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BROADCAST MUSIC, Inc., et al. v. HAVANA MADRID RESTAURANT CORPORATION

No. 249, Docket 21309

UNITED STATES COURT OF APPEALS SECOND CIRCUIT

175 F.2d 77; 1949 U.S. App. LEXIS 4549; 81 U.S.P.Q. (BNA) 506

May 27, 1949

LexisNexis(R) Headnotes

SYLLABUS: [1]**

Plaintiffs alleged the infringement by defendant of the copyrights to eight musical compositions owned by plaintiffs, Peer International Corporation and Edward B. Marks Music Corporation, and exclusively licensed to plaintiff Broadcast Music, Inc. (hereinafter called B.M.I.). It was stipulated by the parties that the copyrights were valid and were owned by the plaintiffs, and it was admitted that the defendant was not licensed to play B.M.I. music. The only issue remaining is whether defendant, owner of the Havana Madrid Restaurant in New York, performed the compositions in that restaurant on August 13, 1946.

The sole witness called on behalf of the plaintiffs was Fernando Castro, who has been since 1932 professional manager for the Latin–American Department of plaintiff Peer International Corporation. On direct examination, he testified as follows: On the night of August 13, 1946, accompanied by his wife and a friend, he went to the Havana Madrid Restaurant at the request of Mr. Harold Orenstein, an employee of plaintiff Braodcast Music, Inc. He went there for the specific purpose of finding out whether defendant was performing any musical compositions licensed to B.M.I. He **[**2]** stayed about four hours, making notes of the titles of songs played by the orchestra. Subsequently he made a typewritten list of the songs and send this list to Orenstein with a letter, three days after his visit to the restaurant. After typing this list, he threw away his handwritten notes. A few days before coming into court to testify in this action, he examined his copy of this typewritten list, and this, plus examination of a copy of the list–which was identified in court although not offered in evidence–refreshed his recollection as to the songs played. The only other time he had examined the list was about a week before his deposition was taken in April, 1948. He named eleven songs played on the night of August 13, 1948, including the eight which are the basis of this action. He is thoroughly familiar with Latin–American music and can recognize the melodies and words of songs of that type.

On cross–examination, he testified that he visited places similar to the Havana Madrid Restaurant frequently; that, many times he had heard the orchestra leaders who played that night at the Havana Madrid; that he personally typed the list from his notes, but that he had dictated the **[**3]** letter to Orenstein, attached thereto.

The only witness called by the defendant was its president, Angel Lopez. He stated that he had instructed the orchestras which played at the Havana Madrid not to play B.M.I. music, and had posted signs to that effect; that he does not select the music used; that he had no knowledge at the beginning of the evening of the songs to be played, and that he did not remember whether any of the songs as to which infringement is claimed were played on the night in question.

After the close of all the evidence, the trial judge dismissed the complaint, finding that 'The evidence adduced at the trial was insufficient to establish that, on the evening of August 13, 1946, the said musical compositions above referred to were publicly performed for profit at defendant's place of business.'

The trial judge's opinion was as follows:

'The proof tending to establish the claims of infringement of plaintiff's copyrights of musical compositions consisted of the testimony of a single witness who is employed by one of the plaintiffs. He was at least an indirectly interested witness. He had been commissioned by BMT, the real party in interest to whom the rights **[**4]** had been assigned, to log the program at the Havana Madrid Restaurant on the night of August 13, 1946. Several circumstances give rise to doubt as to the value of his testimony. Two persons accompanied him at the restaurant and spent the evening there, his wife and a friend. Presumably they knew the purpose of the visit. They may or may not have been able to identify the various compositions which the witness said were played

but at least they must have known, if it was the fact, that the witness was logging the compositions as they were played. He said he made notes during the evening as to the various numbers that were played. Neither of these witnesses was called nor was any explanation offered as to why they were not called as witnesses. He said he destroyed his original notes the following day after he had made a typewritten copy. This copy he said he mailed on August 19th, 1946, to Orenstein who had commissioned him to log the program. Orenstein was in charge of obtaining contracts for BMI for the performance of music in the various nightclubs in New York. Although a copy of the letter and the typewritten list were marked for identification, they were not offered in evidence. **[**5]** Orenstein was not called as a witness. He could have corroborated the witness as to the commission and the receipt of the letter with the typewritten list of compositions played. Moreover, although Orenstein is supposed to have received the lsit or compositions played in August, 1946, so far as the evidence shows BMI never informed the defendant that it was claiming that the defendant had infringed its rights until the filing of this suit in April, 1947. Under the circumstances I am not convinced by the testimony that the plaintiffs' copyrights were infringed as alleged. The complaint should be dismissed.'

