

BRANKO SUGAR -v- LESIELI FATAFEHI or SUGAR and TEVITA LOUMAOSO TAHOLO

DALGETY J

Mrs Taufateau for the Petitioner

Mrs Vaihu for the Respondent and Co-Respondent

Hearing :13th August 1992; 13th, 23rd, 24th, 25th and 26th November 1992

Judgment:19th January 1993

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J U D G M E N T

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- 1 : The Petitioner, Branko Sugar, and the Respondent, Lesieli Fatafehi or Sugar were married in Tonga on 3rd June 1989. It was the Respondent's second marriage and the Petitioner's first. They had been co-habiting with each other prior to their marriage and as a result of that Union two female children were born to them REBECCA FATAFEHI on 9th January 1987 and ENGELINA TANYA SUGAR on 6th February 1989. Both children are illegitimate: neither has been legitimated by their parents' subsequent marriage, presumably because there was a legal impediment to the marriage of the Petitioner and the Respondent at the time of the conception of each child.
- 2 : This is an action of Divorce in which it is alleged by the Plaintiff that the Respondent since July 1992 has frequently committed adultery with Tevita Loumaoso Taholo, the Co-Respondent. Both the Respondent and Co-Respondent deny this allegation. The Petitioner and the Respondent each seeks Custody of the said children, which failing get serious residential access to them. There is no

claim in proper form for maintenance.

MERITS

3 : The marriage was not a particularly happy one and the parties eventually separated in about January 1992. The adultery upon which the Petitioner relies took place thereafter, when the Petitioner and Respondent had ceased cohabiting together as husband and wife. 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 participants. They are the people in the best position to say whether or not adultery took place and their evidence is perfectly competent. There is no such evidence in this case : both the Respondent and the Co-Respondent deny adultery. Accordingly the Court has to rely on indirect proof which may be provided by evidence of various circumstances from which adultery may, more or less reliably, be inferred. It is worth noting that adultery is usually committed (as here) outwith the presence of eye <sup>WITNESSES</sup> 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 reasonable can ...as to the facts alleged ..." - subsection (1) - and, if not so satisfied, to dismiss the Petition and refuse to grant the decree of divorce saught - subsection (3).

4 : The evidence in this case possibly suggestive of adultery comes from three sources. First, there was the testimony of a nurse, a neighbour of the Respondent, MISS TAINA MANI. She said she saw the Co-Respondent at the Respondent's home. She had noticed him there "last month" (October 1992). He now visits her there "only rarely" but previously he "used to visit the Respondent's home and stay there". Her home is adjacent to the Respondent's and she was in a good position to comment upon who resided there or visited it. She has seen the Co-Respondent in residence there. She has also seen

him driving the Respondent's car. Despite her family ties to the Co-Respondent's wife I found her evidence to be truthful and reliable. Secondly, the Co-Respondent's wife MRS KELENI TAILOLO gave evidence of having found the Respondent and her husband together at the Respondent's home one night, as also of an extra-judicial confession. Her evidence obviously requires to be considered with care for her marriage to the Co-Respondent has broken down and she might be tempted to avail herself of this opportunity to blacken his character because of the obvious bitterness she bears towards him. Further she had been given "out of pity" the modest sum of ten pa'anga by the Petitioner to enable her to obtain a birth certificate of her child: she had no money therefor and this had emerged in conversation with the Petitioner after she had approached him to inform him of her husband's misconduct with the Respondent. Having listened to what she said and watched the manner in which she gave evidence I am persuaded that what she said about her husband's conduct was factually accurate. She said that her husband had confessed to her having an "affair" with the Respondent. I have no doubt that this is what the Co-Respondent told his wife. There is nothing unfair in using his own extra-judicial statement as evidence against him - he has only himself to blame if it is false - but I am not prepared to use it as evidence against the Respondent. The Co-Respondent denied having made such an admission to his wife, but I did not believe him. Of considerably more moment was her evidence that at about 2 a.m. or thereby one night, accompanied by two police officers (a Constable Mafua and an officer whose name was unknown to her) she visited the Respondent's home looking for her husband. The house lights had been extinguished. The Respondent was summoned to the door but denied that the Co-Respondent was inside. The Police then saught permission to enter the house and this witness saw them find the Co-Respondent in the Respondent's bedroom under her bed where he was attempting to conceal himself. She noticed on his neck what she euphamistically described as a "love bite". She was not the authoress of such an unsightly blemish upon his person. The Co-Respondent's and Respor lent's explanation for this incident was, frankly, incredible and incredulous. Th Co-Respondent's evidence was that he was drunk,

