

CROLL AND ANOR. v. McRAE.

1930.

Feb. 25, 26 ;

Mar. 14.

Practice—Conduct of Counsel—Improper question—Unjustified statement to jury—Jury unfairly influenced—Judicial discretion.

Street, C.J.
James, J.
Halse
Rogers, J.

If there is any reason to believe that in an action the course of justice has been substantially affected by any improper conduct on the part of counsel, the Court of Appeal has a discretionary power to set aside the verdict and order a new trial but each case of improper conduct must be dealt with on its own circumstances.

The Court on appeal has power to interfere with the exercise of a judicial discretion by a Judge at *nisi prius*, where injustice is likely to be done if it does not interfere.

NEW TRIAL MOTION.

The facts sufficiently appear in the judgment.

Monahan, K.C., and *McTague*, for the appellant.

If the jury received statements relative to the issue not on oath, no matter how, then in spite of what the judge does, the Court will order a New Trial.

Chitty Archbold's Practice 12th Ed., Vol. II. p. 1527 ; *Coghlan v. Christian* (29 S.R. 314) ; *Watt v. Watt* ([1905] A.C. 115) ; *Coster v. Merest* (3 Brod. & Bing. 272).

Shand, K.C., and *Sheppard*, for the respondents.

The Judge called both Counsel into his Chambers and told them what he intended to do in directing the jury on the matter and Counsel agreed and this was after the application for the jury to be discharged. There is no case where a new trial has been granted due to counsel making an improper remark to the jury if the judge has directed them properly as to it.

Cattlin v. Barker (5 C.B. 201) ; *Carbury v. Measures* (4 S.R. 569) ; *Peacock v. The King* (13 C.L.R. 619 at p. 658) ; *Rex v. Shaw* (17 S.R. 383) ; *Gowar v. Hales* ([1928] 1 K.B. 191) ; *Askew v. Grimmer* (43 T.L.R. 54) ; *Wright v. Hearson* (1916 W.N. 216) ; *Grinham v. Davies* (139 L.T. 379 at p. 380).

Monahan, K.C., in reply.

Rex v. Nathan House (16 C.A.R. 49).

Cur. ad. vult.

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STREET, C.J. This is a motion for a new trial of an action. The plaintiffs sued the defendant to recover the price of certain timber said to have been supplied to his order. The timber supplied was to be used in the construction of a bridge at Wallabadah, under a contract entered into between the Tamarang Shire, on behalf of the Main Roads Board, and a man named McGlashan. The defendant had made an unsuccessful tender for the work, and he then made an arrangement of some kind with McGlashan to assist him in carrying it out. He ordered timber for the bridge from the plaintiffs, who are timber merchants, and timber was supplied to McGlashan and used by him in the construction of the bridge, but the defendant refused to pay for it, his reason being that he had told the plaintiffs that, as the specifications for the bridge required that ironbark timber should be used throughout, ironbark timber and nothing else must be supplied and he would have nothing to do with the matter if any timber other than ironbark was delivered and used. On finding that other hardwood had been supplied and used, he refused to pay for it and left the plaintiffs to their remedy against McGlashan. The order for the timber was given by means of two conversations over the telephone, and the story told on behalf of the plaintiffs, by one of them, was that all that was required was that ironbark or grey gum should be used throughout, and that the defendant did not insist upon ironbark and nothing else. The case was therefore one of oath against oath and it was one in which the jury, in arriving at a conclusion, would not only be guided very largely by the probabilities of the case in the light of all the surrounding circumstances, but also by the credit which they might think they could give to the witnesses. The plaintiff James Croll admitted that he had prepared false invoices to help McGlashan to obtain money dishonestly, so that he was manifestly a witness whose evidence would need careful scrutiny, and Mr. Shand submitted to us, in argument, that if the defendant's evidence was looked at closely it would appear that there were reasons why it also should receive careful scrutiny before acceptance. Obviously therefore the case was one in which in the interest of justice it was essential that no extraneous matter should be

allowed to be introduced which might be calculated to influence the jury. They returned a verdict for the plaintiffs for the full amount claimed, and a new trial is now asked for upon the ground that, in the course of the trial, statements were made by the counsel for the plaintiffs which were calculated to influence the jury improperly in the plaintiffs' favour and so to prejudice the fair trial of the action. What happened was this. The defendant was cross-examined for the purpose, amongst other things, as I gather from the record of the proceedings, of showing that he had derived some benefit from the timber supplied by the plaintiffs. He admitted that McGlashan had agreed to transfer the contract for the building of the bridge to him, but he said that it was not in fact transferred, because, in view of what had taken place, he would not have it. Then, after some further questions, the counsel for the plaintiffs put this question to him "If you never got the benefit of any of this timber, why did you instruct your solicitor to offer us £350 in settlement?" and his reply was "I never done such a thing." The impropriety of such a question is obvious, and no counsel with a proper sense of his professional obligations would have asked it in that way.