Rosenman, Goldmark, Colin & Kaye, New York City (Godfrey Goldmark and Murray Cohen, New York City, of counsel), for plaintiffs.

A. Allen Saunders, New York City, for defendant.

COUNSEL:

Rosenman, Goldmark, Colin & Kaye, New York City (Godfrey Goldmark and Murray Cohen, New York City, of counsel), for plaintiffs.

A. Allen Saunders, New York City, for defendant.

JUDGES:

Before L. HAND, Chief Judge, and AUGUSTUS N. HAND and FRANK, Circuit Judges.

OPINIONBY:

FRANK

OPINION:

[*79]

Plaintiffs contend that, as the testimony of the witness Castro was uncontradicted, unimpeached **[**6]** by anything appearing in the record, and not inherently improbable, the trial judge was obliged to accept it as true, and that therefore the judge's findings are 'clearly erroneous.' We cannot agree.

Whether the so–called 'uncontradicted testimony' rule has been adopted by the Supreme Court we are not at all sure. n1 Sponsors of that rule point to *Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 51 S.Ct. 453, 456, 75 L.Ed. 983.* But there the Court was at pains to explain that the testimony of the witness–not as to something he did, saw or heard on a specific occasion, but as to what, in ordinary circumstances was a reasonable time for delivery of a shipment by a railroad company–was 'so completely corroborated by the undisputed facts * * * as to put it beyond the reach of a fair doubt.' The rule, absent such qualifications, had been rejected in several states, n2 and has little to commend **[*80]** it rationally. n3 For the demeanor of an orally–testifying witness is 'always assumed to be in evidence.' n4 It is 'wordless language.' The liar's story may seem uncontradicted to one who merely reads it, yet it may be 'contradicted' in the trial court by his manner, **[**7]** his intonations, his grimaces, his features, and the like–all matters which 'cold print does not preserve' and which constitute 'lost evidence' so far as an upper court is concerned. n5 For such a court, it has been said, even if it were called a 'rehearing court,' is not a 'reseeing court.' n6 Only were we to have 'talking movies' of trials could it be otherwise. A 'stenographic transcript correct in every detail fails to reproduce tones of voice and hesitations of speech that often make a sentence mean the reverse of what the words signify. The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.' n7 It resembles a pressed flower. The witness' demeanor, not apparent in the record, may alone have 'impeached' him. n8 The alleged 'rule,' if taken literally, would return us to the practice of 'trial by deposition,' which common–law procedure rejected and which, in recent years, has been rejected in federal noncommon law trials as well. n9

Without doubt, the result of our procedure is to vest the trial judge with immense power not subject to correction even if misused: His estimate or an orally testifying **[**8]** witness' credibility may stem from the trial judge's application of an absurd rule–of–thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying; n10 but, unless the judge reveals of record that he used such an irrational test of credibility, an upper court can do nothing to correct his error. We thus have what Tourtoulon called the 'sovereignty' of the trial judge. Demeanor, to be sure, is no infallible guide to reliability of testimony; yet, as matters now stand, it is one of the best guides available.

We shall, however, assume, arguendo, that the rule prevails in the federal courts. Even so, it will not avail plaintiffs. For among the exceptions to the rule is this: It

is inapposite if the witness has an 'interest.' n11 The mere fact that he is an ordinary employee may not be enough to show such an interest where, as in the Chesapeake & Ohio case, his testimony is 'completely corroborated by the undisputed facts.' But here the witness was not only a general employee of the plaintiff, Peer International Corp., sole owner of the copyrights to seven of the songs, but he had been specifically requested by the plaintiff, Broadcast Music, **[**9]** Inc. (the exclusive licensee of the copyrights), to act as a sort of detective in obtaining the very evidence as to which he testified. The trial judge correctly said that such a witness is **[*81]** 'interested.' *Nostetter v. Bower, C.C., 74 F. 235; Hennessy v. Wine Growers' Association, D.C., 212 F. 308, 310.* As Castro's testimony had no corroboration, this case comes within the 'interest' exception to the rule. We may not, then, disregard the trial judge's finding of fact based obviously on his disbelif of the testimony on which plaintiffs rely. n12

