[COURT OF APPEAL]

McKENZIE *v.* McKENZIE

[No. 8496 of 1965]

1970 June 11, 12 — Davies, Sachs and Karminski L.JJ.

Practice—Trial—Litigant in person—Legally qualified friend present to prompt—Withdrawal from court as result of judge's intervention—Whether irregularity in proceedings—Whether prejudice to litigant—Whether new trial to be ordered.

On the hearing of a defended divorce suit, in which there were cross-charges of cruelty and adultery involving difficult and complex questions of fact necessitating a lengthy trial, the husband petitioner appeared in person to conduct his case. He had been granted legal aid, but his legal aid certificate had been discharged before the hearing. His former solicitors sent a young Australian barrister to assist the husband, gratuitously, in the conduct of his case by sitting beside the husband in court and prompting him. The judge on ascertaining that the Australian barrister represented the former solicitors told him that he must not take part in the proceedings, which was understood by the barrister as meaning that he must not assist the husband by prompting, and he left the court.

The judge, at the end of the case which lasted ten days, granted the respondent wife a decree nisi on her answer on the ground of cruelty. He dismissed the husband's petition alleging cruelty and his supplemental petition alleging adultery.

On appeal by the husband against the dismissal of his supplemental petition alleging adultery:—

Held, allowing the appeal, (1) that every party had the right to have a friend present in court beside him to assist by prompting, taking notes, and quietly giving advice (post, pp. 37G–H, 38B–C, 41B–D).

Dictum of Lord Tenterden C.J. in *Collier* v. *Hicks* (1831) 2 B. & Ad. 663, 669, applied.

Tucker v. *Collinson*, The Times, February 11, 1886, C.A. distinguished.

(2) That by reason of the judge's intervention the husband had been deprived of that right and, therefore, there had been an irregularity in the proceedings (post, pp. 38D–E, 41F–G); and that where such an irregularity occurred the onus was on the opposite party to show that the other party had not been prejudiced, and since that onus was not discharged in the present case, there would be a new trial on the sole issue of the wife's adultery (post, pp. 40D–E, 42C–D).

Decision of Lloyd-Jones J. varied.

The following cases are referred to in the judgments:

Collier v. *Hicks* (1831) 2 B. & Ad. 663.

Tucker v. *Collinson*, The Times, February 11, 1886, C.A.

No additional cases were cited in argument.

APPEAL from Lloyd-Jones J.

The petitioner, Mr. Leveine McKenzie, appealed from the dismissal by Lloyd-Jones J. on June 27, 1969, of his supplemental petition alleging that the respondent, Mrs. Maizie McKenzie, his wife, had committed adultery with Joseph Graham. There was no appeal against the dismissal of his petition alleging that his wife had treated him with cruelty, nor against the finding on the wife's answer that he had treated her with cruelty. There was no cross-appeal by the wife against the finding that his adultery had been condoned. Lloyd-Jones J. granted the wife a decree nisi on her answer on the ground of cruelty; and although the husband did not challenge that finding of cruelty, he contended that, if the wife had commited adultery, the grant of a decree nisi became discretionary. The husband appealed on the grounds (1) that the judge's decision was against the weight of the evidence; (2) that on the facts the judge ought to have found that the wife had committed adultery; (3) that the judge was wrong in excluding one Ian Hanger from assisting the husband in the conduct of his case and that the husband was thereby prejudiced in the conduct of his case; (4) that the judge was wrong in holding that the evidence of Joseph Graham, the alleged co-respondent, was uncorroborated and (5) that the judge was wrong in disregarding the statement of a consultant psychiatrist at St. Giles Hospital contained in a medical record produced at the trial.

The facts are set out in the judgment of Davies L.J.

Ian Payne for the husband. The husband's appeal is solely against the dismissal by the judge of his supplemental petition alleging that his wife was guilty of adultery. If she was, the practical importance is that, since she did not seek the exercise of the court's discretion, the grant of a decree to her on the ground of her husband's cruelty, which he does not now challenge, is discretionary. It may also affect the quantum of any maintenance to her.

