Present: Ennis A.C.J. and De Sampayo and Dalton JJ. 1925.

DE ZOYSA *v.* MENDIS *et al.*

325—D. C. Galle, 20,454.

Appeal—Question of fact—Failure of Judge to discuss evidence—Interference by Court of Appeal.

Where, in a case involving the decision of a question of fact, the Judge fails to discuss the evidence in his judgment, a Court of Appeal would be justified in interfering with the decision.

APPEAL from a judgment of the District Judge of Galle on a question of fact. In view of the ruling of the Privy Council in *Fradd v. Brown & Co., Ltd.*,[1] the case was referred to a Bench of three Judges.

Navaratnam for second defendant, appellant.

H. V. Perera, for plaintiff, respondent.

June 5, 1925. ENNIS A.C.J.—

The plaintiff in this case prayed for a divorce from his wife, the first defendant, and for damages against the second defendant by reason of the adultery of the first and second defendants. The learned Judge held that the adultery had been proved, granted a divorce, and ordered the second defendant to pay Rs. 300 damages to the plaintiff. The second defendant appeals from this decision.

The appeal is on fact only, and in view of the ruling of the Privy Council in *Fradd v. Brown & Co., Ltd. (supra)*, as to the reality of the occasions upon which a Court of Appeal will overrule a Court of first instance on a question of fact, my brother Dalton and I referred this matter to a Court of three Judges. Not only was there a difficulty in the evidence, but the first defendant had not appealed. I have come to the conclusion that this is a case in which the Appeal Court might properly overrule a decision of the Court below. In the case reported in *18 N. L. R. 302*, it was pointed out that there were circumstances, apart from the manner and the demeanour of the witnesses, which would warrant a Court in differing from a Judge on a question of fact. In this case the main circumstance appears to me to be that the learned Judge in his judgment does not discuss the evidence. He has mentioned his findings as a conclusion without touching on the details. Moreover, the foundation of his judgment against the second defendant is

[1] *(1918) 20 N. L. R. 28.*

1925.

ENNIS A.C.J.

De Zoysa v. Mendis

utterly wrong. He has said that it is difficult to understand why the second defendant should have been implicated, unless the case against him were true. On a basis such as this, no defence at all would be possible. Moreover, as against the second defendant, the learned Judge has taken into account certain letters written by the first defendant. These letters in no way mention the second defendant or implicate him, even if they be taken as the Judge has done as an admission by the first defendant that she has committed adultery. I may say that I do not so regard it myself. But clearly as against the second defendant the reliance of the Judge on these letters was wrong.

On the facts of the case it appears that the plaintiff is the cashier of a firm of paper merchants in Colombo, and his family live at Ambalangoda. It appears that his wife lives in a one-roomed house, which has a small kitchen at the back. The plaintiff's mother lives in the adjoining room, which is smaller, and also has a small kitchen at the back. The story for the plaintiff was that on March 13, 1923, the second defendant came into his wife's room, while it was still dark, in the morning, and that one of the inmates of the room went out and informed the plaintiff's mother in the next room, whereupon the plaintiff's mother came out and began to weave coir yarn outside the door of the first defendant's room. The story goes on that she and her daughter remained there weaving yarn until about 1.30 P.M., when the second defendant dashed out, went over the road to his own house through a crowd of some thirty people who had collected. Meanwhile the plaintiff's mother appears to have caused a telegram to be dispatched to the plaintiff in Colombo to the effect: "Man inside, come immediately." The plaintiff took train to Ambalangoda, and was met at the station, and he proceeded at once to the headman of the village before going home and made a complaint. The defendants each deny the story. The witnesses called by the plaintiff who could speak with regard to the events of the day were his mother and his sister and the wife of the wife's uncle, one Kovis, a mason. Kovis is the only one of the thirty persons who were alleged to have collected outside that has been called. The story of the relatives of the plaintiff is that on the night in question, the first defendant was sleeping in her room with her two children, the eldest of whom is a boy of seven, and with her was also the plaintiff's sister, a girl of twelve. The mother says that in the early morning this girl of twelve came to her and told her that Etin was in the room, and that she did not want to sleep there. It was this communication which led the mother, together with this girl of twelve, to station themselves in front of the door weaving coir. This story, on the face of it, does not seem to be natural. It would seem improbable that a man, with the intent alleged against Etin, would have gone into the room where, in addition to the woman, there was a boy of seven and a girl of twelve.