It is suggested that the judge believed Castro but refused to accept his testimony solely because it was not corroborated. We do not so read the judge's opinion. We think he had the 'uncontradicted witness' rule in mind, and, accordingly, pointed to the witness' interest and to the lack of corroboration in order to bring the case within the exception. Plaintiffs urge that some f of the other reasons assigned by the judge are unsound. We need not consider whether or not that is true, for we think it enough that he gave a sound reason. n13

Affirmed.

n1. See *Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733, 851, 35 L.Ed. 501.*
[10]**

n2. See *8 A.L.R. 796,* Annotations.

Perhaps, at any rate, it is inapplicable to the findings of a trial judge in a juryless case. Cf. *Golden Eagle Farm Products v. Approved Hydrating Co., 2 Cir., 147 F.2d 359, 360,* Note 1; *Cohen v. Commissioner, 2 Cir., 148 F.2d 336, 337; Railway Mail Association v. Chamberlain, 8 Cir., 148 F.2d 206, 207;* 2 Collier on Bankruptcy (14th Ed.) 966 (1948 Supp.) note 26, commenting on *Matter of New Style Hat Mfg. Co., D.C., 43 F.Supp. 122.*

n3. A somewhat cynical commentator has said: As applied to uncontradicted testimony there are two broad rules: one, that the uncontradicted testimony of a witness is for the jury; the other, that the jury may not arbitrarily reject the uncontradicted testimony of a witness; and the courts apply one or the other as they mean to leave the matter to the jury, or to interfere. In the statement of these two rules the courts sometimes give preference to the power of the jury, and sometimes, on the other hand, require the jury to accept uncontradicted testimony unless there is some apparent reason against it.' *8 A.L.R. 796, 796.*

n4. Wigmore, Evidence, § 949.
[11]**

n5. *Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F.2d 975, 977.*

n6. Powell and Wife v. Streatham Nursing Home (1935) A.C. 243, 149–150.

n7. **Ulman, The Judge** Takes The Stand (1933) 267.

n8. See, e.g., *Quock Ting v. United States, 140 U.S. 417, 11 S.Ct. 733, 851, 35 L.Ed. 501; Arnstein v. Porter, 2 Cir., 154 F.2d 464, 470,* and cases there cited.

An upper court 'of necessity has to operate in the partial vacuum of the printed record'; Employers Liability Ass'n Corp. v. Sweatt, 95 H.H. 31, 57A.2d 157, 160.

n9. See, e.g., *Arnstein v. Porter, 2 Cir., 154 F.2d 464, 471–472.*

n10. See *Quercia v. United States, 289 U.S. 466, 468, 53 S.Ct. 698, 77 L.Ed. 1321.*

n11. See, e.g., *Quock Ting v. United States, 140 U.S. 417, 421, 11 S.Ct. 733, 851, 35 L.Ed. 501; Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 402, 408, 19 S.Ct. 233, 43 L.Ed. 492; Railway Mail Association v. Chamberlin, 8 Cir., 148 F.2d 206, 207; Doering v. Buechler, 8 Cir., 146 F.2d 784, 785–786.*

n12. Judges are usually reluctant to call a witness a liar. See Moore, Facts (1908) §§ 1048–1050. They prefer more polite locutions, such as saying his testimony was 'latitudinous'; see Mr. Justice Baldwin in *Poole v. Nixon, 19 Fed.Cas. 992, at p. 996,* No. 11,270.

Moreover, as may well have been the case here, the judge may think the witness did not commit perjury but was honestly mistaken, because of bias or for other reasons.
[12]**

n13. Plaintiffs cite *United States v. United States Gypsum Co., 333 U.S. 364, 394–395, 68 S.Ct. 525, 542, 92 L.Ed. 746.* We think that case inapposite. It teaches that the findings of a trial judge may have somewhat less significance than that of a jury or that of some administrative agencies. It also teaches that a trial judge's finding may be 'clearly erroneous,' although apparently supported by oral testimony, where that testimony 'is in conflict with contemporaneous documents' of such character that it would be unreasonable to believe what the witness said.