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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

ZANATTA v McCLEARY

Street CJ, Samuels and Mahoney JJA

14 April 1976 — (1976) 1 NSWLR 230

PRACTICE AND PROCEDURE – TRIAL JUDGE ADMITTED AFTER THE DECISION THAT HE TOOK INTO ACCOUNT MATTERS NOT IN EVIDENCE – EXTRA-CURIAL STATEMENTS OF ADJUDICATORS – WHETHER ADMISSIBLE – WHETHER JUDGE CAN BE COMPELLED TO TESTIFY TO THE CONSIDERATIONS WHICH LED HIM TO HIS DECISION.

This was an appeal from an order of damages for injuries sustained by the plaintiff in a motor car accident. One ground of appeal being that the trial judge took into consideration matters not in evidence before the Court. It was alleged in affidavits supporting the application, that subsequent to the hearing, the trial judge admitted in a conversation at the local club he had considered certain matters not revealed in evidence. Upon an application for the sworn affidavits to be admitted.

HELD: Appeal dismissed.
1. Street CJ: Evidence cannot be adduced from a judge seeking to establish how his decision was reached, whether the line of inquiry be directed to the admissibility of the material before him, to the process of reasoning he adopted, to the weighing by him of extraneous irrelevancies or otherwise to matters underlying his adjudicative process. The correctness or regularity of proceedings before him is not examinable in the light of subjective evidence from the judge who heard the case. There are strong considerations of public policy in denying to any party the freedom to elicit from a judge evidence of this character. Nor is it without significance that no such case can be found where such evidence has been tendered and admitted.

2. Samuels JA: A judge of a court of record cannot be compelled to testify to the considerations which led him to his decision, or to the manner in which he has exercised his judicial powers. This principle is founded upon grounds of policy which are obvious enough. Its application does not mean that judicial determinations are shrouded from scrutiny. Ordinarily, a judge has a duty to state the reasons for his decision, and his failure to do so may itself amount to an error of law.

STREET CJ: ... Before coming to the legal significance of the matters advanced on this appeal, some preliminary comment is called for. Passing over the question of the prudence of a judge taking part in a conversation in such terms as are alleged in the affidavits, it is a departure from the dictates of good taste and a regrettable repudiation of the privilege of professional intimacy for counsel and solicitor, made privy to a confidential, albeit indiscreet, disclosure by a judge, to publish to the world at large the sentiments and information thus confided in them. The unpalatable fact is, however, that these affidavits have been sworn and filed, and it falls to the Court to decide whether or not they should be admitted.

There is a surprising absence of authority touching upon the tendering before an appeal court of evidence of statements made by the trial judge of an inferior court after the conclusion of the proceedings in his court. It is, of course, clear enough that during the course of the proceedings, whether in the courtroom itself or elsewhere, such as on a view, anything said by the presiding judge could be the subject of examination of an appeal. But where, as in the present case, the proceedings in the court below have wholly terminated, the trial judge would, generally speaking, cease to fulfil any judicial role in relation to those proceedings.

To this generality there are some obvious exceptions. The requirements of s11 of the *Criminal Appeal Act* that the trial judge should furnish a report for the Court of Criminal Appeal provide one exception. Another will be found in circumstances in which some administrative question might arise concerning the working out of the order. Other exceptions could, no doubt, be stated. But none would extend to a casual, social conversation such as is sought to be tendered in evidence in the present case.

The purport of the evidence in the affidavits is that the Judge stated after the hearing that he had taken into account not only certain personal views that are said to have been inadmissible, but also information received by him indirectly from the local doctor. The criticism which is sought to be founded upon the contents of these affidavits is that the Judge, in taking this material into account, in effect admitted evidence which was not only inadmissible but which was irregularly before him. The allegations in the affidavit are directed to establishing both the irregularity by which this evidentiary material was taken into the scales by the trial Judge, as well as the inadmissibility of the material itself.

