IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 60 of 1978

Between:

ANURADHA
d/o Ram Swamy Reddy — Appellant

and

1. MATA PRASAD s/o Suruj Bali
2. VIJAY KRISHNA REDDY — Respondents

S.M. Koya for the Appellant
F.S. Lateef for the Respondents

Date of Hearing : 20 November 1978
Delivery of Judgment: 30/11/78

JUDGMENT OF THE COURT

Henry J.A.

This is an appeal by a wife against the granting of a decree nisi on the ground of adultery. It is convenient to call the parties "the husband", "the wife" and "the co-respondent". The husband alleged that the wife had committed adultery with the co-respondent between July 5, 1975 and September 23, 1976. The wife denied that she had committed adultery. There is no pleading on the record so

far as concerns the co-respondent. At the hearing he appeared and denied committing adultery. He took part in the hearing during the case for the husband but thereafter failed to put in an appearance. He was not present at the hearing of this appeal.

Proceedings were commenced in the Magistrate's Court at Suva under the provisions of Part XI of the Matrimonial Causes Act 1968. A magistrate conducted the hearing pursuant to Sections 68 and 69. A certified copy of the proceedings was forwarded to the Supreme Court. In accordance with Section 70(a) the learned magistrate gave an opinion to the effect that the husband had established the allegation of adultery to his satisfaction and that the offence had not been condoned. The proceedings then came before the Supreme Court where the file was minuted by a Judge "Decree Nisi, Report on children to be obtained from Social Welfare Officer". This minute was signed by the Judge. A decree nisi was sealed. This decree is in the prescribed form and states (inter alia) "Upon considering the petition filed herein and the evidence taken thereon the Supreme Court Doth Decree ....." then follows the formal order for a decree nisi.

Questions of law have been raised concerning the validity of the decree nisi issued and sealed in that manner but before proceeding to deal with those submissions, the nature of the evidence and the findings made ought to be examined. The spouses were married in 1965 and have 2 children,

both boys, now aged 6 years and 4 years. In July 1975 the husband left Fiji to study in India. He returned in June 1976. It will be noted that the allegation of adultery is between July 1975 and September 23, 1976 so the period extends for some 3 months after his return. During that period the husband and wife resumed cohabitation in the matrimonial home so a substantial question of condonation arose if the fact of adultery were proved. On appeal questions of proof of adultery and whether or not there had been condonation were argued as grounds of appeal. We find it convenient to deal with these questions before turning to the question of the validity of the decree nisi.

Proof of adultery depended on the uncorroborated evidence of a housegirl described as a divorcee aged 26 years. The evidence was that the husband arranged for his mother and the housegirl to live with his wife and children whilst he was away in India. The husband, whose evidence was accepted, stated he did not know the co-respondent until he was introduced to him by his wife on his arrival at Nausori. The housegirl said that in the month of September 1975 a telephone was installed in the home. Co-respondent started visiting the wife at her home. The witness was told by the wife that the co-respondent was a brother of her sister. He was not. The children called him "Police uncle". The husband's mother stayed for only 2 months when she returned to Labasa having had her fare paid by the wife. The

housegirl said that the wife asked the mother to return to Labasa. During that period there were numerous visits by co-respondent to the home and numerous telephone calls which can properly be inferred to be regular calls by co-respondent to the wife. Co-respondent was taken into the bedroom and shown some of the wife's saris.

The housegirl spent every alternate weekend at her parents' home in Naboro. On one such weekend she missed a bus after attending the Colonial War Memorial Hospital for her "usual treatment" so she returned to the matrimonial home at about 9 p.m. The opinion of the learned magistrate on this incident may now be cited. He said:-

> " She couldn't catch a Navua bus and was obliged to return to the respondent's home at 9 p.m. She saw the Co-respondent there. She prepared meals for them and also witnesses the Co-respondent embracing the Respondent; shouting "South Indian is a low caste". She said the respondent stopped her from disclosing to anyone of this particular incident. She went on to say that the Respondent and the Co-respondent went out shopping on a number of occasions. The Co-respondent spent most of the weekends with her at her matrimonial home. One particular night they made noises in her bedroom. The Co-respondent did not leave until 5 a.m."