Moreover, the conduct of the mother-in law upon being apprised of the presence of this man in the room does not seem to be natural. She makes no outcry, but calmly sits down and weaves yarn outside the door. It appears that some time later she called for the wife of the plaintiff's uncle, and caused the telegram to be sent. The telegram does not mention the name of the second defendant. Finally, the story that the second defendant ran away from the house about 1.30 P.M., after being kept a prisoner for eight hours, and dashing through a croud of thirty people, does not seem natural. Had it been the fact, one would have imagined that it would have been possible to have called more testimony—and independent testimony—as his presence on that occasion. The story then of the events of March 13, 1923, has an artificial ring about it, and does not seem to accord with what one might expect as the natural attitude of persons in such circumstances.

In the next stage of the story is the question of certain letters written by the first defendant. These letters were written to the plaintiff and to the managing partner and the senior partner of the firm in which the plaintiff was engaged. The letters appear to me to be the letters of a woman who is earnestly seeking a reconciliation with her husband. The learned Judge has regarded them as containing admission of guilt. There is in fact no direct admission of guilt in any one of these letters. There is the statement that the fault is the writer's, and that the mishap occurred through her ignorance. She prays the assistance of her husband's employers, to effect a reconciliation, and in the letter to her husband, P 3, while admitting her fault, she prays for a pardon, asking him not to believe the sayings of others, and she also suggests that she would be glad to leave the place and go somewhere else, even to a small house away from this quarter. The letters seem to be letters of a woman in genuine distress at the estrangement between her husband and herself. As I have said, however, as against the second defendant they are inadmissible, as they do not in any way mention him, and do not in fact contain any admission of guilt.

Finally there is the story put in by the second defendant that the plaintiff had condoned his wife's offence, if any. This story is frankly admitted, although the circumstances related differ slightly in the mouths of the different witnesses. It appears that on June 25 the plaintiff went down to Ambalangoda, and went to his house, and arrived there about dinner time. He says that his wife and his mother-in-law came to the house while he was there, and sought once more to effect a reconciliation. The second defendant in some way became aware of this and informed a headman or more than one headman, in the result three headmen arrived at the house, one of whom had to travel a distance of three miles. On the arrival of the headman, the plaintiff was found seated on a chair, and the woman standing by a table. The learned Judge has accepted the

1925.

ENNIS A. C.J

De Zoysa v. Mendis

plaintiff's explanation of this circumstance. He considers that it was not in the circumstances a condonation of the offence. In my view the circumstance shows that the woman has been doing her very utmost to remove the estrangement between herself and her husband, and has a bearing on the truth of her story that the case against her has been concocted by her husband's relatives. One of the employers of the husband gave evidence, and he said that on receipt of the letter addressed to him by the wife he called for the plaintiff, and suggested that he should drop the matter, when the plaintiff said that "if he did so he may be killed as there were several enemies." This seems to indicate that the plaintiff was afraid of somebody who is interested in the prosecution of the case to a finish, which is the suggestion also of the first defendant. Now, although the learned Judge had the advantage of seeing and hearing the witnesses, he has not gone into any of these details in weighing the value of their testimony. It seems to me that the stories told are such that we are bound on appeal to give weight to them. The artificial and unnatural character of the stories renders doubtful the evidence proceeding from the relatives of the plaintiff. The paucity of evidence also from among the persons who were alleged to have been standing on the road all the morning is a feature which has also to be considered. These matters taken together tend to establish the truth of the story told by the first defendant and also by the second defendant. In my opinion, the learned Judge should not have held in favour of the plaintiff on the first issue on this evidence. There is one other fact which bears on the probability of the story, and which is in favour of the story of the first defendant, and is against the story of the witnesses for the plaintiff, and that is that the woman at this time was in an advanced state of pregnancy and gave birth to a child in July.

I would accordingly set aside the decree as against the second defendant, and dismiss the plaintiff's action against him with costs here and below.

With regard to the first defendant, it is to be observed that the decree *nisi* does not appear to have been made absolute. It would be right for the Court below to give the first defendant an opportunity of showing cause against the decree being made absolute, should she ask for it.

DE SAMPAYO J.—I agree.

DALTON J.—I agree.

Appeal allowed.