MAGANLAL DAYABHAI, MAGANLAL NATHUBHAI AND BALU BHAI *v.* SHIWA BHAI

[Appellate Jurisdiction (Carew, P.J.) April 7th, 1954]

O. 16 r. 11 of R.S.C.; o. VIII, r. 5 (3) of the Magistrates' Courts Rules—no suit to be defeated by non-joinder or misjoinder of defendant —sections 27, 51 and 54 of the Magistrates' Courts Ordinance—calling of witnesses by Court in civil and criminal cases.

An action was commenced against the President of the Gujerati Class at Ba on 1st July, 1953. Leave was given to join other defendants at a later stage. After some adjournments the trial commenced at the 1st Class Magistrate's Court at Ba on 17th November, 1953.

At the conclusion of the hearing and after both Counsel had addressed the Court on the 8th December, 1953, the Magistrate adjourned the proceedings until 15th December, 1953, upon which date he recalled the plaintiff to give evidence despite the objections made by Counsel. The Magistrate then proceeded to amend the writ and particulars of claim by inserting the words "as representing all persons who were members of the 'Gujerati Class' on or about 15th April 1946." He also made another minor amendment. The Magistrate then recalled two of the defendants and after a short adjournment gave judgment in favour of the plaintiff against the three appellants, dismissing two defendants from the suit.

The three defendants appealed.

HELD.—(1) Amendments to the pleadings at a late stage in the proceedings should only be allowed after careful consideration, in accordance with legal principles, and after the parties or their counsel have been heard.

(2) A Judge in a civil action may only call evidence with the consent of both parties.

Cases referred to:—

Coulson v. Disborough [1894] 2 Q.B. 316.
Dean v. Brown, 78 L.J.K.B. 840.
Harris v. Beauchamp [1894], 63 L.J.Q.B. 480.
In re Enoch and Zaretzky Bock & Co. [1910] 1 K.B. 327.
Murtagh v. Barry, 59 L.J.Q.B. 388.
R. v. Dora Harris [1927] 2 K.B. 587.

P. Rice for the appellants.

A. D. Patel for the respondent.

CAREW, P.J.—I confess that after reading the record of the trial my feeling was one of surprise at the course taken by the learned Magistrate. A Magistrate's Court derives its authority from the Magistrates' Courts Ordinance (Cap. 3), and nothing shall be intended to be within its jurisdiction unless so expressly stated by that Ordinance.

In the exercise of its jurisdiction a Magistrate's Court is bound to do so in accordance with ordinary legal principles. Mr. Rice submitted that the recall of certain witnesses, the plaintiff and two of the defendants, when the defence had been closed and when both Counsel had addressed the Court was contrary to the principles of the laws of procedure. He argued that although section 51 (1) of the Magistrates' Courts Ordinance (Cap. 3) empowers the Court to summon a person to attend to give evidence, the section does not give the Court absolute power; it grants power to be exercised only for such reasons in law as a superior court would exercise them. And in his submission the power given by section 54 of the Magistrates' Courts Ordinance (Cap. 3) must also be so exercised.

He further contended that it is an established principle of law that in a civil trial the Judge has no right to call a witness not called by either side, unless he does so with the consent of both parties.

In making the amendment to which objection is taken the learned Magistrate relied, according to the record, on Order XVI, Rule 11, of the Rules of the Supreme Court, Order VIII, Rule 5 (3) of the Magistrates' Courts Rules, and Order XVI, Rule 9, of the Rules of the Supreme Court. It is not clear why recourse was had to the Supreme Court Rules. Order III, Rule 8, of the Magistrates' Courts Rules provides that the Rules of the Supreme Court may be used as a guide only where no appropriate provision is provided by the Magistrates' Courts Rules. Order XIV of the Magistrates' Courts Rules, which relates to amendments, was not referred to by the Magistrate, and it does not appear to have been relied upon by him.

As I understand the argument, complaint is made not so much in regard to the power of the Magistrate to make the amendment but that in the circumstances it should not have been made and that it was made in an arbitrary fashion. It is the practice, when an amendment is made at any stage of the proceedings on the application of either party or by the Court on its own motion, that the order allowing the amendment shall be made upon such terms as to costs or otherwise as shall seem just.

It is true that an application was made for the whole of the costs of the action on the ground that the action could not have succeeded on the pleadings as they stood before the amendment, and that this application was refused; but there is nothing to indicate whether the Magistrate considered the costs of the amendment alone, nor that he had invited the views of Counsel thereon. Furthermore, the learned Magistrate did not consider granting an adjournment, nor did he invite Counsel's view on the advisability of doing so. In view of the opposition of Counsel for the defendants to the procedure adopted by the learned Magistrate, one would have expected that Counsel would have been heard in full by the Magistrate before he decided to continue the proceedings and call further evidence.