This witness was cross-examined by counsel for the wife and by the co-respondent himself at some length. It was after this that the co-respondent took no further part in the proceedings. It was

claimed that the housegirl had fabricated her evidence.

The husband in evidence concerning the attitude of his wife on his return said:-

> "I returned from India in June 1976. At Nausori Airport my wife, my children and the Co-respondent. My wife introduced me to the Co-Respondent saying he was her distant cousin.
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> I went to Labasa for a few days. The co-respondent came to my house had his meal and returned saying he was a special police constable.
>
> I noticed change in her attitude. She always came late from work, giving excuses that her services were required for longer hours because tourists boats were in port of Suva.
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> The telephone calls were for my wife. I taxed her why there were so many telephones for her. My housegirl told me certain things. She continued to come home late. I asked her to give up her job. She refused to give it up.
>
> On 23/9/76 I found her missing from home. All her personal effects disappeared."

The evidence of the wife was a denial of the story of the housegirl. She denied that the co-respondent accompanied her and the children to the airport. She said she had known the co-respondent since 1965 and said he visited the house while her husband was there and that her husband "knew him all along". She said her mother-in-law asked co-respondent to cut the grass in the compound. She denied receiving phone calls or that she returned late from work. Her explanation

of visits from co-respondent, in addition to his cutting the grass, appears as follows:-

> " I did not force my housegirl to go out every weekend when the Petitioner was in India.
>
> I was never annoyed with her. It is not true that the co-respondent came home in the evenings - after work. He did come in the absence of my mother-in-law. He spent about 15 minutes only. He lives in Samabula. He is single - only 22 years of age. At times he had dinner at home with me. He stayed with me for sometime - short while. He visited me during the weekends. When the Petitioner was in India he visited me every 3rd or 4th weekends. Between 10.00 a.m. or 11.00 a.m. and 3.00 p.m.
>
> I have never stayed at home during the week days. I did not sleep with Co-respondent. The child did not say that he would not sleep with me because the Co-respondent used to sleep with me."

Her explanation for leaving home in September 1976 was that her husband chased her away with a knife so she had to go. She made an allegation, which seems to have been unsupported by any detail, that the housegirl told the respondent that she Ramratti "was loving and keeping the petitioner."

Section 94 deals with questions of proof. It enacts that:-

> "94.(1) For the purposes of this Ordinance, a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court.

" (2) Where a provision of this Ordinance requires the Court to be satisfied of the existence of any ground or fact or as to any other matter, it is sufficient if the Court is reasonably satisfied of the existence of that ground or fact or as to that other matter."

In Section 94, which is contained in Part XVI of the Act the expression "the Court" includes a Magistrate's Court.

Section 57 provides:-

"57. Except as provided by this Ordinance, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree."

In this Section the court means the Supreme Court.

In Jamisha Ali v. Hasiman Nisha & Hamid Khan (Civil Appeal No. 53/1976 Judgment March 25, 1977) this court adopted a passage from the judgment of Dixon J in Briginshaw v. Briginshaw (1938) 60 C.L.R. 336, 368-9, which said:-

" Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbably explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find."

This court also said:-

> "It is the practice of divorce courts generally to require corroboration although a court may act on uncorroborated evidence after carefully scrutinising the circumstances and bearing in mind the nature of the charge made."

Reference was also made to Blyth v. Blyth [1963] A.C. 643.

The learned magistrate accepted the evidence given for the husband and rejected that of the wife. It has now been argued that he failed to take proper advantage of having the opportunity to judge the credibility of the witnesses. It was claimed that the learned magistrate came to his opinion solely on the demeanour of the witnesses and not upon the whole of the evidence. There is no ground for this submission because the learned magistrate said "I have considered the testimony of the witnesses thoroughly. And I have also very closely observed the demeanour of each of them." He then proceeded after reviewing the evidence at some length, to make his "findings". Counsel for appellant relied upon the Yuill v. Yuill [1945] 1 All E.R. 185. The relevant handnote reads:-

> "An impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question, and it was open to appellate Court to find that the view of the trial judge as to the demeanour of a witness was ill-founded."

