

Haine, J.

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IN THE SUPREME COURT) CORAM: WILLIAMS, J.

OF PAPUA NEW GUINEA)

Friday,
17th January, 1975.

BETWEEN: BRIAN DAVID EDWARDS

Petitioner

- and -

DOROTHY ROSE
EDWARDS

Respondent

- and -

STEVEN GEORGE SMITH

Co-Respondent

(M.C. No. 62 of 1974 (P))

JUDGMENT

1975

Jan. 7, 8,
9, 10, 11,
17

PORT
MORESBY

WILLIAMS, J.

In this suit the petitioner prays for the dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent. The petitioner also seeks an order for the custody of the children of the marriage, an order for damages against the co-respondent and an order that the co-respondent pay the petitioner's costs of the suit.

In the petition it is alleged:-

(a) That since at least December, 1973 the respondent has had an adulterous relationship with the co-respondent,

(b) That from December, 1973 until 8th June, 1974 the respondent, while still residing in the matrimonial home, spent a large portion of her time with the co-respondent and adultery occurred on numerous occasions,

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(c) That after 8th June, 1974 the respondent and co-respondent committed adultery at Daru, and

(d) That the respondent and co-respondent then lived as man and wife in Lae until September, 1974 and that they are now living as man and wife in Port Moresby.

In her answer the respondent says that she first committed adultery with the co-respondent in May, 1974, which adultery is continuing, and that the respondent and co-respondent are living together as man and wife; otherwise the respondent denied the allegations of adultery contained in the petition.

The co-respondent in his answer denied that he commenced to have an adulterous relationship with the respondent in December, 1973 and said that it commenced in May, 1974.

The respondent in her answer seeks:-

- (a) An order that the respondent have the custody of the children of the marriage,
- (b) An order that the petitioner have reasonable access to the said children, and
- (c) An order that the petitioner pay the respondent's costs of and incidental to the suit.

In his answer the co-respondent seeks:-

- (a) An order dismissing the petitioner's application for damages, and
- (b) An order that the petitioner pay the

co-respondent's costs of the suit.

It appears from the evidence, and I so find, that the petitioner and the respondent were married at the United Church, Boroko, Port Moresby on the 2nd December, 1967 according to the rites of the United Church of Papua New Guinea.

It further appears, and I find, that the petitioner was born in New South Wales on the 28th July, 1940 and resided in Australia continuously until he ~~entered~~ Papua New Guinea on the 24th November, 1964. He has ~~resided~~ in Papua New Guinea continuously since this time except for holiday periods spent in Australia. The petitioner stated that it was his intention to return to live permanently in Australia on the completion of his employment in Papua New Guinea. I find that the petitioner is deemed within the meaning of the Matrimonial Causes Act to be domiciled in Papua New Guinea at the date of the institution of this suit.

I also find that there are two children of the marriage, namely David Edwards born on the 4th April, 1969 and Karen Edwards born on the 22nd February, 1970.

It will be seen from the pleadings that both the respondent and co-respondent admit an adulterous relationship. What is denied is the length of time during which this relationship has subsisted. Having regard to the pleadings and the evidence adduced before me, I have no doubt that adultery first occurred between them at the earliest on a date in May, 1974, and that the respondent and co-respondent have since about 8th June, 1974 been living as man and wife. I find that the ground of adultery has been proved.

I turn now to the question of custody of the children of the marriage. It appears from the evidence that the respondent left the matrimonial home in Port Moresby on the 8th June, 1974. She took with her the child Karen and that child has been in the de facto custody of the respondent since that date. The child David has since

that date been in the de facto custody of the petitioner.

It appears from the evidence that the co-respondent is a Warrant Officer in the Armed Forces and that he has been transferred to Singleton in New South Wales. The respondent is presently residing in Port Moresby with the co-respondent as man and wife. It is proposed that when the co-respondent leaves for Singleton in the very near future the respondent will go with him to reside with him there. It is further proposed that the two children, David and Karen Edwards, go with and reside with the respondent and co-respondent in Singleton, New South Wales.