The judge erred in holding that Ian Hanger was not entitled to assist the husband in the conduct of the suit. Every litigant is entitled to have the assistance of a friend nearby and that friend is entitled to assist the litigant by prompting him, making notes or suggestions, giving advice, and suggesting ways in which the litigant can cross-examine the witnesses: *per* Lord Tenterden C.J. in *Collier* v. *Hicks* (1831) 2 B. & Ad. 663, 669. While it is true that nobody can take part in the proceedings as an advocate unless he is qualified so to do by being a member of the Bar or in the lower courts a solicitor, there is no prohibition on any person assisting a party to the proceedings in other ways, e.g., by passing notes, giving advice, or prompting. The judge said that Mr. Hanger could not take part in the proceedings. He was merely sitting next to the husband and making suggestions to him. However, the judge's direction was construed by Mr. Hanger as an order not to assist the husband. The view of Lord Tenterden C.J. in *Collier* v. *Hicks* (1831) 2 B. & Ad. 663, 669, although obiter, has always been accepted as authoritative on this aspect of the law: see *Cordery on the Law relating to Solicitors*, 6th ed. (1968), p. 50. *Tucker* v. *Collinson*, The Times, February 11, 1886, does not assist since that case turned on whether a suit was frivolous and vexatious where unqualified advice was given by attorneys who had not proper certificates. The decision was that an unqualified

attorney could not represent the litigant in the proceedings. That case is distinguishable because Mr. Hanger here was not attempting to take part in the proceedings as an advocate.

Justice must not only be done, but it must be seen to be done. The husband here was conducting a case in a country which was not that of his birth, where there were considerable linguistic difficulties, and it was a difficult case which was lengthy, complex and where the issues of fact were not easy. In those circumstances to be deprived of the assistance which he might have expected from Mr. Hanger amounted to severe prejudice.

The denial of the assistance to which he was entitled constituted the trial a nullity because justice must be seen to be done. The refusal of the help that Mr. Hanger could have given to the husband amounted to a refusal of natural justice. Therefore, there should be a re-trial on the issue of adultery. There was in fact prejudice which arose as the result of the exclusion of Mr. Hanger from the court. The husband subpoenaed a clerical officer from the hospital to produce the medical record. Had there been a skilled adviser at his side, he might well have been advised to have applied for an adjournment with a view to obtaining evidence from the psychiatrist. If it be right that the judge's error was no more than an irregularity, the onus is on the wife to show that there was no prejudice in fact.

As to the facts, the judge's view that the co-respondent's evidence was not corroborated was wrong because the statement contained in the medical record produced at the trial of what the wife told the psychiatrist was prima facie capable of being corroboration. Further, the judge seems to have ignored the medical record without giving any satisfactory reason for doing so. Finally, he never really dealt with the question of condonation. On any view, if the wife be right in her evidence, the intercourse which she had with her husband in the van in February 1966, amounted to condonation of the cruelty which she alleged.

Anthony Wilcken for the wife. It is conceded that the judge erred in the view which he took about Mr. Hanger's presence next to the husband in the court. The husband was entitled to the assistance and prompting of Mr. Hanger. But the denial of such assistance was no more than an irregularity and did not make the trial a nullity. It is analogous to the refusal of legal aid in a criminal case. Such a refusal does not make the trial a nullity nor of itself does it entitle the convicted person to a re-trial, nor of itself will it be a ground for appeal.

It would not be right in this case to find that the husband had been prejudiced by the denial of the assistance to which he was entitled. During the lengthy trial which took place the judge had ample opportunity to study the demeanour of the parties, and he clearly disbelieved the husband whom he described as a glib and persuasive liar. He clearly disbelieved the co-respondent who was the key witness on the issue of adultery. No doubt the judge would have been assisted if the psychiatrist had been in court to give evidence, but the husband knew how to procure his attendance. He issued witness subpoenas to get the clerical officer from the hospital and to have the family doctor in court. Therefore, the denial of skilled advice did not prevent him from getting the psychiatrist to court. Further, on all important matters the judge was convinced that the wife was a witness of truth.