At page 189 Lord Greene M.R. said:-

> " That it is open to an appellate Court to find that the view of the trial judge as to the demeanour of a witness was ill-founded has indeed been recognised by the House of Lords itself. The case to which I refer was one in which I was engaged as counsel in the Court of Appeal and in the House of Lords, and I think it right to place the matter on record as the only report of the case does not bring out the relevant circumstances. The case is that of Hvalf. Polaris and Another v. Unilever, Ltd., and Others (4) 46 Ll.L.R 29(H.L.). In one respect it resembles the present since the trial judge had himself taken a most active part in the examination of the witnesses."

A passage from the speech of Lord Russell of Killowen at page 72 from the Hvalf.Polaris and Another v. Unilever,Ltd. and Others' case was cited as follows:-

> "I concur with the motion proposed, but I desire to add this, that having carefully studied the shorthand notes of the evidence I can find therein no trace of any matter or thing which would justify the view that the evidence given by the witnesses on behalf of the appellants was otherwise than truthful and accurate."

No material in this case, comparable to that in Yuill's case, has been put forward as a basis for the judge to refuse to accept the opinion. After carefully considering the whole of the opinion and recommendation of the learned magistrate we have a clear view that his findings on credibility were made with a correct appreciation of his task and that they are borne out by a

careful examination of the material before him.

So, accepting the view that the question of credibility was correctly determined, we pass to the findings on adultery and condonation. The general rule as to proof of adultery is conveniently set out in Halsbury's Laws of England 3rd Ed. Vol.12 para. 446 p.237 which reads:-

> "Direct evidence of adultery is rare(k). In nearly every case the fact of adultery is inferred from circumstances which by fair and necessary inference lead to that conclusion (l). There must be proof of disposition and opportunity for committing adultery (m), but the conjunction of strong inclination with evidence of opportunity does not lead to an irrebuttable presumption that adultery has been committed (o), and likewise the Court is not bound to infer adultery from evidence of opportunity alone (p).
>
> The Court will closely scrutinise a case where only a single witness is called to prove a charge of this nature, particularly if that witness is a loose woman with whom the adultery is alleged to have been committed (q), and it looks with strong suspicion on the evidence of paid detectives(r)."

In our opinion upon a careful appraisal of the evidence, once credibility has been correctly determined, the evidence fairly supports a finding of adultery when considered in the light of the law as laid down by Dixon J (supra). Indeed, no satisfactory explanation was given at all of the close association and the acts deposed to over a long period during the husband's

absence and the change of attitude of the wife to him on his return. The explanation of mowing the lawns is quite insufficient to explain the evidence accepted. In our view the finding of the learned magistrate was made upon a proper appreciation of the issues after a careful consideration of all the evidence and his opinion was justified upon the evidence.

Condonation has been stated to be, in general terms, the conditional forgiveness of all such offences as are known to, or believed by, the offended spouse, so as to restore as between the spouses the status ante quo. The learned magistrate said he had reviewed the authorities referred to by counsel on this topic. He held, after stating that he believed the evidence given by the husband and rejected the evidence of respondent, that the offence had not been condoned. The learned magistrate said:-

> " He the Petitioner went to Labasa to his parents place for a short time. He was told something in relation to her conduct upon his return from Labasa. He believed that someone was trying to demolish his marriage."

The husband said:-

> "I returned from India in June 1976. At Nausori Airport my wife, my children and the Co-respondent. My wife introduced me to the Co-respondent saying he was her distant cousin.
>
> I went to Labasa for a few days. The co-respondent came to my house had his meal and returned saying he was a special police constable.

"I noticed change in her attitude. She always came late from work, giving excuses that her services were required for longer hours because tourists boats were in port of Suva.

