JANE LIVIA v. SILAS LIVIA And JOSEPHINE VOZOTO

High Court of Solomon Islands
(Palmer J.)

Civil Case No. 338 of 1994

Hearing: 28 April 1995
Judgment: 5 May 1995

J. Remobatu for Petitioner
B. Titiulu for Respondent

PALMER J: The parties were married at the Magistrate's Court, Honiara, by the District Registrar on the 16th of June 1982. Since then two children have been born in the marriage; Eddie Livia and Lorraine Livia. The parties resided for the most part of their marriage at their matrimonial home at Naha.

The first incident of adultery occurred in 1992 between the Respondent and the Petitioner's brother's daughter. The Petitioner gave evidence that this adultery was condoned and the parties resumed normal marital relations thereafter.

In March or May of 1993, the second incident of adultery was claimed to have occurred between the Respondent and one of the Petitioner's sister's daughter. Both adulteries therefore were committed with the Petitioner's nieces.

The second incident of adultery however, did not come to the knowledge of the Petitioner until December of 1993, some six or nine months after the alleged incident. The Petitioner first became aware that there had been something amiss, when she was told whilst having her holidays in December 1993 at her home village at Malaita. On her return to Honiara, she confronted the Respondent with what she had heard, but was denied by the Respondent. The Co-Respondent (the Petitioner's niece) however, had admitted the affair to her when also confronted.

Since becoming aware of that second affair in December 1993, to October of 1994, when the Respondent moved out of the matrimonial home, the Petitioner says under oath that she had not had or permitted normal sexual relations with the Respondent, although they resided together in one house.

She now comes to this Court with the petition for divorce on the ground of that second adultery committed in March or May of 1993.

The Respondent opposes that petition on the ground of connivance and or condonation.

The defence of connivance unfortunately, is inapplicable in the circumstances of this case. There is no evidence of connivance whatsoever. There is clear undisputed evidence that the Petitioner only became aware of the affair *after* the alleged act of adultery. She could not therefore have been guilty of connivance.

In *"Rayden on Divorce", Eighth Edition by Joseph Jackson and D.H. Colgate, at page 224, paragraph 7*, the learned authors defined *"connivance"* as follows:

> ***"Connivance implies an anticipatory consent to adultery committed by the other spouse. It may be active or passive acquiescence in, or toleration of, the adultery, but mere negligence, in attention or over-confidence, not amounting to intentional concurrence and consent, are not connivance".***

In *Churchman v. Churchman [1945] P.44, 50*, per judgment of Lord Merriman (also cited in *"Rayden on Divorce"* at page 225), his lordship stated:

> *"It is of the essence of connivance that it precedes the event, and generally speaking, the material event is the inception of the adultery and not its repetition....."*

In *Douglas v. Douglas [1950] 2 ALL E.R. 748, at page 752*, Denning, L.J. pointed out that the principle on which connivance is founded is *Violenti non fit injuria* (That to which a man consents cannot be considered an injury).

The only viable defence raised therefore is that of *condonation*.

Rayden on Divorce (ibid) defines condonation as ***"... the reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not thenceforward commit any further matrimonial offence. Condonation therefore consists of a factum of reinstatement and an animus remittendi".***

The learned Authors also pointed out that condonation is a question of fact.

The two crucial matters therefore to be proven to the required standard are; the factum of reinstatement, together with the intention to forgive and remit the wrong.

First, has there been reinstatement?

The Respondent claims that there was. He referred to the continued existence of their relationship as husband and wife from December 1993 to October of 1994 under the same roof. He also referred to the attendance and assistance of the Elders from the Jehovah's Witnesses *(of which the Petitioner is a member)*, in which the adultery was admitted to in the presence of the Petitioner and the Elders; counselling was given, a prayer for forgiveness made, and a trial period of 6 months given. This was in the month of January 1994.

In the month of March 1994, the Respondent says that he was stabbed by the Petitioner's relatives and had to be admitted in hospital for about four days. He says that during that period of hospitalisation he was visited regularly by the Petitioner; once staying overnight with him.

The respondent also claims that sexual intercourse occurred once during that period, but this has been strongly refuted by the Petitioner.

On this evidential point I prefer the evidence of the Petitioner. The Respondent could not remember clearly when that incident occurred. The reason given for the lack of ability to recall was that sexual intercourse in a marriage was part of the normal activities of such a relationship, and that therefore he does not keep track of or records of, when such incidents took place. However, it was pointed out to him by Mr Remobatu that from December 1993 to October 1994, their relationship was not really normal, and therefore he should have been able to recall that incident clearly, especially when it was the only incident throughout that period and perhaps should have been regarded as special by him.

Having observed both parties giving evidence and noting that not even a specific date could be given, and no corroboration of that alleged intercourse, the Respondent's claim in my view should not be accepted as correct. It is my view that no intercourse occurred throughout that period as stated by the Petitioner in her evidence.

