

MATA ITIONA -v- BAURO TAISIA

HIGH COURT OF SOLOMON ISLANDS
(F. O. KABUI, J.)

Civil Case No. 386 of 1999

Date of Hearing: 26th & 28th April 2002 & 16th August 2002

Date of Judgment: 23rd August 2002

Mrs. Tongarutu for the Petitioner
Respondent not in Court

JUDGMENT

Kabui, J. This is an amended Petition seeking the dissolution of marriage between the Petitioner and the Respondent. The Petitioner filed the amended Petition on 29th April 2002. The first Petition was filed on 19th November 1999. It was served on the Respondent on 9th April 2002. There is however some doubt that the Respondent had been served with the amended Petition. However, paragraph 2 of the affidavit of service filed by Mrs. Tongarutu on 22nd April 2002 clearly states that she had explained the content of the Petition she served on the Respondent and the notice of hearing fixed for 26th April 2002 at 10:30 am. At the hearing on this date, the Respondent did not appear in Court. There being proof of service, I allowed Counsel for the Petitioner to proceed in the Defendant's absence. The first Petition and the amended one are the same in respective terms except that the amended one has in it elements of irretrievable break down of the marriage. It was an attempt to insert the alternative ground of continuous separation of 5 years resulting in the irretrieval breakdown of the marriage under the Divorce Act (Cap. 170). The attempt is in my view incomplete. The Respondent is a resident of Honiara. The Petitioner alleged in her Petition that the Respondent had constructively deserted her during their marriage.

The Facts

The parties were married in Honiara on 12th January 1992. The marriage was celebrated in the Wesley United Church in Honiara. After marriage, the parties lived with the parents of the Respondent in Honiara. Soon the marriage began to show signs of cracking. The Respondent was hardly at home on weekends. He would be away for 3 to 4 nights without coming home. When he came home, he would be drunk and would hit the Petitioner. Often, the Petitioner would seek refuge in her sister's house at Naha 1. Sometimes, the Respondent would come and take her back to his house but at other times, she would return on her own. At one stage, she told the Respondent that if he did not change his behaviour she would leave him. In May 1995, the Petitioner left for Gizo and remained there until 1997 when she returned to Honiara. She found work in Honiara and now lives with another man from whom she has two children.

The Law

Constructive desertion as a legal concept is best described in my view at page 175 in **Rayden on Divorce**, Ninth Edition, by Joseph Jackson and C. F. Turner, 1964. There, the authors say,

..."Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves his wife;

and the case of a man who compels his wife by his conduct, with the same intention, to leave him; and the case of one who persists in treating his wife in a way which he knows she will probably not tolerate, and which no ordinary woman would tolerate, and she leaves him. This is the doctrine of constructive desertion”...

The authors continue at page 176 thus,

...”It is as necessary in cases of constructive desertion to prove both the factum and the animus on the part of the spouse charged with the offence of desertion, as it is in cases of simple desertion. The practical difference between the two cases lies in the circumstances which will constitute such proof, for, while the intention to bring the matrimonial consortium to an end exists in both cases, in simple desertion there is an abandonment, whereas in constructive desertion there is expulsive conduct”...

Standard of proof

Again, at page 176, the authors say,

...”In a case of constructive desertion, the onus of proving that the intention to desert continues may be much lighter than in a case of mere withdrawal from cohabitation. A mere wish or intention that the other spouse would leave is insufficient by itself to constitute constructive desertion. The wish or intention must be accompanied by conduct which is of a grave and weighty character, and which the Court can properly regard as equivalent to expulsion in fact. It is also said, however, that when the fact of separation is proved, the intent to bring the home to an end can be inferred, amongst other things, from words so plain, that the spouse using them may be taken to mean what he says if there is no background of ill-treatment, it may well be more difficult to prove that mere words of expulsion were intended to be final, conclusive and effective, than if there is such a background. Conduct short of a matrimonial offence might be sufficient to justify the other party in leaving, but it is essential to examine the actual facts in order to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the border-line which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home. The ordinary wear and tear of conjugal life does not in itself suffice, nor does one of the risks that a man or woman takes on entering into the condition of matrimony.”...

I have not cited cases of authority because what the authors say is based on decided cases cited in the Ninth Edition of which they are the authors.

The evidence in this case

The parties lived in Vura for about a month and then moved to a house at Vavaya Ridge. They lived there for more than 3 years. The evidence given by the Petitioner in Court was rather brief in nature. However, the better story emerged upon being questioned by the Court. The picture that I see of the relationship was that the Respondent, after a month or two after marriage, began to show disinterest in his wife. His drinking habit and his general conduct towards the Petitioner confirmed his attitude in this respect. The Petitioner was most of the time lonely and alone in the matrimonial home. Lonely and alone in the sense that her husband was not there with her to share thoughts and to chat as husband and wife often do. Not only that. His coming home drunk and displaying no sense of respect for his wife was no productive counter-balance for the often loneliness the Petitioner felt during the Respondent's absence. There is no evidence to show that the Petitioner was over-bearing on the Respondent in anyway in terms of demanding attention from him. In evidence, the Petitioner said that the Respondent would leave the house on either Thursdays or Fridays and would not return home until Sunday morning or Monday morning. She said he would return from work on Mondays to

Wednesdays but if his friends came to pick him up after work he would go with them again. She recalled one occasion when he returned home drunk and threatened to hurt her with a knife. He also cut her clothes. She also recalled being taken to White River and left stranded with a Gilbertese family for about a month without being visited by the Respondent. She said her sister came and took her to Naha to live with her there. She recalled that being in 1995. She recalled the Respondent coming to her sister's house at Vura and being angry with her. After that she left for Gizo. The Respondent never contacted her at Gizo. When she returned to Honiara in 1997, the Respondent asked her for money because at that time she was working and earning salary. She said that at that time, the Respondent was already living with another woman. That was all the extent of his interest in her. Otherwise, there was no other interest at all in her. He had never asked her to return to him.