On the face of it the court may well be concerned that a man acting in

person has been deprived of a right which might prejudice him in the conduct of his case. But in the circumstances of the present case he was in no way prejudiced because he was not represented. It is significant that the husband appeared in person in numerous court appearances in the interlocutory stages of these proceedings before the trial and conducted those proceedings ably by himself. On those occasions he plainly was not prejudiced. Having regard to the clear view which the judge took about the credibility of the parties and to the fact that he gave this case anxious care and consideration, it would be wrong to have a re-trial on an issue of primary fact where a judge of such wide experience has taken the view that the husband is such a persuasive and glib liar and that the wife is a witness of the utmost truth. It would cause extreme expense, delay and injustice to have a re-trial of a matter which has been so carefully investigated by so experienced and careful a judge. Despite the irregularity the trial should stand and the judge's decree should not be set aside.

Payne in reply.

DAVIES L.J. This is a somewhat unusual case. It is an appeal from a judgment of Lloyd-Jones J. given on June 27, 1969, whereby he dismissed the prayer in a petition brought by the husband on the ground of cruelty and adultery—the adultery charged being contained in a supplemental petition—and on the wife's answer granted her a decree on the ground of cruelty. She had also charged adultery, but the judge held that that adultery had been condoned. Mr. Payne, for the husband, does not challenge the judge's finding of cruelty against the husband, and he does not seek to upset the judge's dismissal of the charge of cruelty made against the wife.

These two parties are Jamaican in origin. They were married in that island on September 29, 1954, and had six children (one having died). The husband came here in 1956 and the wife in 1957 and they lived at all material times at a house in Camberwell Grove, London, S.E.5. In 1964 the marriage became unhappy; and on July 10, 1965, the wife made a complaint in the Lambeth magistrates' court on the ground of persistent cruelty and wilful neglect to maintain. That was shortly followed by the issue of his petition, on the ground of cruelty, on August 20, 1965. On September 16, 1965—and this is of importance—she applied for an injunction to prevent him from molesting her and the children and to expel him from the matrimonial home. That was heard by Waller J. in the long vacation as vacation judge, and the husband gave an undertaking to the judge not to molest his wife and children and to leave the matrimonial home, which he did.

She filed an answer on December 13, 1965, alleging cruelty and adultery; and eventually, on February 13, 1969, he filed a supplementary petition, as he called it, alleging adultery between her and one Graham.

On May 13, 1966, the wife underwent a perfectly legal operation for hysterectomy to terminate her pregnancy; and one of the main points in the husband's charge of adultery against her was that he had given his undertaking in September, 1965, and that he had not had any intercourse with his wife thereafter; and there is no doubt that she was pregnant in the spring of 1966 and on the advice of a psychiatrist, given on April 13,

A 1966, had an operation to terminate the pregnancy. I will come back to that in a moment.

The husband in earlier stages of the litigation had been legally aided but, for reasons that we do not know, his legal aid was terminated at the end of 1968. The trial started on June 13, 1969. He had applied to Faulks J. on June 11 for an adjournment, but that application was, no doubt quite properly, refused. The trial started two days later and lasted B some 10 days.

The important point from which this appeal really arises is this. The husband no longer had legal aid; but at the commencement of the hearing there was sitting beside him a young man, Ian Hanger, who was an Australian barrister putting in some time in this country in the offices of Messrs. Jeffrey Gordon & Co., who had been the last of two or more C firms of solicitors who had been acting for the husband previously in the litigation. Mr. Hanger was there voluntarily in order to assist Mr. McKenzie in conducting his case. No doubt Mr. Hanger's assistance would have been of great value to the husband in the hearing of this case, which was complicated and lasted some 10 days or so. There was a very long history, and it was a difficult case for a man with an untutored mind to conduct. In addition to having no effective knowledge of legal affairs, D there was a good deal of difficulty in communication and in understanding these parties. As the judge said:

> ". . . this was quite a difficult case, quite apart from the difficulties of communication which are inevitable because of the rapidity and the sometimes inaudible way in which the evidence was given on both sides, if more on the [wife's] side. But quite apart from the E difficulties of communication of that kind (and I am using a phrase which has now become hallowed), there were features in the case that were disturbing and disconcerting."

The judge referred to the fact that the husband conducted his case in person, and that Mr. Hanger was there to help him, in these terms:

> "I ought to have said that on the first day he appeared with a young F man, who said that he represented one of the firms of solicitors who had once acted for the husband and was obviously concerned to prompt the husband. I then discovered that that firm was no longer on the record, and I hope and believe I rightly said that I did not think this young man could take any part in the proceedings and he did not reappear."