I am not saying that an offer of compromise may not be admissible in evidence in some cases, but the circumstances in which it was made must first be taken into consideration for, as is stated in *Taylor on Evidence* (11th Ed. p. 539), "confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy." The question put in this case involved an assumption, that the defendant had in fact given instructions to his solicitor and then an inquiry why he had done so. Such a question was altogether improper, and there was no suggestion that any offer, if in fact made, was made in such circumstances that evidence of it would be admissible. On the contrary, counsel expressed his regret for having made the statement and said that he was not going to press the matter any further. In the circumstances the only inference that can be drawn is that, if any offer of settlement was in fact made, it was not made in such circumstances that evidence of it would be properly admissible. The counsel for the defendant asked

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that the jury might be discharged, but *Ferguson*, A.C.J., who was presiding, declined to take that course, saying that he would tell them when summing up, as in fact he did, that there was not the slightest evidence that any such offer had been made. He tells us that his reason for taking that course was that as the case was near its conclusion and as there might be a verdict for the defendant, he thought it better, in the circumstances, to let it go on to a conclusion than to take it away from the jury. The matter does not rest there however. At a later stage, while the defendant was still under cross-examination, he said, presumably in answer to a question, "I don't know that anybody knows whether McGlashan has been paid for this bridge." He was then asked to look at a letter, and, on objection being taken to this, the counsel for the plaintiffs said "The bridge has been paid for." That statement can only have been thrust upon the jury for the purpose of influencing them in some way in the plaintiffs' favour, and counsel was at once rebuked by the learned Acting Chief Justice, who told him that it was a most improper thing to say.

Mr. Shand, who appeared on this motion for the plaintiffs, but who—it is proper to say—was not their counsel on the trial of the action, has called our attention to what was said by *Barton, J.*, in *Peacock v. The King* (13 C.L.R. 619). The Court in that case was dealing with evidence improperly admitted and afterwards formally withdrawn from the jury, and what the learned judge said was this (p. 659):—"It is impossible to make the administration of justice proof against occasional accidents such as the original reception of the evidence, and when they occur the only course possible is to strike out the matter complained of and to warn the jury strongly to leave it entirely out of consideration. This is the practice adopted, so far as my knowledge and experience extend, on the criminal as well as the civil side, and is the only possible means of rectifying the mishap. To hold that on all such occasions the whole proceedings are rendered abortive would be to place a fatal obstacle in the path of the administration of justice."

It is apparent, as he pointed out, that to say that every time than an accident occurs in the course of a trial the whole

proceedings are rendered abortive would place a very serious impediment in the way of justice but I do not think that he meant to say that in the case of every accident the only possible means of rectifying the mishap is to warn the jury against being misled by it.

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He was dealing with a case in which evidence had been admitted under a misapprehension, and in which the incident had been dealt with in such a way at the trial that in his opinion it could not possibly have influenced the jury against the accused. I do not think that he meant his words to be construed as meaning that in his opinion every accident occurring during the course of a trial could be adequately remedied by a warning to the jury, and no such rule can in my opinion be laid down. Accidents in the course of a trial may be of infinite variety, and the appropriate remedy may vary accordingly, and if such authorities as there are on the point are looked at it will be seen, I think, that they show that each case of accident or improper conduct, when it arises, must be dealt with on its own circumstances.

In *Morris v. Vivian* (10 M. & W. 136) the Court held that it lay in their discretion to say whether a new trial should be granted when improper conduct on the part of jurymen was alleged, and *Alderson, B.* (at p. 140) disclaimed the laying down of a rule for any case—I suppose he meant every case—where suspicion of unfairness or bias could attach. So also in *David Syme & Co. v. Swinburne* (10 C.L.R. 43), where misconduct on the part of a jurymen was alleged, *Sir Samuel Griffith, C.J.*, said (at pp. 52, 53):—"That under some circumstances may be a ground for a new trial, but the granting of a new trial on that ground is discretionary: and a new trial is granted only because there is reason to believe that the course of justice has been substantially affected." In the same case *O'Connor, J.*, pointed out (at p. 62) that the sole object of the Court's interference with the verdict of a jury, on account of the misconduct of a jurymen, was to secure the pure administration of justice, and that the test to be applied was "Is there reasonable ground for belief that the fair administration of justice has been or is likely to be interfered with." In *Norton v. Stringer* (29 N.Z.R. 249) *Denniston, J.*,