The Petitioner places a lot of emphasis in turn on this point, that the fact that no intercourse occurred throughout that period of 11 months showed clearly that she did not condone the Respondent's adultery. Mr Remobatu also stresses the point that there was no forgiveness and therefore no condonation.

As to the question of reinstatement, there was in my view some evidence of this. The parties continued to reside in the matrimonial home as husband and wife although no sexual intercourse occurred. There was also an attempt on the Petitioner's part it seems, through the Elders of the Jehovah's Witnesses, to effect some sort of reconciliation, and whereby a trial period was given to see how their relationship would fare. That is with respect, evidence in my view of reconciliation and also evidence of condonation *(see Abercrombie v. Abercrombie. [1943] 2 ALL E.R.465)*.

In her evidence on oath, the Petitioner stated that her Church Elders gave six months to the Respondent to change his ways. These included, refraining from

taking alcohol, and not going out late at nights, helping the Petitioner with the house-work and not re-offending. The Petitioner however stated that she did not see any change, and so no attempt was made to contact the Church Elders to do a follow-up.

It is my view that the Petitioner's actions in requesting the Elders from the Jehovah's Witnesses to try and assist them in their marital problems, quite significant. That together with the trial period of six months given are evidence in my view of the intention to forgive.

In *"Rayden on Divorce"* (ibid) the learned Authors stated at page 234, paragraph 20 as follows:

> ***intention can be, and generally is, inferred from the circ"Reinstatement is not sufficient without proof of an intention to forgive and remit the wrong. The umstances..."***

In the *"NOTES'* at page 235 of *"Rayden on Divorce"* the learned Authors also made the following statement:

> ***"Nevertheless, forgiveness must be understood, not in any psychological or theological sense as implying that no resentment at the wrong is any longer felt, but in the legal sense as implying merely that the legal remedy for the wrong is waived."***

The case quoted in support was Beeby *v.* Beeby (1799), 1 Hag. Ecc. 789, 793, 797 in which it was stated:

> ***"condonation is forgiveness legally releasing the injury.... In general it is a good plea in bar; it is not fit that a man should sue for a debt which he has released".***

The crucial evidence in this case of an *"intention to forgive and remit the wrong"* in my view can be inferred from the actions of the Petitioner in requesting her Church

Elders to provide counselling and prayer support, and in giving the Respondent a trial period of six months. Whether sexual intercourse occurred or not in that period is not material in these circumstances. The Petitioner was prepared to release the injury caused, for at least six months. Whether she was the one who gave the Respondent the trial period of six months or her Elders, would make little difference in my view. The evidence shows that there was a trial period of six months given, to see if he would change his ways. That in itself amounts to an act of condonation.

The fact that the Respondent is not deeply religious does not imply that the Petitioner can consider herself not bound by her actions. Rather, the attendance and assistance of the Church Elders was done at her behest. It is her intentions therefore that is material, and relevant.

Also, the fact that the Petitioner stated in her evidence under oath when asked by the Court, that she was no longer interested in effecting any reconciliation now, or that she was prepared to give the Respondent another chance, immaterial to the fact that she had demonstrated an act of condonation. That in my view is sufficient.

If the total period of 11 months that the parties resided together under the same roof is also taken into account, plus the affectionate, or maybe compassionate actions of the Petitioner, in attending to the Respondent after he had been stabbed by her own relatives, and despite being forbidden to visit him at hospital, are all considered, then it is my view that there is even stronger evidence to support the view that there was not only reinstatement, but also an intention to forgive.

A marriage partnership is not composed solely of a sexual relationship, though that is one of the natural consequences or results. The mere fact that no sexual intercourse occurred in the period from December 1993 to October, 1994 is not evidence in my view of non-reinstatement and an absence of an intention to forgive and remit the wrong. Rather, it shows and this is borne out in the evidence of the Petitioner, an element of revulsion, resentment, anger and hurt, as a result of the matrimonial offence. But that is not the test to be applied. In the theological sense it could easily be argued that despite the actions of the Petitioner, there had indeed been no forgiveness. The test to be applied here however, is whether the legal remedy for the wrong has been waived?

This can be shown by reconciliation; which is clear evidence of condonation, and accepted in *Roe v. Roe [1956] 3 ALL E.R.478. 484, Div. Ct.*, as the test of condonation. It can also be shown by resumption of normal sexual relations with the offending partner despite the fact that there is evidence which shows that the offending partner admits that she had never been forgiven by her husband *(see Cramp v. Cramp and Freeman, [1920] P.158).* In one English case *Baguley v. Baguley [1957],* Times, October 10th C.A., it was held that one act of intercourse amounted to reinstatement of the husband by the wife, who had voluntarily submitted to him.

At the same time, I bear in mind that the fact of living together again under the same roof is not necessarily evidence of condonation *(see Bateman v. Ross [1813], 1 Dow.235).* The individual facts of each case must be examined by the Court.

I have already highlighted the reasons why in my view there has been condonation in this case. On that basis the petition must be dismissed.

ALBERT R. PALMER
A.R. PALMER

JUDGE