The law relating to the calling of witnesses by the Judge in civil cases is reviewed in *In re Enoch and Zaretzky Bock & Co.* [1910] 1 K.B. 327 and in *R. v. Dora Harris*, [1927] 2 K.B. 587. It was laid down in *In re Enoch* (*supra*) that in a civil trial the Judge has no right to call a witness not called by either side unless he does so with the consent of both parties, and if a witness is so called neither party can cross-examine him as of right. It may be argued that the

witnesses called by the Magistrate were not witnesses who had not been called by either side ; that they had already been called and the Magistrate had merely recalled them. I do not think this distinction can be made in view of the remarks of *Fletcher Moulton, L.J.* in *In re Enoch* (*supra*). In the course of his judgment, at p. 366 he said:—

"A Judge has nothing to do with the getting up of a case. The argument is based on a case in the Court of Appeal of *Coulson v. Disborough* [1894] 2 Q.B., 316, in which certainly there were dicta which require to be carefully examined. . . . One of the learned Judges, the *Master of the Rolls* (*Lord Esher*), did however, give a dictum to which I wish to refer particularly, but it is quite evident that nothing was said throughout the argument of this witness being called in *invitos* as far as the parties were concerned. Lord Esher said this: 'If there be a person whom neither party to an action chooses to call as a witness, and the Judge thinks that that person is able to elucidate the truth, the Judge, in my opinion, is himself entitled to call him.' If that means that the Judge is entitled to call him when either side objects, I am satisfied that there is no basis for that dictum. It certainly was not necessary for the decision ; and the consequences to which it would lead if so interpreted are such that I am satisfied that the Court of Appeal would never in the form of a dictum have given a decision so wide-reaching and so destructive of fundamental principles of our laws of procedure without either authority or reasoning. It is not based on any course of reasoning, and no authority is cited for it. I say it would be destructive of the fundamental principles of our law of procedure because of this: according to such dictum, if witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by a person whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination ; because the Court of Appeal laid down that if a Judge does call a witness then neither party can cross-examine him as of right. That may be most reasonable if the calling has been with the assent of both parties, because he cannot be called a witness of either party, but it would lead to consequences which I do not even like to contemplate if the dictum were supposed to apply to cases where a Judge calls a witness to the facts of the case without the consent of the parties, and then refuses, or has the power to refuse, that there shall be any cross-examination. Therefore, I think that the dictum refers only to cases where a Judge has called a witness without protest—that is to say, with practically the acquiescence of both parties—and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility, though not for the accuracy of his statement. It is well known that if a party calls a witness he may not then attack his general credibility. There may be a person whom it would be desirable to have before the Court, but neither party wishes to take the responsibility of first vouching his personal credibility or that he is a witness fit to be called, and the Judge may relieve the parties in this way—by letting him go into the box as a witness of neither party, and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the

> dictum certainly does not lay down, in my opinion, and it is certainly not the law, that a Judge, or any person such as an arbitrator in a judicial position, has any power to call witnesses to fact himself against the will of either of the parties."

When the Magistrate recalled the plaintiff and two defendants, the question arises whose witnesses were they? Could Counsel for the plaintiff have cross-examined the plaintiff when he had been recalled by the Court, and could Counsel for the defendants have cross-examined the two defendants who had been recalled by the Court?

In the case of *R. v. Dora Harris* (*supra*) the Judges of the Court of Appeal made some pertinent observations in the course of the hearing of the appeal. *Salter, J.* said (page 1070): "The rule in *Enoch and Zaretzky Bock & Co., In re,* is that in a civil action a Judge must find out the truth so far as he is permitted to do so by the evidence tendered by the parties, even though he knows that he is being misled. It is different in criminal cases." *Lord Hewart, C.J.* remarked at page 1070: "In civil cases the Judge merely keeps the ring. The dispute is between the parties and neither side need call hostile witnesses. In a criminal case the position is different. There the prosecution is bound to call before the Court all material witnesses, notwithstanding that the witnesses may give inconsistent evidence. The reason is that the whole of the facts may go before the jury. A Judge in a criminal trial when he calls a witness does so nearly always in the interests of the accused person. If a witness is called by the Judge after the defence is closed, how can the defence deal with the fresh evidence?"

Avory, J. said, in the course of delivering the judgment of the Court of Appeal (page 1072):—