1930. dealing with an application for a new trial on the ground of misconduct on the part of counsel, said that the misconduct must be serious and obvious to justify the interference of the Court, and that it must also in the opinion of the Court have led to an erroneous conclusion by the jury. In the more recent case of *Peat v. Greymouth Evening Star Printing and Publishing Co.* (1917 N.Z.L.R. 40) *Sim, J.*, in delivering judgment, in which *Denniston, J.*, concurred, in another case of alleged misconduct by counsel, said (at p. 46):—"It was not suggested seriously that the observations objected to could have influenced the jury in their consideration of the case, and unless there is some reasonable ground for supposing that the observations might have had some influence in leading the jury to the conclusion at which they arrived, the verdict, in our opinion, cannot be disturbed." Reference was then made to *Norton v. Stringer*, and then, later on in the same judgment, dealing with a charge of misconduct on the part of a jurymen he said (p. 47):—"The general rule appears to be that misconduct with which the successful party has had nothing to do will not form a ground for granting a new trial unless such misconduct was calculated to influence the verdict, or was such as to raise a well grounded suspicion that it may have influenced the result."

The headnote in that case repeats what was said by *Denniston, J.*, in *Norton v. Stringer*, that is that to justify the interference of the Court the conduct complained of "must" in its opinion have led to an erroneous determination by the jury. To say that the conduct complained of must have led to an erroneous determination is to say in other words that the result complained of was actually brought about by that misconduct, but I do not think that *Denniston, J.*, used the word "must" in that sense in *Norton v. Stringer*. The judgment in the later case of *Peat v. Greymouth Evening Star Printing and Publishing Co.*, to which as I have pointed out he was a party, was to the effect that all that it was necessary to show was that there was some reasonable ground for supposing that the misconduct complained of might have had some influence in leading the jury to the conclusion at which they arrived.

The jurisdiction of the Appellate Court to interfere with the verdict of a jury and to order a new trial is based upon the right of every litigant to have his case fairly tried, free from bias and prejudice, and free from the intrusion of any extraneous matters calculated to influence the jury improperly in arriving at a determination. There may be cases where the impropriety complained of is of such a character, and the effect of it upon the minds of the jury is so purely speculative, that the Court cannot say that there is any reason to suppose that it improperly influenced them, but wherever, to use the language of Sir *Samuel Griffith*, C.J., in *David Syme v. Swinburne*, there is reason to believe that the course of justice has been substantially affected, then in my opinion the Court has power—a discretionary power no doubt—to set aside a trial already had and to order a fresh inquiry. The Jury Trials (Scotland) Act, 1815, empowers a dissatisfied party to apply for a new trial not only upon certain specified grounds but also “for such other cause as is essential to the justice of the case,” and in *Reekie v. McKinven* (Sessions Cases 1921 p. 733) Lord President Clyde referring to these words said (pp. 734, 735):—“I have no intention to attempt an exhaustive definition of this kind of cause. But it is safe to say that anything which occurs in the conduct of the case before the jury which is inconsistent with the conditions of fair trial, and displaces any reasonable confidence in the result arrived at, amounts to a cause essential to the justice of the case.” We have no statutory direction of that kind to guide us, but I am clearly of opinion that quite apart from any express statutory authority this Court has power to set aside a verdict and order a new trial for any cause which is essential to the justice of the case. Courts of law exist in order that fair and impartial justice may be had, and, except so far as its hands are tied by statute, I think that this Court has an inherent power to interfere whenever in its opinion the justice of the case requires that it should do so.

Then comes the question whether we should do so in this case. I am clearly of opinion that we should. I cannot imagine anything more likely to influence the jury unfairly, and to displace reasonable confidence in their verdict, than to tell them that the defendant, who was strenuously denying

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that he was in the plaintiffs' debt at all, had offered them, or instructed his solicitor to offer them, a large sum of money in settlement of their claim. Human nature being what it is, of what use is it to tell them to disregard such a statement. The poison, once instilled into their minds, must inevitably work, and who could possibly feel any confidence in a verdict in the plaintiffs' favour arrived at after so prejudicial a statement had been made. In such a case a warning in the summing up to disregard it is only to revive their recollection of it, and to renew its damaging potency.