Does continuous drinking amount to constructive desertion?

This point was considered by the Court of Appeal in **Hall v. Hall** [1962] 1 W. L. R. 1246. That case concerned a wife who left her husband because of his continuous drinking. She sought maintenance on that ground. There was no evidence that the husband was violent when drunk but his drinking was continuous and staying out late at night. He often came home noisily and caused a lot of disturbance to the wife and other members of the family. In fact, the husband was out most of the nights and coming home in the early hours of the morning. Instead of using the side door left open for him, he insisted in using the front door. He would bang the door and shouted causing the wife to come down-stairs to let him in apart from causing the rest of the family to wake up. The wife had to come down-stairs to ensure that the house was locked and the lights put off. She also had to turn off the gas taps, which sometimes the husband left turned on unlit. She alleged cruelty before the justices but was dismissed. The justices, however, found constructive desertion. The husband appealed and his appeal was allowed. The wife appealed to the Court of Appeal and her appeal was allowed. The order made by the justices was restored. At page 1251, Ormerod, L. J. said,

..."In my judgment this case involves a question of fact. The question is not whether drunkenness of itself is sufficient to amount to expulsive conduct. The question is whether the conduct of this husband (caused, no doubt initially, by the drunken-ness) was sufficient to justify his wife in leaving him and saying that she found it impossible to live with him. The circumstances are such that any decent wife must have been caused considerable trouble and unhappiness by the husband's conduct. He came home drunk regularly; and it is clear that when he did come home drunk, he came home noisily late at night, created a considerable disturbance, and so deprived his wife and other members of the household of their sleep and peace of mind. It does not seem to me to be surprising that in such circumstances the wife found that she could not put up with it for an indefinite period, and finally left him. It may be that this conduct was not committed by the husband with the intention that it should drive the wife from their home. But, in my judgment, it was the sort of conduct which might well do this, and the husband, if he did not know, should have known what the result of his conduct might be.

Be that as it may, in my judgment the conduct of which the husband was guilty in this case was the sort of conduct of which was in the "no-man's-land," and the issue was one of act"....

At page 1255, Diplock said,

..."It is impossible, in my view, to say that a course of conduct of the kind indulged in by this husband could not amount to constructive desertion; whether it did or not is a question of degree; it falls within that no-man's-land where the issue is one of fact"...

At page 1256, His Lordship said,

..."For conduct to amount to constructive desertion two elements are required, factum and animus. First, the conduct must be such that a reasonable spouse in the circumstances

and environment of these spouses could not be expected to continue to endure. This, I apprehend, is what is meant by such expressions as "serious," "convincing," "grave and weighty," although I await with some philological excitement an example of conduct which is "grave" without being "weighty". The undue sensibility or eccentric phobias of the complaining spouse will not convert blameworthy behaviour which a reasonable spouse would endure, albeit unhappily, as part of the wear and tear of married life, into conduct capable of amounting to constructive desertion. But the justices, I think, had the correct test of the factum element in their mind, for they say in their reasons: "This" (that is, the husband's) "conduct was in our view in excess of that which any "spouse bargains to endure," which, with great respect to Danckwerts L.J., I think is an adequate if inelegant way of putting the heart of the matter. They alone saw the witnesses, they alone heard the evidence, and on a matter which is essentially one of degree I do not think there is any material upon which their decision in this respect can be said to be perverse.

Secondly, there is the element of animus, namely, that this husband must have known that this wife would in all probability not continue to endure his conduct if he persisted in it. I see no reason for supposing that the justices misdirected themselves as to this. They say in their reasons, in addition to the passage I have already quoted: "We were of the opinion that the conduct "of the husband was of such a character that we regarded it as "equivalent to an expulsion of the wife from the matrimonial "home" "...

So, it is a question of fact whether or not the conduct complained of can lead to it being constructive desertion. Applying this to the facts of this case, I would have no doubt in my mind that the conduct of the Respondent was constructive desertion. The Petitioner had told the Respondent that she would leave him if he persisted in his conduct towards her. The Respondent knew about this but took no remedial steps to rectify the situation. It is no surprise that there was no issue of the marriage. The Respondent was hardly at home. The Petitioner is now living with another man since 1998 and has two children of her own. It was a foregone conclusion that if the Respondent did not mend his ways, the Petitioner would eventually leave him. It was only a question of time before the Petitioner would decide that she had had enough and it was time to go. This is exactly what happened in this case. I find in favour of the Petitioner on the ground of constructive desertion. I will grant a decree nisi to be made absolute at the expiry of 3 months without sufficient cause being shown to the Court. I grant it accordingly.

F. O. Kabui
Judge