The telephone calls were for my wife. I taxed her why there were so many telephones for her. My housegirl told me certain things. She continued to come home late. I asked her to give up her job. She refused to give it up.

On 23/9/76 I found her missing from home. All her personal effects disappeared."

Further he said on his return from Labasa when the housegirl told him something he no longer had sex with his wife. After being taxed about phone calls and late hours the wife left home and children and went to the United States of America where her parents resided. On her return she set up house in Sigatoka. After a careful perusal of the evidence, and accepting that the finding of credibility is correct, we are of opinion that the learned magistrate was correct in his conclusion that the offence had not been condoned. In our opinion all the findings of the learned magistrate are clearly supported by sufficient evidence and the learned judge was correct in accepting that opinion as to what decree ought to be made.

The main argument of counsel for appellant turned upon the question whether or not the learned judge had exercised properly, or at all, the jurisdiction conferred on him.

Counsel did not, except in reply, deal to any great extent with the topics just discussed. This for the reason that, if his submissions on the main issue succeeded, any other question was irrelevant. The scheme of the act must now be examined. It is an unusual method of dealing with matrimonial disputes insofar as special provisions have been enacted in Part XI to deal with conditions met with in Fiji - probably on the ground of expense, time and inaccessibility of many parts to the centres where the Supreme Courts sit whilst magistrate's courts are more convenient, less expensive and more accessible. An earlier Ordinance, the Native Divorce Ordinance (Cap. 42), appears to be a former provision which gave similar jurisdiction to magistrates. Its provisions need not be further referred to.

We turn again to review the relevant provisions of the Act of 1968. We have already referred to Section 94 which appears in Part XVI and deals with questions of proof. We need not refer further to Part XVI. The important provisions are those contained in Part XI.

Section 64 gives power to magistrates courts, subject to the rules and restrictions imposed by that Part, to hear proceedings under the Act for dissolution of marriage and judicial separation. Section 68 provides for the taking of evidence at the hearing. By subsection (2) all such evidence shall be taken down in writing, either by or in the presence of the magistrate,

and thereafter read over to and signed by the witness and by the magistrate. This was done.

Section 69 provides:-

"Upon the termination of the hearing the magistrate shall not give judgment but shall adjourn the case for any period not exceeding three months, and, thereafter, for such periods, if any, as may be necessary to give effect to the directions of the Court given under the provisions of the next two succeeding sections."

Section 70 then comes into operation. It provides:-

"(a) As soon as possible after the termination of the hearing, the magistrate shall forward to the Court a certified copy of the evidence taken, together with copies of all process and other documents in the proceedings and a statement of his opinion as to the decree, if any, to which the petitioner is entitled, and the Court may, upon consideration thereof, either accept, reject or modify such opinion, or order -

(i) that further evidence be taken by the magistrate;

(ii) that the case be reheard by that or another magistrate; or

(iii) that the case be transferred to itself for hearing."

It will be noticed that a power is conferred on the magistrates' court to give to the Supreme Court a statement of the opinion of the magistrate as to the decree, if any, to which the petitioner is entitled. The learned magistrate did that. We have already reviewed his opinion and the evidence upon which that

opinion was based.

The further consideration of the case is then for the Supreme Court. That court is called upon to accept, reject or modify the opinion or to make one of the orders in Section 70(a)(i), (ii) or (iii). This Section then provides as follows in subsection (b), namely:-

> "Unless the Court makes any of the orders specified in the last preceding paragraph it shall decide the case and direct what decree shall be pronounced by the magistrate."

The important words are "it (the Supreme Court) shall decide the case and direct what decree shall be pronounced by the magistrate". The decision of the Supreme Court is governed by Section 57 which enacts:-

> " Except as provided by this Ordinance, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree."