> "It is also quite true that there has been laid down no definite rule limiting the point in the proceedings at which the learned Judge may exercise that power. But it is obvious that injustice might be done to an accused person unless some limitation is put on the exercise of that right, and for the purposes of this case we adopt the rule laid down by *Tindal, C.J., in R. v. Frost,* where the Chief Justice said (4 *St. Tri.* (*N.S.*)), at p. 368; 9 C. & P., at p. 159: 'Where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins; but if any matter arises *ex improviso,* which no human ingenuity can foresee, on the part of a defendant in a civil suit, or a prisoner in a criminal case, there seems to me no reason why that matter which so arose *ex improviso* may not be answered by contrary evidence on the part of the Crown.' That rule applied only to witnesses called on behalf of the Crown, but we think that the rule should also apply to cases where the Judge calls a witness in a criminal trial after the case for the defence is closed, and the right of the Judge to do so should be limited to a case where some matter arises *ex improviso* which no human ingenuity could have foreseen. Otherwise, as I have said, it appears to us injustice may be done to the accused. In this view we have the support of so great a Judge as *Bramwell, B.,* in 1859, in the case of R. *v. Haynes.* There, after witnesses had been called for the defence

and Counsel had replied on behalf of the prosecution, Counsel for the Crown proposed to call another witness. Bramwell, B., said it was quite clear that Counsel could not call such witness as the cases were closed, and to allow it would necessitate two more speeches. Having with him *Crompton, J.*, he said (1 F. & F., at p. 666): 'We are both of opinion that it is better to abide by the general rule, and that it would be inexpedient to allow this fresh evidence to be gone into after the close of the whole case.' "

The conclusion which I draw from the authorities is that whereas a Judge in a criminal trial may recall a witness only in exceptional circumstances and generally in the interests of the accused, a Judge in a civil action may not do so, even in similar circumstances, except with the consent of both parties.

Mr. A. D. Patel, who appeared for the respondent in this Court, did not do so at the trial in the Magistrate's Court. He said, however, that he was present in the Magistrate's Court and that he considered at the time that the course taken by the learned Magistrate was irregular, but that since that time, on looking into the matter, he has reached the view that there was nothing irregular in the procedure adopted by the Magistrate. Mr. Patel argued before me that the provisions of the Magistrates' Court Ordinance (Cap. 3) expressly gave the Magistrate the power to proceed as he did.

He submitted that the Magistrate's Court is a creature of statute and that section 27 of the Magistrates' Courts Ordinance (Cap. 3) made it incumbent on the Magistrate to determine all matters in controversy without multiplicity of legal proceedings; that section 51 enabled the Magistrate to summon any person to give evidence, and that section 54 empowered him to call any person present in Court as a witness. He contended that the Magistrate had power under the Magistrates' Courts Rules to make the amendment and that the Magistrate gave his reasons for making the amendment; that Counsel for the defendants had only asked for costs and had not asked for an adjournment.

I agree with Mr. Patel that those sections of the Magistrates' Courts Ordinance to which he refers confer such powers on a Magistrate; the Magistrate's Court being a creature of statute, no Magistrate could exercise these powers in the absence of express provision. But this does not mean that these powers may be exercised upon other than proper legal principles.

I agree with Mr. Rice that the powers conferred by these sections are not absolute and must not be exercised arbitrarily. The principles which are laid down in *Murtagh v. Barry*, 59 L.J.Q.B., p. 388, and *Dean v. Brown*, 78 L.J.K.B., p. 840, are in my opinion applicable. In these cases the question was whether section 93 of the County Courts Act, 1883 (51 and 52 Vict., c. 43) which provides that a County Court Judge shall " in every case whatever have the power if he shall think just to order a new trial to be had upon such terms as he shall think reasonable," gave the County Court Judge absolute power to order a new trial. It was held that the section did not grant an absolute power to order a new trial, and that the County Court Judge was bound by the rules of law laid down and acted upon by the Supreme Court in granting a new trial.

In the course of his judgment in *Dean v. Brown* (*supra*) at page 847, Farwell, L. J. said:—

> "The only alternative is to hold that each of the numerous County Court Judges has a free hand to do as he pleases. But this would lead to chaos ; the difficulty of exercising such a jurisdiction without any rules to guide the Judge is very great, and I cannot bring myself to hold that the Act intended new trials to depend on the idiosyncrasy of each individual, unguided and unfettered by any principle or rule, and so to inaugurate a system really open to the reproach unjustifiably brought against equity by Seldon, that it depended on the measure of each Chancellor's foot. . . . So, too, *Lord Justice Davy in Harris v. Beauchamp* (1894, 63 L.J.Q.B., 480, at p. 484) says of the wider phrase 'just or convenient' in section 25 of the Judicature Act, 1873, that it does not confer an arbitrary or unregulated discretion on the Court to invent new modes of enforcing judgments in substitution for the ordinary modes. . . ."

In my opinion, the learned Magistrate improperly exercised the powers conferred upon him by sections 27, 51 and 54 of the Magistrates' Courts Ordinance and by the Magistrates' Courts Rules. The procedure adopted by him in recalling witnesses and amending the proceedings did not conform with the fundamental principles of the laws of procedure.

If it became the practice to amend proceedings and to call evidence at the end of a case after the conclusion of the addresses, it might well be that a party who had led a particular line of evidence or who had defended an action on a certain basis could be highly embarrassed and indeed prejudiced. Any amendment at this late stage should be allowed only after careful consideration in special circumstances, and then only in accordance with established legal principles and after the parties or their Counsel had been heard. If the Court then wished to call further evidence it could do so only by consent.

This appeal succeeds.