G Mr. Payne submitted, in my opinion rightly, that the judge was wrong in taking that course. Mr. Hanger was not there to take part in the proceedings in any sort of way. He was merely there to prompt and to make suggestions to the husband in the conduct of his case, the calling of his witnesses and, perhaps more importantly, on the very critical and difficult questions of fact in this case, to assist him by making suggestions H as to the cross-examination of the wife and her witnesses.

Our attention was called by Mr. Payne to some words of Lord Tenterden C.J., used many years ago in *Collier* v. *Hicks* (1831) 2 B. & Ad. 663. I need not go in any detail into the question of fact which arose in that

case. Very shortly, it was that somebody wished to appear before a magistrates' court and he was turned out. An action of trespass was subsequently brought. Lord Tenterden C.J., in the course of giving the first judgment said, at p. 669:

> "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

That was, although obiter, a statement by Lord Tenterden C.J. that any person may attend as a friend and may take notes and make suggestions. No doubt the judge in the instant case had not that passage in mind, for otherwise no doubt he would have ruled differently from the manner in which he did. That case is referred to in *Cordery on the Law relating to Solicitors*, 6th ed. (1968), p. 50. It quotes the above words of Lord Tenterden C.J. and cites that case as an authority. It might be interesting to note, in case any further editions of that textbook are printed, that, by some extraordinary error, in the same note where *Collier* v. *Hicks*, 2 B. & A. 663, appears there is a reference to a case called *Collett* v. *Dickinson*, The Times, February 11, 1886, which we have seen but which does not help in the present case: but the important thing is that the name of the case in The Times is not *Collett* v. *Dickinson* but *Tucker* v. *Collinson*, which is perhaps a rather odd mistake to find in a textbook.

Mr. Payne submitted, in my opinion rightly, that the judge ought not to have excluded Mr. Hanger from the court, or, rather, ought not to have prevented Mr. Hanger from assisting the husband in the way that he proposed to do. And, goes the submission, justice was not seen to be done in those circumstances.

The facts of the present case were very unusual. The judge had, and this court has, necessarily to consider them very carefully. The husband left the matrimonial home in September, 1965. According to the wife, they met casually in February, 1966, and she went for a ride in a van which the husband admittedly had at that time. She said, and the judge found—he accepted by and large her evidence throughout, and by and large rejected practically everything that the husband said throughout—that an act of intercourse took place between them in the van. That if it were true, as the judge found it was, would satisfactorily account for her pregnancy in April, 1966. But the matter did not stop there, for the husband called a Mrs. Martin from St. Giles Hospital which the wife had attended to have the hysterectomy operation, and she produced a record sheet. The record that Mrs. Martin produced does not seem to have been the original record, but a photostat copy, and we have before us a photostat copy of a photostat copy. It is signed, we are told, by a Mr. Hutchins, although I cannot read his signature, the consultant psychiatrist. It reads as follows:

> "13.4.66. This patient has borne six children. Husband has left her and she is pregnant"; [and almost certainly the next three words are] "by another man." "She is depressed," [I cannot read the next word] "losing weight and sleeping badly. I am of the opinion that

A continuation of this pregnancy would be detrimental to her mental health. I would recommend termination of pregnancy and subsequent sterilisation."

There are two other notes on the next sheet, finishing with one on May 13, 1966: "I agree, hysterectomy and sterilisation." The husband says that that document shows that the wife had told the psychiatrist, not only that her husband had left her, but that she was pregnant by another man. B The judge, despite that, said that he was not really satisfied that the words *were* "by another man"; and, of course, he had no knowledge of the provenance of the information which the psychiatrist noted in his record. It is perfectly true that there is nothing to show that she had told the psychiatrist that, or whether he obtained the information from possibly some other doctor, or a sister, or a nurse. We do not know. However, C there was that document. The judge was not satisfied with it at all. Mr. Wilcken, for the wife, says that the husband had sufficient knowledge, or was sufficiently well advised, to procure the attendance of Mrs. Martin to produce that record; and he could perfectly well, it is said, have procured the attendance of the psychiatrist to give direct evidence, and that was not done. Mr. Wilcken says that obviously the husband was completely competent to take such steps as were necessary to obtain the evidence. D That is the first main point on which Mr. Payne says that the husband was handicapped in being deprived of the assistance to which he was entitled.

