IN THE COURT OF APPEAL OF TONGA

DIVORCE JURISDICTION

NUKU'ALOFA REGISTRY **APPEAL NO. AC 27 of 2010**

BETWEEN : MANAVAHE ATA

Appellant

AND : HALAMEHI FA'ASE'E

Respondent

Coram : **Burchett J**
Salmon J
Moore J

Counsel : **Mr Fakahua for the Appellant**

Mr Pouono for the Respondent

Date of Hearing : **11 April 2011**

Date of Judgment : **15 April 2011**

JUDGMENT OF THE COURT

[1] This is an appeal, filed on 21 December 2010, from an order of Justice Shuster of 18 November 2010 dismissing a petition for the dissolution of a marriage.

FACTS AND BACKGROUND

[2] The appellant is a 36 year old Tongan man who was married to the respondent, a 33 year old Tongan woman on 22 December 2001. There is one child of the marriage, a girl aged 8 who currently resides with the respondent. The appellant's petition in the Divorce Jurisdiction of the Supreme Court sought a decree on the basis that the respondent had behaved in such a way that the appellant could no longer reasonably be expected to live with the respondent. The alleged behaviour of the respondent included:

a) being a person of hard character, easily provoked and hard to pacify;
b) repeatedly committing adultery with other men without the consent of the appellant;
c) repeatedly drinking liquor without the knowledge of the appellant;
d) arguing with the appellant on occasions and using abusive language in the presence of their child and the appellant's mother;
e) arguing with the appellant on matrimonial matters and using abusive language directed toward the appellant;
f) taking their joint property and damaging the appellant's parents' house where the respondent was residing whilst the appellant worked in Vava'u; and
g) repeatedly trying to commit suicide.

The appellant also sought an order that custody of their child be granted to the appellant with reasonable access to the respondent.

[3] His Honour was not satisfied upon hearing evidence from 3 witnesses that the respondent had committed adultery or acted unreasonably.

GROUNDS OF APPEAL

[4] The sole ground of the appeal was that the learned Judge had erred in his findings of fact, contrary to the evidence and erroneous in law. It was said that the trial Judge had erred in his consideration of the evidence from the appellant, respondent and the appellant's witness, Semi Taufa in respect of the alleged adultery of the respondent. It was also contended that the trial Judge had erred in his consideration of the evidence in respect of the other alleged behaviour and actions of the respondent.

CONSIDERATION

[5] Section 3(1) of the *Divorce Act* (Cap 29) provides:

Grounds for divorce petition.

> **3.** (1) Any husband or wife who is at the time of the institution of the suit domiciled in the Kingdom may present a petition to the Supreme Court (hereinafter referred to as "the Court") praying the Court to dissolve the marriage upon evidence-
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> *(a)* that since the celebration of the marriage, the respondent has committed adultery or has been sentenced to a term of imprisonment of not less than 5 years; or
>
> …

> *(g)* that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent *(Inserted by Act 39 of 1988.)*

[6] As noted earlier, the only ground relied on by the appellant was that the respondent had behaved in such a way that the appellant could no longer reasonably be expected to live with her. That is, the ground specified in s 3(1)(g). However a particular of that ground was the alleged adultery of the respondent which could have been raised as an independent ground under s 3(1)(a). Clearly an important feature of the appellant's case was the allegation of adultery.

[7] We have reviewed the evidence given before the trial judge. There was some evidence pointing to the respondent having committed adultery. One particular piece of evidence was the admission made by the respondent to the appellant that she had committed adultery. However in her evidence, the respondent did not deny making the admission to the appellant but gave evidence explaining why she did so. She also denied the adultery. This was credible evidence which the trial judge was entitled to accept. The other evidence led by the appellant concerning the alleged adultery was all circumstantial. Again it was evidence the trial judge was entitled to view as falling short of proving adultery. As noted by the Supreme Court in *Sugar v Fatafehi & Taholo* [1993] TLR 4:

> … Given the absence of Inquiry Agents in Tonga proof of adultery will always be a matter of some difficulty. Direct proof may of course be provided by the evidence of the participants. They are the people in the best position to say whether or not adultery took place and their evidence is perfectly competent. ……. It is worth noting that adultery is usually committed (as here) without

> the presence of eye witnesses and accordingly there must be a significant body of evidence available to enable the Court to infer that a married person has engaged in the act of adultery. Section 5 of the *Divorce Act* (cap.29) is remarkable for stating the obvious namely that "on a petition for divorce it shall be the duty of the Court to satisfy itself so far as it reasonabl[y] can … as to the facts alleged … " - subsection (1) – and, if not so satisfied, to dismiss the Petition and refused (sic) to grant the decree of divorce s[o]ught – subsection (3).

[8] The evidence relied on by the appellant to prove the other aspects of respondent's behaviour referred to in [2] of these reasons was not, in our opinion, so overwhelmingly compelling as to have required the trial judge to accept the evidence or, additionally, to accept that it demonstrated the appellant could not reasonably be expected to live with the respondent. The reasons of the trial judge did not address this behaviour in detail. We have reviewed the evidence ourselves and the evidence does not, in our opinion, demonstrate the appellant could not be reasonably expected to live with the respondent. While the relationship between the appellant and the respondent became a troubled one in which they quarrelled, the evidence about the respondent's drinking and arguing and the other conduct the appellant complains of was not so serious as to compel the conclusion that this ground of divorce was made out. The trial judge was entitled to conclude the respondent had not acted unreasonably though we note that, strictly, that is not the statutory formulation of this ground. But his Honour was, in substance, rejecting the ground relied on by the appellant.

[9] The appellant has not demonstrated any error on the part of the trial judge. The appeal should be dismissed with costs.

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Burchett J

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Salmon J

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Moore J