The co-respondent is also married. He has one child of his marriage aged nearly thirteen, and there is another child who was residing in his household having been committed to his care as a State Ward in New South Wales.

The co-respondent's wife is presently residing in Singleton, New South Wales and has instituted a matrimonial suit in the Supreme Court of New South Wales naming as co-respondent Mrs. Edwards, the respondent in this proceeding. In her petition Mrs. Smith seeks:-

(a) A decree of dissolution of marriage on the ground of adultery with Mrs. Edwards,

(b) An order for the custody of the child of the marriage,

(c) An order for maintenance for herself both pending suit and permanently in the sum of \$70.00 per week, and

(d) An order for maintenance for the child both pending suit and permanently in the sum of \$30.00 per week,

and a number of other orders related to property and costs of that proceeding.

In the course of his evidence before me the co-

respondent stated that it was his intention to contest the suit instituted by his wife, and, on the evidence, it appears that a period of at least eighteen months will elapse before the suit is heard and disposed of. It is thus implicit in the arrangements proposed by the respondent and co-respondent that they will be living together in an adulterous relationship which must subsist for at least eighteen months, and that the children David and Karen Edwards live with them during the continuance of this relationship. It might also be observed that the respondent is pregnant and expects the birth of the child early in April next.

It further appears that the respondent in this suit has very little means of her own so that the respondent would, for all practical purposes, be compelled to rely on the co-respondent for the maintenance and support of her children. The respondent in her evidence claimed that she had ideas about setting up a dressmaking business in Singleton but it was clear from her answers in cross-examination that she has given the matter no serious thought and has made no examination of the potential of this kind of business.

Upon the evidence of the co-respondent his income on return to his posting to Australia will be \$10,330.00 per annum, which I take to be a gross sum subject to taxation. It further appears that apart from his income from the Army he has a few resources. From his salary he would have to make provision for the maintenance and support of the respondent, the children of her marriage and her unborn child, and, in addition, faces a real possibility of being ordered to make substantial contributions for the maintenance and support of his present wife and the child of his marriage.

On the other hand the petitioner is employed in the shipping department of a large Papua New Guinea company. His salary is \$9,204.00 per annum. He occupies a three bedroom house in Port Moresby which is owned by his employers. In his evidence the petitioner said that he has been considering other employment in a Papua New Guinea

coastal shipping company at a salary of \$10,000.00 per annum, together with certain shares in that company. He stated that he had not yet decided whether or not he would take up this new employment. The petitioner further stated that it was proposed that his sister, who presently resides in Australia, would come and reside with him in Papua New Guinea and assist him in the care and control of the children of the marriage should he be awarded their custody.

It is asserted by the respondent that the petitioner by reason of his over-indulgence in alcohol is a person quite unsuited to have the care and control of the children. A great deal of evidence was led concerning the drinking habits of the petitioner although little of it related to the year 1974. Without canvassing this evidence in detail I am left with the firm impression that the respondent's allegations in this respect have been grossly exaggerated. If the allegations of the respondent in this regard be true then it would seem that the petitioner would be in no condition to carry out the duties of his position effectively. There is no evidence of this; on the contrary all the evidence points to the fact that the petitioner is well regarded by his employer and carries out his duties in an efficient manner. In addition, there is evidence that from early in 1974 to the time of the separation the petitioner regularly delivered the children to a pre-school centre and a child minding centre, picked them up at the end of his day's work, picked up his wife from her place of employment, and drove them home. This evidence does not appear to be seriously disputed, although some vague suggestions to the contrary were made. I have no hesitation in accepting the petitioner's evidence in this respect.

There is also a body of evidence that the petitioner from January, 1974 until the separation in June, 1974 regularly bathed, clothed, fed and put to bed the two children of the marriage, and that this state of affairs has continued with respect to the child David since the separation of the parties. Evidence to this effect was given by the petitioner of specific occasions on which he performed these tasks, he having kept a detailed diary of

these events. When these events were put to the respondent in cross-examination she said, as to most of them, that she did not remember them, and again I have no hesitation in accepting the petitioner's evidence on this aspect of the case. There are also allegations that the petitioner exhibited highly nervous tendencies, had black-outs, and once attempted suicide. These allegations appear to be confined to the month of January, 1974. The petitioner in his evidence stated that at this time he was under considerable stress as his marriage was starting to disintegrate and there were many domestic quarrels. He received medication and states that he has had, in the ensuing twelve months, no recurrence of his nervous trouble and he expects none. Upon a consideration of the evidence I find that it has not been shown that the petitioner's conduct has been such as to disqualify him from having the care and control of the children.

