09/75

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

WILKIE v PUBLIC TRANSPORT COMMISSION

Moffitt P, Reynolds and Hutley JJA

12 February 1974

PROCEDURE – FAIR TRIAL – INTERFERENCE BY JUDGE – PROCEDURE TO BE ADOPTED.

Application for a new trial on grounds of unreasonable interference of the judge at the trial. Trial judge took over the task of examining the complainant to the extent that he asked 12 questions, whilst both counsel asked a total of 157. Many of his questions were on matters upon which evidence in chief had not been led; he became so impatient with the witness as to confuse her; and he subjected her to sustained questioning appropriate to that of a cross-examiner rather than of a judge seeking to clarify some matter.

HELD: Application granted.
1. No doubt the course taken by the learned judge was well intended, but it represented a serious departure from the procedure conventionally adopted to procure a fair trial. A judge has a wide discretion as to the conduct of a trial and an appellate Court is reluctant to circumscribe that wide discretion. However there are limits beyond which it is unwise to go, lest a fair trial and the appearance of a fair trial be denied to a litigant.

2. Though the failure of counsel to protest was a factor which the court had to consider, and may be decisive in some cases, as it may lead to the inference that the intervention of the trial judge was not really unwelcome, this was not such a case. It was counsel's duty to remain in the case doing the best for his client in spite of the difficulties His Honour's conduct put in his way. His continuing to act without protest did not amount to acquiescence.

THE COURT: ... No doubt the course taken by the learned judge was well intended, but it represented a serious departure from the procedure conventionally adopted to procure a fair trial. A judge has a wide discretion as to the conduct of a trial and an appellate Court is reluctant to circumscribe that wide discretion. However there are limits beyond which it is unwise to go, lest a fair trial and the appearance of a fair trial be denied to a litigant, Lord Greene MR in *Yuill v Yuill* [1945] 1 All ER 183; [1945] P 15 at 20; 61 TLR 176) said:

> 'A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the judge from what it is when he is being questioned by counsel, particularly when the judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.'

Lord Denning in *Jones v National Coal Board* [1957] EWCA Civ 3; [1957] 2 QB 55 at 64; [1957] 2 All ER 155; [1957] 2 WLR 760 said:

> "So also it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other; see *R v Cain*, *R v Bateman* and *Harris v Harris*, by Birkett LJ especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost: see *R v Clewer* (1953) 37 Cr App R 37. The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Chancellor Bacon

spoke right when he said that: 'Patience and gravity of hearing it an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"

These are standards that have been adopted in our Courts (*R v Martin* (1960) SR (NSW) 286; *Tousek v Bernet* (1959) 61 SR (NSW) 203; 77 WN (NSW) 838.)

The respondent submitted that the applicant's counsel had not objected to the judge's conduct. Counsel should have respectfully requested His Honour to desist. This court cannot ignore the fact that there are special problems in making a complaint to a judge that he is acting non-judicially in taking over the conduct of a case. Only after much of the damage has been done does his conduct become plain. Apart from this difficulty the applicant's counsel could hardly have intervened to ask that His Honour exhibit the same attitude to the respondent's witnesses as he had to the applicant. Though the failure of counsel to protest is a factor which the court has to consider, and may be decisive in some cases, as it may lead to the inference that the intervention of the trial judge was not really unwelcome, this is not such a case. It was counsel's duty to remain in the case doing the best for his client in spite of the difficulties His Honour's conduct put in his way (*Brassington v Brassington* (1961) 3 All ER 988 at 990 (CA)). His continuing to act without protest does not amount to acquiescence.