Our attention has been called to the case of *Grinham v. Davies* (139 L.T. 379) which it is said shows that the course to be adopted in the circumstances is a matter in the discretion of the presiding Judge, and it is said that as the learned Acting Chief Justice exercised his discretion this Court cannot now interfere. *Grinham v. Davies* was a case in which there had been a violation of the established rule of practice that in an accident case it should not be intimated to the jury that the defendant is insured, and in which it was held by a Divisional Court on appeal from the County Court that it was within the discretion of the Judge to discharge the jury at the expense of the party whose advocate had violated that rule. *Salter, J.*, said (at p. 381) that it was within the discretion of the County Court Judge to take the course which he did and that that discretion was not subject to appeal, and *Talbot, J.*, said (at p. 382) "We have no right to inquire whether the County Court Judge acted judiciously in the circumstances." As the County Court Judge in that case had discharged the jury there was nothing that the Appellate Court could do on appeal, except perhaps to vary his order as to costs, but I do not suppose for a moment that the Judges of the Divisional Court, whatever they may have said, meant to lay down a rule in general terms to the effect that in cases of misconduct or impropriety the presiding Judge has a discretion which cannot be interfered with. I think that he has a discretion in such cases, and though I do not think that it should be lightly interfered with by an Appellate Court, I am unhesitatingly of opinion that if justice requires it a Court of Appeal not only can but will interfere. In *Huggons v. Tweed* (10 C.D. 359) where the Judge of first instance refused an application

to have a counter-claim excluded on the ground that it could not be conveniently disposed of in the action in which it was set up, and ought to be tried in an independent action, *Jessel, M.R.*, held that an appeal would lie. He said (at p. 363) :—
 “Now the question how a claim can be most conveniently disposed of is for the discretion of the Judge—a judicial discretion indeed, but still a discretion the exercise of which is not lightly to be interfered with. The Court of Appeal, in a strong case, would interfere with the exercise of this discretion, but I think that it ought to do so only in a strong case where injustice is likely to be done if it does not interfere.”

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I may add, too, that in this case it is apparent from what the learned Judge tells us that he did not exercise his discretion as to what the proper remedy should be in view of the gross impropriety that had taken place. Without forming or expressing any opinion in that respect he merely adopted the course of allowing the case to go on, as a convenient one in what he regarded as the not impossible event that the jury might return a verdict for the defendant.

For these reasons I think that the verdict cannot stand and that there must be a new trial. The order of the Court will be that the verdict be set aside and a new trial ordered. The respondent must pay the costs of this motion and the costs of the first trial will be costs in the cause.

That really disposes of the case but before leaving it there are one or two remarks of a general character which I wish to make. I am glad to be able to say that it is almost if not entirely without precedent in our Courts for a new trial to be asked for on the ground of misconduct or impropriety on the part of counsel, but I am compelled to say that this case is one of a serious character. It is one in which counsel not once but twice offended against the rules of propriety and obtruded upon the jury statements which, if he had stopped to think for a moment, he must have realised could have no other effect than that of prejudicing their minds unfairly against the defendant. It is immaterial to say that no wrong was intended. Harm may be done by thoughtlessness or carelessness as well as by intention, and it is surprising that after one warning counsel should have so far forgotten what was proper as to

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bring down another rebuke from the Bench. I cannot impress too forcibly upon the members of the Bar the necessity for observing high standards of professional conduct and a proper sense of responsibility in the conduct of cases. If that is not done the whole profession will suffer in the estimation of the public. In *Reekie v. McKinnen* (*ante*), the Lord President, in referring to an improper argument addressed to a jury, having relation to the expenses of the case, said (p. 735) :—" In this matter, as in other matters germane to the fair conduct of judicial proceedings, it is the duty of everyone concerned, not merely to avoid arguments of that kind, but to eschew loose or careless statements which may—however unintentionally—insinuate such considerations into the minds of the jury. There is no safe rule except to avoid even the risk of offence. If two courses are open, one of which may pass though ambiguous, while the other unmistakably maintains the highest standard of practice, the duty of everybody is, of course, to select the latter and reject the first." And in *Wright v. Hearson* (1916 W.N. 216) *Rowlatt, J.* said :—" It is the duty of counsel to know and observe the rules governing what they may and what they may not do in the conduct of cases ; they may not disregard those rules and trust to not being checked in time. In proportion as counsel voluntarily observe those rules so will their standing and reputation grow."

I hope that these observations will be taken to heart by the members of the Bar, and that they will bear in mind that, as the Lord President said, there is no safe rule except to avoid even the risk of offence.

JAMES and HALSE ROGERS, JJ., concurred.

Appeal upheld, New Trial ordered. Respondents to pay costs of motion. Costs of first trial costs in the cause.

Solicitors : *W. W. Hawdon* (Gloucester) by his agent *Aubrey Halloran*.

Elliott & Walker (Dungog) by their agent,
N. A. Elliott.