According to the minute of the learned judge he directed the issue of a decree nisi which the learned magistrate later pronounced in the Magistrate's Court on August 18, 1978. This was done in pursuance of Section 71. The contention of counsel for appellant was that the learned judge must exercise two separate functions, first, that he shall decide the case, and, secondly, direct what decree shall be pronounced by the magistrate. It is contended that the learned judge exercised only the second function. It was further

contended that he should have given reasons for his decision. It was submitted that a failure to do so was an abdication of the duty of the Supreme Court to decide the case and was no more than a simple reliance on the opinion of the magistrate. This was claimed to be a defect which deprived the Supreme Court of jurisdiction so that the proceedings were a nullity, and, further that the omission could not be cured by remitting the case to the Supreme Court for further consideration and for the making of specific findings.

Part XIV (Sections 91 and 92) provides for appeals. It is clear from Section 92 that the right of appeal is by a person aggrieved by a decree of "the Court" and that this means a decree of the Supreme Court. Stress was laid on the necessity for specific findings to be made in the Supreme Court so that on appeal, the findings made would be available for the determination of the appeal by the appellate court.

The question is whether the Supreme Court did decide the case, which means the case which was forwarded in terms of Section 70(a). The first duty of the Supreme Court was to consider the certified copy of the evidence taken, together with copies of all processes and other documents, and a statement of the opinion of the magistrate as to the decree, if any, to which the petitioner is entitled. Upon consideration of such material the Supreme Court may accept, reject or modify such opinion

or make one of the orders set out in subsections (i), (ii) or (iii). The minute makes it clear that the learned judge did not reject or modify the opinion of the magistrate and did not make any of the further orders under subsections (i), (ii) or (iii). It was then the duty of the judge, having accepted the opinion, to decide the case and to decide what decree the magistrate shall pronounce. In our judgment the minute of the learned judge was not a mere direction to grant a decree nisi. It was a decision by him that he had accepted the opinion of the magistrate and had decided the case after carrying out his statutory duties under Section 70(a) and, having accepted the opinion of the learned magistrate, gave a direction for a decree nisi to be pronounced. The words "Decree Nisi" indicate quite clearly to us that the granting of a decree nisi was his decision and that such a decree should be pronounced. If there be any failure it would be a failure, not in deciding the case, but in failing to follow the decision by an express direction for the pronouncement of a decree nisi in accordance with his decision. We do not agree that there was any such defect, but, if there were, it would not be a matter which went to jurisdiction but was one for this court to exercise its power to give the necessary direction or to send the case back for such purpose. The giving of the direction is mere machinery to give effect to the decision.

The form in which an individual judge minutes a decision or sets out in a formal judgment his particular findings is a matter for

him according to the circumstances of each case. In a defended case it is generally advisable, when accepting the opinion of the magistrate, to give some reason or reasons for so accepting the opinion. It may be no more than an adoption and approval of the opinion after a full consideration of the case. Particular matters may arise which ought to be specifically dealt with. Circumstances vary so greatly that we do not feel it proper to take the matter any further except to say that, if the opinion is rejected or modified it will generally be proper to give full reasons. This, we understand, has been the practice. If the opinion is accepted, then according to the particular circumstances sufficient findings ought to be made. We trust we have said enough to ensure that an argument such as that put forward in this case will not trouble this court again. Before dealing with this question we had earlier considered at some length the findings and opinion of the learned magistrate and concluded that the same were soundly based and disclosed no ground upon which the learned judge ought not to have accepted them. It is clear he did so by endorsing a minute "Decree Nisi" which, in our view, can mean only that his decision was that he was satisfied that adultery had been proved and that there was no condonation and a decree ought to be made and pronounced. To suggest that an experienced judge has not carried out his statutory duty and has not given proper consideration to the material before him, does not in the least commend itself to us, particularly when,

on a review of the case, no reason has been shown why the opinion of the learned magistrate ought either to be rejected or modified or that any other step or order contemplated by Section 70(a) ought to have been taken or made. In our respectful judgment the granting of a decree nisi was a proper exercise of the function of the learned judge and supported by the case put before him in terms of Section 69.

The appeal is dismissed.

Chakkarayach
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Judge of Appeal

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Judge of Appeal

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Judge of Appeal

Suva.