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GAVIN SNOW

v.

NINA SMALL

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[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Perry J.A.), 29th March, 6th April]

Civil Jurisdiction

C *Divorce—summary procedure—evidence taken by masigtrate—magistrate in best position to assess credibility—petition on ground of five years' separation—adultery by petitioner not cause of separation—court's discretion—whether decree harsh and oppressive or contrary to public interest—petitioner about to emigrate—maintenance—Matrimonial Causes Ordinance 1968, ss.15(m), 24(1) (2) (3).*

Husband and wife—maintenance—decree for dissolution of marriage—husband petitioner about to emigrate—decree not to be pronounced until arrangements for payment of maintenance made to satisfaction of magistrate—Matrimonial Causes Ordinance 1968, s.24(2).

D *Appeal—divorce—summary procedure—evidence taken before magistrate—magistrate in best position to assess credibility.*

In proceedings for divorce in the Magistrate's Court the appellant gave evidence of a five year separation from his wife, the respondent, and called an independent witness in corroboration. The respondent gave evidence but in it did not challenge the evidence of the period of separation. The Magistrate accepted the evidence of the petitioner and recommended that the discretion of the court should be exercised in his favour in respect of adultery committed by him some two and a half years after the separation commenced, and that a decree should be granted. The Supreme Court however, held that it was not satisfied that the petitioner had established a separation of five years.

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F *Held :* 1. The magistrate, having seen and heard the witnesses, was in a better position to make an assessment of their credibility than either of the courts above.

2. The question of credibility was vital and, there being no evidence to the contrary, the finding of the magistrate as to the five years' separation should be upheld.

G 3. The adultery on the part of the petitioner, not having occurred until two and a half years later, was not the cause of the separation and had terminated; in the circumstances the court's discretion should be exercised in the petitioner's favour.

4. There was no evidence that the granting of a decree would be harsh and oppressive or contrary to public interest.

H 5. The case would be remitted to the magistrate to pronounce a decree nisi, but in view of the petitioner's intention to migrate to Canada and having regard to section 24(2) of the Martimonial Causes Ordinance, 1968, not until arrangements had been made to the satisfaction of the magistrate for payment of maintenance by the petitioner.

Cases referred to :

Behari v. Shiu Kuar alias Shiukumari (1968) 14 F.L.R.101. A

Burford v. Burford [1955] 3 All E.R.664; [1955] 1 W.L.R. 1242.

Appeal from the refusal by the Supreme Court to grant a decree of dissolution of marriage upon the recommendation of the Magistrate's Court.

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K. C. Ramrakha and H. M. Patel for the appellant.

Respondent in person.

The facts sufficienty appear from the judgment of Perry J.A.

6th April 1972

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The following judgments were read :

PERRY J.A. :

This appellant on the 19th July, 1971, filed a petition for dissolution of marriage from the respondent under S. 15(m) of the Matrimonial Causes Ordinance, 1968, which provides D

> "that the parties to the marriage have separated and have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed."

The respondent appeared in person at the hearing before the Magistrate and opposed the making of a decree. She also appeared before this Court and continued her opposition. E

In giving evidence before the Magistrate the petitioner deposed that he had been married to the respondent on the 5 January 1959. There were no children of the marriage. He said that he ceased to live with the respondent in June 1966 when they were living at Qauia Lami and that he left the home because he believed the respondent was involved with someone else. He said that he then went to live at Kanavi Street where he lived for two years and then at Khamendra Street and that there was no likelihood of his living again with the respondent as man and wife. He asked for a decree of divorce and that the time should be abridged as he wished to migrate to Canada. F

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In answer to a question put to him by the respondent, he denied that they had been separated for two years only.

Corroboration of the period of separation was given by one Bale who said he was at present living with the petitioner and had done so since July 1966 — at first at Kanavi Street and later at Khamendra Street. He confirmed that the respondent had not lived at either address. H

In evidence the respondent stated that she was opposing the petition as she still loved the petitioner and would stick to him. She stated that the respondent did not want her back but that she wanted him back.

She did not agree that there was no hope of their living together. She did not say how long they had been apart, nor was she questioned on this. Her sister one Vasite Small said that the respondent had not lived with the petitioner for two years but she added "during the first three years of separation petitioner and I approached the respondent to come back to petitioner." I think there has been a transposition of terms here and that she really meant that she and her sister had approached the petitioner to come back. Vasite Small also said that she went to Nadi last year but could not remember how long before she went to Nadi the parties had separated.

The petitioner was recalled to say that in 1969 he had lived with one Eileen Boca for a year and had after this period ceased to live with her.

On this evidence the Magistrate found as proved that the petitioner and the respondent had parted company in June 1966 and that despite the respondent's belief to the contrary there was no reasonable likelihood of the parties being reconciled or cohabiting again and he recommended that a decree be granted.

This recommendation was referred to the learned Judge of the Supreme Court. He pointed out that the witness Bale had not mentioned that Boca had lived with the petitioner. Then he said —

> "The evidence does not satisfy me that the petitioner had established that the parties had lived separately and apart continuously for five years immediately preceding the date of the petition nor am I satisfied that the petitioner and his witness have both been straightforward with the Court and are to be relied upon."

The finding of the Magistrate that the parties had been continuously apart for five years is a finding of fact reached after a consideration of the evidence given before him. Having seen and heard the witnesses he was in a better position to make an assessment of their credibility than either the Supreme Court or this Court.

The respondent had not given any evidence challenging the petitioner's evidence of the period of separation and the evidence of her sister while inconclusive if anything supports the petitioner's case because of the reference to "the first three years of separation". It is true that the witness Bale made no reference to the presence of the woman Boca in the petitioner's home but the explanation of this is that at the stage when he gave his evidence there had been no evidence given by the petitioner of his association with her. Consequently Bale was not asked about this. The reference to Boca came when the petitioner was recalled.