Neither the researches of counsel nor my own researches have brought to light any authority directly supporting, or even touching upon, the admissibility of evidence of statements made by a judge after the end of the trial on matters of this nature. In *re Whiteley and Roberts' Arbitration* (1891 1 Ch 558), Kekewich J held, as is summarised in the headnote of that case:

> 'Evidence of an admission out of Court by an arbitrator, that he made his award improperly — as, for example, by collusion or in consequence of a bribe — is not admissible in support of an application to set aside the award.'

Whilst that case appears to go a very long way and might require critical examination if the point were to arise again, it is at least consistent with the general proposition that evidence is not admissible of subsequent statements made by a person who has adjudicated or judge, tending to affect the rights of the parties under his adjudication. He being *functus officio*, this is but a basic rule of evidence. What the arbitrator or judge might say about the dispute after fulfilling his function in regard to it is pure hearsay.

A judge does not fulfil a role comparable, for example, to statutory tribunals of the character of those which, far from determining a dispute between parties, exercise an original and direct administrative authority over an individual. In such a case the administrative authority is fairly to be regarded as the opposing party to the individual, and subsequent statements made by it might be admissible in proceedings brought to examine the validity or effect of its decision. A judge is remote from the contest and from the parties and his subsequent statements implying error on his part or procedural irregularity have, in general, no evidentiary significance as between the parties themselves. If a question of alleged dereliction of duty on the part of the judge arose, the position might be different. But that is not this case, and I express no opinion in that regard. In a complaint of error, such as is here advanced, the other litigant is not to have his rights questioned upon the basis of hearsay evidence such as a subsequent statement by the trial judge.

The affidavits of the barrister and solicitor, tendered by the appellant, consisting as they do of hearsay, are inadmissible and should be rejected.

It becomes necessary then to examine the application made on behalf of the plaintiff that, in the event of the affidavits being rejected, an opportunity should be afforded her to call the judge himself to give direct evidence of his adjudicative processes.

In *Phipson on Evidence*, 11th Edition, para. 569, it is said:

> 'Judges of the superior courts cannot be compelled to testify to matters which have arisen before them in other trials; though this does not extend to collateral incidents occurring during such trials – e.g., the attempted rescue of a prisoner in court. But there is no objection to the judge of an inferior court being called in some circumstances, although it would seem highly undesirable to call such a witness unless there was absolutely no other means of proving some piece of evidence vital to proceedings...'

There are many cases also touching the position of arbitrators when called as witnesses in subsequent proceedings, but these cannot be applied either directly or by analogy to the case of a judge. In *Hennessy v Broken Hill Pty Ltd Co Ltd* [1926] HCA 32; (1926) 38 CLR 342 at 349 the High Court said:

> 'Even Judges are competent witnesses, though they may not be compellable to testify as to matters in which they have been judicially engaged; but their evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers. Arbitrators, too, are equally competent as witnesses, though they cannot be compelled to testify as to the reasons which influenced them in the exercise of their discretionary powers or to explain, vary, contradict or extend their awards ...'

Neither of these general statements, nor, for that matter, any other direct authority of which I am aware, resolves the question of whether oral evidence could be sought to be elicited on this appeal from the Judge himself, not being a judge of a superior court. But drawing upon such guidance as is to be derived from the authorities, I am of opinion that evidence cannot be adduced from a judge seeking to establish how his decision was reached, whether the line of inquiry be directed to the admissibility of the material before him, to the process of reasoning he adopted, to the weighing by him of extraneous irrelevancies or otherwise to matters underlying his adjudicative process. The correctness or regularity of proceedings before him is not examinable in the light of subjective evidence from the judge who heard the case. There are in my view strong considerations of public policy in denying to any party the freedom to elicit from a judge evidence of this character. Nor is it without significance that no such case can be found where such evidence has been tendered and admitted.

For the foregoing reasons I am of the view that it is not open to the plaintiff to follow the course foreshadowed during the hearing of the appeal, that is to say, to call the Judge himself for the purpose of giving evidence of the matters taken into account by him and as to his approach to his adjudication upon the plaintiff's claim for damages.