had been visiting a relation in the vicinity, saw his wife and the two police constables, panicked, and decide to hide in the nearest house which just happened to be that of the Respondent. He claims that the Respondent was outside cleaning and took no exception to his entering her house where he proceeded to hide under her bed. He heard the police knocking on the door and calling upon the Respondent (who by then apparently was inside and the front door closed) to answer, and admits being discovered by the police under her bed. If as he claims he was unknown to the Respondent it is surprising that she allowed him to enter her house uninvited and thereafter took no steps to call for help or inform the police of his unwelcome presence within her abode. Ladies of virtue I would think do not take kindly to men invading their boudoir! Even when the police came to the house and summoned her to the door she still said nothing about the Co-Respondent's presence within. This fictitious version of events is precisely that, an invention, false and untrue, a pitiful attempt to evade the consequences of having been found together at night in the Respondent's house. It is so incredible a tale that I cannot conceive how the Co-Respondent and Respondent seriously expected anyone to give it credence. The Respondent's evidence in this respect was largely along similar lines to that of the Co-Respondent. She claimed that before this incident she did not know the Co-Respondent. Her evidence as to the events of this night I reject as patently untrue. Thirdly, there is the evidence of the PETITIONER himself, which amounted to having seen the Co-Respondent at the Respondent's house when he arrived there on Saturday mornings to collect the children for access; how on one occasion he had seen the Co-Respondent in his wife's bedroom, on the bed, covering his face with a blanket; having seen the Co-Respondent's motor vehicle parked outside the Respondent's home; having seen the Co-Respondent's clothes on the clothes line at the Respondent's property; and having seen his wife waiting to uplift the Co-Respondent, when he left his place of work at the end of the working day. I have no reason to disbelieve any of this evidence.

5 : The evidence of the Respondent and Co-Respondent on the merits was unimpressive and unreliable and to the extent that it is at variance with that given by the Petitioner, Mrs Taholo and Miss Mani it is not believed. I prefer the evidence of the Petitioner and his witnesses. Having regard to the evidence which I have accepted, the surrounding circumstances are such that the inference of adultery is readily drawn. The Respondent and Co-Respondent have had ample opportunity to commit adultery during his frequent visits to or periods of residence at her house. These opportunities were so compromising and so suspicious that to demand proof of mutual passion or undue familiarities between them would be otiose. I shall accordingly grant decree of divorce to the Petitioner.

#### CHILDREN

6 : With the consent of the parties, I was able to inspect the homes of both the Petitioner and the Respondent. Materially, the former's home is preferable to that of the latter, but not to such an extent that this factor alone is decisive. In the past the Respondent has not taken care to ensure that the children attended school regularly. There has been a material change for the better in this regard in recent months, which is just as well otherwise the Respondent's case for custody would have been seriously weakened. Bitterly contested custody disputes are always difficult matters for the Court to resolve especially in a case such as this where I am satisfied that either parent would be a suitable custodian well able to provide for the health, education and welfare of the children throughout childhood. There really is not very much to choose between either parent in this regard. There are however a number of factors which suggest that at this juncture the Respondent should have the custody of the children, namely -

- (a) the children involved are two very young girls;
- (b) the Respondent presently has the custody of the children and I am not persuaded that there is any compelling reason to interfere with the status quo in this regard;

(c) The Respondent would be able to care for the children herself;

(d) The Petitioner would require to import his parents from Sweden to Tonga to care for the children and this would cause difficulties as (i) there is no guarantee that they would wish to, or be allowed by the Immigration Authorities to, reside in Tonga until the children reached majority; and (ii) they speak neither English nor Tongan; and,

(e) The Guardian ad Litem in her Report had recommended that Custody be awarded to the Respondent.