With respect to the learned Judge, it is difficult to see why in these circumstances this witness should not be regarded as straightforward and reliable. Moreover the disclosure of the association with Boca came voluntarily from the petitioner when recalled and not because of any case made out by the respondent. Again I find it difficult to see how this could justify the criticism of his truthfulness and reliability.

Accepting then the evidence of the petititoner and his witness, I consider that the Magistrate's finding of five years separation should be upheld. The advantages of seeing and hearing witnesses and of judging their demeanour in contrast to conclusions found on a written record of evidence are so well known and so often stated in the authorities as to

need no repetition here. The question of credibility was vital here and in addition there was really no evidence to the contrary.

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I turn now to S.24(3) which provides —

> "The Court, may, in its discretion refuse to make a decree of dissolution on the ground of separation if the petitioner has, whether before or after the separation commenced, committed adultery that has not been condoned by the respondent, or having been so condoned, has been revived."

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"The ground of separation" is defined in S.24(1) as being the ground specified in S.15(m) supra. The petitioner has admitted adultery with Boce. There is no evidence of condonation.

The Magistrate recommended that the Court should exercise its discretion in favour of the petitioner. The learned Judge of the Supreme Court said "I do not consider it a proper case in which to exercise my discretion in respect of this petitioner's own adultery for one year with someone whom he has apparently left."

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Now, as was pointed out by this Court in *Behari v. Shiu Kuar alas Shiukumari* (1968) 14 F.L.R.101 the question of discretion does not arise until the Court is satisfied that the case has been proved by the petitioner and here as there, the learned Judge was not so satisfied. See also Hodson L.J. in *Burford v. Burford* [1955] 3 All E.R.664 at 665.

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Consequently while the conclusion of the learned Judge here is entitled to due weight it is nevertheless "obiter" and it is open to this Court to make its own order on the question or to remit it to the Supreme Court.

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The evidence is that the adultery did not occur until two and a half years after the separation and consequently cannot be regarded as a cause of the separation. Moreover the evidence does not I feel with respect justify the conclusion "whom he has apparently left." It may be instead that she left him. The respondent informed this Court that Boca is now in Canada and that that is the reason the petitioner wished to go there. This of course is merely an unsworn statement.

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Taking the view as I do that the adultery was not the cause of the separation that it has now terminated and that the marriage is virtually at an end, I am of the opinion that the Court's discretion should be exercised in the petitioner's favour.

However S.24(1) also provides that where

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> "the Court is satisfied that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would in the particular circumstances of the case be harsh and oppressive to the respondent, or contrary to the public interest to grant a decree on that ground on the petition of the petitioner the Court shall refuse to make the decree sought."

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There is no evidence of the Petitioner's conduct before the separation and the only evidence of his adverse conduct after the separation is the evidence of his adultery with Boca, which I have already considered.

There is no evidence that would justify a finding that the granting of a decree would be harsh or oppressive to the respondent or that it would be contrary to the public interest. A separation for five years is recognised by the Legislature as a proper ground for divorce — here there are no children — the marriage did endure for over six years before the separation and the parties are now aged respectively 37 and 31 years. Provided her maintenance is secured, I find it difficult to think that a decree would be harsh or oppressive to her. There is no definition of "public interest" but the Legislature has provided that a decree may be made in these circumstances. There is nothing here to distinguish this case from the ordinary case of five years separation and there is no reason to believe that in such circumstances it would be "contrary to public interest" to grant the decree.

Finally however there is the right of the respondent to be maintained by the petitioner. Here S.24(2) provides —

> "Where in proceedings for a decree of dissolution of marriage, on the ground of separation, the Court is of opinion that it is just and proper in the circumstances of the case that the petitioner should make provisions for the maintenance of the respondent, whether by way of settlement of property or otherwise the Court shall not make a decree on that ground in favour of the petitioner until the petitioner has made arrangements to the satisfaction of the Court to provide the maintenance or other benefits upon the decree becoming absolute."

The petitioner is already subject to a Court Order M/C 155/69 to pay the respondent $7 per week for her maintenance. He has observed this until recently. He said in evidence that he proposed to pay this sum to her after his migration to Canada. Facilities for the enforcement of maintenance orders exist between Fiji and Canada. The Magistrate recommended that having regard to the respondent's admitted earnings of $13 per week plus her keep, an order should be made for the petitioner to pay the respondent $7 per week. The learned Judge noted that no arrangements for security for maintenance have been offered and he considered that the respondent might have great difficulty in enforcing a maintenance order in Canada if the marriage were dissolved and the petitioner migrated there.

This would be so in my opinion. On the other hand the petitioner is unlikely to have property to offer as security.

In these circumstances I think it is better to leave the matter in the hands of the Magistrate so that he can see that her interests are protected. I think that this is a case where the decree should be withheld until the petitioner has made satisfactory arrangements to provide her maintenance.

Accordingly I would allow the appeal in part and I would remit the matter to the Magistrate to pronounce a decree nisi to be made absolute at the expiration of three months. This decree nisi is however not to be pronounced until arrangements for payment of the maintenance at $7 per week have been made to the satisfaction of the Magistrate. The Magistrate shall determine whether such arrangements are in the form

of security or bond or otherwise. I would quash the order for costs made in the Supreme Court but make no order for the costs of this appeal. A

MARSACK J.A.

I agree and have nothing to add.

GOULD V.P.

I have read the judgment of Perry J.A. in this case and am in entire agreement with his reasoning and conclusions. B

All members of the Court being of the same opinion there will be orders in the terms proposed in the judgment of Perry J.A.

Appeal allowed.