SAMUELS JA: *[His Honour rejected the affidavits in support as irrelevant to any ground of appeal and considered whether a judge is compellable to the considerations which influenced his judgment. The salient part of his judgment reads]:—* In *Hennessy v The Broken Hill Proprietary Company Limited* [1926] HCA 32; (1926) 38 CLR 342 at p349 where Knox CJ, Gavan Duffy & Starke JJ in a joint judgment said:—

> 'Even Judges are competent witnesses, though they may not be compellable to testify as to matters in which they have been judicially engaged: but their evidence has been received upon matters which did not involve the exercise of their judicial discretions and powers.'

Buccleuch (1872) LR 5 HL 418 concerned the evidence of arbitrators: but their privileges cannot be greater than those of Judges. Hence, in my opinion, the principle is this. A judge of a court of record cannot be compelled to testify to the considerations which lead him to his decision, or to the manner in which he has exercised his judicial powers.

The principle is founded upon grounds of policy which are obvious enough: they were expressed by Cleasby B p432 in the passage quoted above. Its application does not mean that judicial determinations are shrouded from scrutiny. Ordinarily, a judge has a duty to state the reasons for his decision, and his failure to do so may itself amount to an error of law: *Pettitt v Dunkley* (1971) 1 NSWLR 376.

I turn to the submission. We were not referred to any authority in which the admissibility of statements made by a Judge out of court has been discussed. But if, as I think, a judge of a court of record is not compellable to testify to the considerations which led him to his decision, and, if, indeed, his own evidence is not to be received upon such matters per Cleasby B in *Buccleuch* (*supra*) I cannot see that they can be proved by evidence of his statements out of court. It is, to my mind, the subject matter of the evidence which is objectionable rather than the mode of proof. But it is true that a Judge is not, of course, a party to the proceedings before him. Hence it may be said that his extra-curial statements concerning any issue which has been litigated before him and determined is no more than hearsay. It was on this ground that Kekewich J in In *re Whiteley & Roberts' Arbitration* (1891) 1 Ch 558 rejected an arbitrator's admission tending to show that he had been bribed by one of the parties. I would reserve my opinion about the correctness of that decision.

It is unnecessary, in this case, to express any final view as to whether there are circumstances in which a court will receive evidence of extra-curial statements made by a judge concerning a proceeding in which he has given judgment. But I am firmly of the opinion that such evidence is not admissible if its purpose is to show the process of reasoning or the factors taken into account in coming to the decision.

The affidavits assert that in the conversation which they purport to recount the learned Judge not only offered a private exposition of the grounds upon which he determined the factual issues before him, but dilated upon his own experience in support of his opinion. It is, however, unnecessary

to decide whether this encounter took place in the terms alleged and I do not do so. But it would be destructive of the mutual confidence which must exist between the bench and the profession if social occasions were to be used as a means of recording a judge's private conversation — however imprudent — for the purpose of showing that he has expressed personal views of a particular kind.

MAHONEY JA: *[His Honour rejected the affidavits in support and continued]* ... Two further matters should be mentioned. The appeal has been dealt with upon the assumption that his Honour, the District Court judge, said and did the things referred to in the two affidavits tendered. There has been no examination of the truth of the matter so assumed; no decision has been made that his Honour did say or do any of such things.

Second, reference may be made to the general question of the tender of the kind of evidence appearing in the affidavits in question. I would not desire to qualify the right of a party, or the right of his professional advisers, fearlessly to press every matter which, within the law, may properly be pressed in support of a claim. However, justice requires that a proper sense of responsibility be exercised in this regard and if evidence, the tender of which is apt to cause damage to others, will not be admissible, then justice will normally require that that evidence be not tendered. The fact that such evidence may, if accepted according to its terms, indicate a degree of indiscretion would render it less rather than more appropriate to be tendered. Matters of indiscretion, if they arise, may be dealt with by other means.