The second point of which complaint is made is that the judge said that the direct evidence of adultery was wholly uncorroborated. That evidence was the evidence of Graham, who went into the witness-box and E said categorically that he had committed adultery with the wife on a number of occasions, giving places where he alleged that the adultery had been committed. The judge correctly directed himself that in the circumstances of the case it would be unsafe to act upon the evidence of Graham unless it was corroborated; and the judge stated categorically that it was wholly uncorroborated. Mr. Payne says that that again is wrong because there was some corroboration, for what it is worth, in the medical sheets F to which I have just been referring. He also submitted that there was some corroboration in the husband's own evidence of having followed his wife towards the co-respondent's house on a particular occasion.

The only other point, I think, that was raised by Mr. Payne was the question of condonation. The judge, rather unusually, said that he could not make a finding of adultery against the husband because it had been G condoned. I would not have thought that that was the right approach to the problem. He might very well have made a finding of adultery against the husband. From what he said I think that he was satisfied that the husband had committed adultery; but he could have said that he could not pronounce a decree on that ground because it had been condoned.

Be that as it may, the other question on condonation which was adumbrated by Mr. Payne but really, I think, finally abandoned, was this. It H was suggested that if, as the wife said, she had had intercourse with her husband willingly in the van in February, 1966, she must have condoned all the antecedent cruelty on which she was alleging that she should be

given a decree. I do not agree; and I do not think that Mr. Payne really insists upon that. If, as the judge found, there was this act of intercourse, it was one isolated act, and I do not think that there was any intention on either side to reinstate the other spouse. It seems to me that condonation goes out of this case.

What is to be done in the circumstances? The judge was in error in refusing to allow Mr. Hanger to give his advice and assistance to the husband. There are very difficult questions of fact in this case. There is the question whether or not Graham's evidence was rightly rejected. There is the question as to the source of the information contained in the medical sheet. There is the question whether the wife ever did say that she was pregnant by another man. There is the question of corroboration of the evidence of Graham. The facts are very unusual; and, as Mr. Payne submitted—and he may very well be right—the findings in some respects are somewhat startling.

The case, as I confess, has caused me some anxiety. It has already taken this very long time in the court of first instance, and cost a great deal of money. One does not really see, save possibly on the question of maintenance, that anything is to be gained by further inquiry into this matter. But I have come to the conclusion that the dismissal of the husband's charge of adultery made in his supplemental petition ought not to stand in the circumstances. I think, therefore, that this appeal should be allowed and that a re-hearing should be directed, but a rehearing only of the charge of adultery against the wife contained in the husband's supplemental petition. The case will have to be tried by a different judge. Lloyd-Jones J., of course, in the circumstances would not wish to re-try the case. I would allow the appeal accordingly.

SACHS L.J. On the first day of this lengthy trial an incident of a most unusual type occurred. The parties to the litigation come from Jamaica: they came respectively in 1956 and in 1957. From 1965 onwards this litigation between them pursued a course which cannot be described as one of prompt pursuit and which in fact resulted in voluminous pleadings. The result, in turn, was that there were, when the case came to be called on, a really large number of issues, some of them complex. Moreover, it was a case which, by the very nature of the origin of the litigants, was bound to result in difficulties of communication as between the parties, the witnesses, and the court. Those difficulties were, as my Lord has mentioned, referred to in the judgment below as being "inevitable." They were increased by what the judge described as "the rapidity and the sometimes inaudible way in which evidence was given on both sides." The difficulties were thus not only inevitable, but they did arise and they affected all concerned in court with the trial of this suit.

Not least, those difficulties fell upon the husband, who was in person and who had the always arduous task of conducting his own litigation, taking such notes as he could of what was happening, and giving evidence when that was his function. Not having legal aid at the moment when the cause was called on, he had, however, the advantage at that moment of having sitting beside him a young man who had been deputed to help

him by a firm of solicitors whom he had previously instructed. That young man happened to be someone who was qualified as a member of the Bar in Australia: obviously the assistance which he could give might well have proved valuable. On the first day of the trial, however, his position beside the husband attracted the attention of the judge, who asked him who he was and who then spoke to him in terms which he, the young man, not unnaturally took to be an intimation that he should desist from what he was doing. He went away, first to the back of the court and then out of the court.

