive" is too strong a word. But none of their Lordships dissented in any way; in fact, they agreed with the earlier part of the Lord Chancellor's proposition that new evidence must at least be such as is presumably to be believed. It seems to me that the evidence of this young woman is not such as is presumably to be believed on the face of it from the facts which I have already recounted. In addition, when one looks at the affidavit which she has made in support of this motion, she seeks to say, in effect, that the Defendant, who is a retired boxer, has on several occasions treated her with violence and attacked her 'with clenched fists and she has been obliged to seek the protection of the police. I suppose the only point of that paragraph was to suggest, if no more, that she refused to give this evidence in the first instance because she was afraid of her husband. But there is no suggestion that she did not give evidence because of any threats that her husband had made to her, nor was there any request for protection made by her at any time. In a further affidavit which she has filed in reply to affidavits put in on the other side she has admitted that since the date when she made this affidavit, the 26th May, she has been with her husband. She has been seen with him on apparently friendly terms and has gone to a public house and spent the night in the same house with him and other people. I am paying no attention to the affidavits put in on the other side but I am looking at her affidavit and the subsequent affidavit which she put in in reply. The story that she was acting under the duress of her husband has become exceedingly thin. In my judgment, there is no ground for allowing this fresh evidence to be admitted.

I have already indicated on the general facts of the case that the question was one of fact and, notwithstanding what has happened since the opening of the case, I remain of the opinion that the Judge's decision on the facts was arrived at properly after a full and patient hearing and really could not be disturbed in this Court. But I think it right to say that I think there is on the face of the evidence a good reason why the evidence of the Plaintiff and, indeed, of Mr Warren, should be scrutinised very closely, if not disbelieved. Mr Montagu, on behalf of the Defendant, pointed out to us that when this claim was first formulated in a letter it was said that the money was handed over in February. Then the Writ was issued and the date is given on the indorsement of the Writ as January. Finally the 2nd April was selected as the date on. which this payment was made. Moreover, for my part I think there is great force in the facts elicited by Mr Montagu and the learned Judge himself from the Plaintiff as to the existence or non-existence of a receipt which had an effect on the credit of the Plaintiff. I am referring to the supposed receipt for £1,000. He said nothing about it in chief at all and if there had been such a document in existence prepared by him for the Defendant to sign one would have thought that would have been an essential part of his case. He eventually tried to say that there was such a document and he had it with him. The way in which that evidence about the receipt came out appears to me to be of a kind which must lead anyone to scrutinise the matter very closely. On this matter of the receipt, the same applies to the evidence of Mr Warren, who was very

fully cross-examined about it and gave a rather remarkable account first of all with apparent uncertainty and then with apparent certainty as to the existence of this unsigned receipt for £1,000.

I say nothing more about the other matter which has been touched on in this action, namely, the aspect of illegality. As my Lord has said, the Plaintiff on his own story knew what he was doing in trying to pay an additional £1,000 on the side because the law would not allow the Defendant to receive more than the controlled price of the house. That matter has not been discussed here and I say nothing more about it. In my judgment, this appeal fails and should be dismissed.

LORD JUSTICE PARKER: I agree. I would only add one word on the application for leave to call further evidence. The further evidence which it is desired to call in this case is the evidence of one of the Plaintiff's witnesses, Mrs Marshall, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances in which the Court on such an application will grant leave to adduce that further evidence must be very, very rare, for the very good reason that such evidence on the face of it does not comply with the test as laid down by Lord Loreburn in Brown v. Dean, in 1910 Appeal Cases, page 373, where he said that new evidence must at least be "such as is presumably to be believed". It may be that if it could be shown that the witness told a lie originally because he or she had been bribed or because he or she had been coerced, nevertheless it could be said in those circumstances that her evidence was such as is presumably to be believed. But in this case there is no suggestion that Mr Marshall bribed his wife: there is no suggestion that he coerced his wife to give the evidence which she did give at the trial. All that is said is that Mrs Marshall, whose relations with her husband were strained, was afraid of his hitting her and afraid of physical violence. As regards that, the one thing which the further affidavits clearly show is that this woman was nothing like as afraid of her husband as she has made out, and she has utterly failed to satisfy me that the reason she gave her evidence as she did originally was through fear of her husband. As she has failed to prove any such ground, it is impossible, in my view, for any Court to say that her evidence could be credible. In those circumstances, I would refuse the application and dismiss the appeal.

(Appeal dismissed with costs).