Turning to the respondent's conduct there is evidence, which I accept, that the child Karen since she has been in the respondent's de facto custody has been adequately provided for. Whilst I do not doubt that she has affection for the children I think it probably true, as was submitted by counsel for the petitioner, that her own happiness is placed in the forefront of her considerations. I do feel considerable concern for the future welfare of the children should the respondent be awarded their custody. As I have already mentioned, the proposal is that they be taken from this country to Australia and that, at least for an appreciable period of time, the respondent would be depending upon the co-respondent to provide for their care and maintenance, in circumstances where the respondent has no legal responsibility to do so. In this respect I think it is not unimportant to note that the co-respondent created a situation where his own wife has left him, taking with her the child of their marriage, and that he is not at the moment supporting or maintaining them. He is facing claims in a court of law for their maintenance and support. Should the co-respondent fail to make adequate provision for the children of the petitioner and respondent then they would be in a strange country without adequate care and maintenance and out of

the jurisdiction of this court, which may make it difficult, if not impossible, for this court to make any further effective provision with respect to them. It appears from the evidence that the respondent was born in Papua New Guinea and has apparently lived a substantial part of her life here. There is no evidence that she has relatives or friends in Australia to whom she could turn if in need.

I am bound by the relevant provision of the Matrimonial Causes Act to have regard to the welfare of the children as the paramount consideration. I am also conscious of what has been said in many cases of the desirability as a matter of common sense that in many cases children of tender years are best committed to the care of their mothers.

It seems to me that I am faced on the one hand with the position that if custody be awarded to the respondent then their future is surrounded with a number of uncertainties to which I have adverted, and on the other hand with the position that the petitioner has, particularly in the last eight or nine months, demonstrated his capacity and willingness to take good care of the children. In this state of affairs I think that I would be taking unwarranted chances with the future of these children were I to award custody to the respondent. I accordingly propose to order that the petitioner have the custody of the children until further order.

I turn to the claim made by the petitioner against the co-respondent for damages. It has been said in a number of cases that the object of damages in cases of this kind is not to punish the co-respondent but to compensate the petitioner for loss he has suffered. There is no evidence in this case of any pecuniary loss suffered by the petitioner as a result of the respondent's departure from the matrimonial home. According to evidence given by the petitioner the respondent told him that she had never loved him and had married him for security. The respondent admitted making this statement. I gather the general impression from the evidence that the marriage was never

a very happy one and that it is not the case that the petitioner lost a loving and affectionate spouse. It also seems that, at least in the early stages of the affair ~~between the respondent and the co-respondent~~, the former was the moving party. In his evidence when asked his feelings when his wife left him and went to live with the co-respondent the petitioner stated, "I was not happy mainly for Karen's sake - it was morally wrong to submit Karen to this - he was married himself with two children." Whilst the petitioner has no doubt suffered worry and distress, it is difficult to quantify what damage (if any) he has suffered. In all the circumstances I do not think that it is appropriate to make any award of damages.

I now consider the question of costs. I think that this is clearly a case in which the co-respondent should be ordered to pay the petitioner's costs of the suit. He was a party responsible for the break-up of the marriage between the petitioner and respondent. Further, he actively supported the respondent's claim for custody of the children. It is true that he has succeeded in the issue of damages. However, the time spent on this issue was very small indeed, the bulk of the time occupied by the trial being devoted to the issue of custody. I order the co-respondent to pay the petitioner's costs of the suit to be taxed.

Solicitors for the Petitioner: Messrs. Francis & Francis
Solicitors for the Respondent: Messrs. Craig Kirke & Wright
Solicitors for the Co-Respondent: Messrs. Craig Kirke &
Wright