That young man, however, had done nothing, so far as this court has been able to ascertain, other than sit quietly beside the husband and give him from time to time some quiet advice or prompting. In those circumstances, the husband was fully entitled to have that assistance, and the young man was fully entitled to give it. That was settled in 1831, when Lord Tenterden C.J. in *Collier* v. *Hicks*, 2 B. & Ad. 663, said, at p. 669:

> "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice."

That statement of the position has never been criticised since. In saying that I have in mind *Tucker* v. *Collinson* as reported in The Times, February 11, 1886 (reported on another point in 34 W.R. 354). In that case a lady, stricken with court dumbness when her appeal was called on, was not allowed to have the assistance of somebody who wished to help her. But that ruling turned on some very special provisions of the in forma pauperis procedure then in force: it had nothing whatsoever to do with a case like the present.

What in the circumstances is the result in the present case of the judge having fallen into error in sending this young man away? Mr. Payne submitted that there had been such a denial of justice as to render the trial a nullity. His alternative point was that, if it was not a nullity, it was an irregularity or defect which it had to be shown had caused no prejudice to the husband. No cases have been cited to this court on the effect of an error of the type now under consideration. I have no hesitation in rejecting the submission that the proceedings were a nullity. It does, however, seem to me that where such an error takes place the onus rests on the opposite party to show that it did not cause prejudice.

Turning to the particular facts of this case, it has been aptly pointed out that this was a lengthy trial, and that the longer the trial the greater is the need of a litigant in person for assistance. It has also been rightly pointed out that the trial of the issue of adultery had some most unusual facets. For instance, the co-respondent cited in the supplemental petition was called and gave evidence of adultery which was completely denied by the wife. There was, too, the note of April 13, 1966, by a consultant psychiatrist which prima facie indicated that the wife may well have confessed that she was pregnant by a man other than her husband. That note the judge treated as being almost a hieroglyphic and illegible, although it seems to me to bear only one possible construction: but anyway it was something that created a difficulty, a need for elucidation, and a need

for advice to be given as to how to deal with the matter. It is not necessary to go into other potential causes of prejudice to the husband in a case like the present.

On the other hand, I am fully aware that this particular litigant was one who was described by the judge as adroit and nimble, and one able to try to turn matters to his advantage; that he was rated to be a remarkably intelligent and astute person; and that he was able to "think on his feet" and (as the judge put it) to make any trick which he thought he could capture. I am also aware and give full credit to both the judge and counsel for having rendered every practicable assistance to the husband, endowing him, perhaps, with certain advantages that he would not have had if he had been represented by counsel. Nonetheless, at the end of the day one comes to this. As Mr. Payne aptly pointed out, all the assistance a litigant in person receives from a judge and from opposing counsel is not really the same thing as having skilled assistance at his elbow during the whole of a lengthy trial. In those circumstances it has not been shown that there was no prejudice to the husband on the adultery issue through lack of assistance which he ought to have had. It is moreover always, to my mind, in the public interest that litigants should be seen to have all available aid in conducting cases in court surroundings, which must of their nature to them seem both difficult and strange. I too agree that in those circumstances there should be a new trial on the one issue to which my Lord has adverted.

KARMINSKI L.J. I agree. The effective dismissal by the judge of the help of Mr. Hanger was in my view wrong, having regard to all the circumstances of the case. It was a heavy case, with grave issues of fact, and there were, as has been pointed out, certain language difficulties which made the judge's task more difficult. Although the judge may have come to a correct decision on the facts of this case, I am not certain that he did, nor that he would have come to the same conclusion if Mr. Hanger had been allowed to stay and help the husband.

I agree with the order proposed by my Lords and that the appeal should be allowed and a new hearing ordered accordingly.

Appeal allowed.
New trial on issue of wife's adultery only before different judge.
Costs below and of new trial reserved to judge at new trial.
Decree nisi rescinded.
Legal aid taxation of wife's costs.

Solicitors: *Jeffrey Gordon & Co.; Hepburns.*

N. P.