*Things has changed since that report. Level now lives with a man.*

I shall therefore grant the Respondent custody of her two daughters.

One matter that did cause me some concern was the suggestion in evidence that the Co-Respondent had assaulted the children. This

*Key witness*

was never proved. My decision on Custody is based on circumstances

*Mr. Kiko Pele*

as they exist at the present. Custody of course can be reviewed at any stage on cause shown and I would not be at all surprised if

*was never heard since*

a non-custodial parent sought to vary a custody order where there was credible testimony that his children had been abused since the

*he was found to testify*

date of the original order. The Petitioner presently enjoys residential Access to his daughters each weekend from Friday night until Monday morning and it is in the best interests of the children that they retain such regular contact with their father. He should also be entitled to residential access to said children during each school vacation period, for one-half of that period. I shall make an access Order to that effect.

MAINTENANCE

7 : In the circumstances I do not consider that the Respondent is entitled to an award of maintenance for herself. Sooner rather than later she must obtain employment even if initially it is only part-time work during school hours and at week-ends. Thus she can provide some measure of support for herself and make a contribution to the maintenance of the children.

8 : Under section 19 of the Divorce Act (cap. 29) the Court is entitled to make a maintenance order for the parties' children. The Court cannot however do that ex proprio motu but must be asked to do so in proper form. The correct procedure is set forth in Rule 16 of the Divorce Rules 1991 and requires a Summons supported by Affidavit specifying the precise nature of the relief sought, and full details of the income and capital of both parents. This procedure has not been followed in the present case. Both parties asked me to determine the issue of maintenance and by inference waived strict adherence to the rules of procedure. I have all the information required by the Rules and shall on this occasion only make an Order for Maintenance for each child despite the procedural irregularities foresaid. Counsel however should take heed that henceforth the Divorce Rules 1991 must be complied with to the letter! Having regard to the Respondent's income of almost 1,000 pa'anga gross per month, his outgoings on the necessities of life, and the fact that he will be caring for the children each weekend and for part of the school holidays, an appropriate award of maintenance for each child would be 125 pa'anga per month.

#### PROCEDURE

9 : Counsel in this case, as in many others, are still using a pre-printed Divorce Petition referable to the now repealed Divorce Rules 1927 (as amended) and printed in Volume 1 of the 1988 edition of the Laws of Tonga. That form no longer applies. Under the Divorce Rules 1991, it is provided that proceedings shall be commenced by a Petition containing certain specified information and a prayer detailing the relief sought - Rule 3. A style to be followed is set forth in Appendix 1 to these Rules. I stress that this is a style and must be varied as appropriate according to the particular circumstances of each case. The old pre-printed forms should no longer be used! There is no need for a new printed form, for each case is unique albeit that there are certain similarities in all. Each Petition should be freshly drafted having regard to the circumstances of the case, just as is done with the Summons in a Civil Action: this of course would not prevent organised Counsel entering on a computer or word-processor style petitions which can then be adjusted to meet the circumstances of a particular case.

ORDER

10 : In the circumstances I shall pronounce an ORDER in the following terms -

IT IS ORDERED AND ADJUDGED THAT:-

- (ONE) : The Respondent be divorced from the Petitioner and accordingly the marriage solemnised at Nuku'alofa on 3rd June 1989 between them be dissolved, unless sufficient cause be shown to the Court within six weeks why this decree should not be made absolute.
- (TWO) : The Respondent be granted custody of the two female children of the family of the Petitioner and Respondent namely Rebecca Fatafehi born 9th January 1987 and Engelina Tanya Sugar born 6th February 1989.
- (THREE) : The Petitioner be granted residential access to said children (i) each week-end from 1800 hours on Friday until 0830 hours on Monday and (ii) during school vacations, for one half of each such period.
- (FOUR) : The Petitioner be ordained to pay the Respondent as maintenance for each of said children the sum of 125 pa'anga per month, payable on the last day of each month commencing 31st January 1993 and continuing thereafter until each child respectively attains the age of 21 years or until further Order of this Court, whichever is the earlier.
- (FIVE) : No Costs be found due to or by any of the parties to this action.



*Ransy R. Duly*

NUKU'ALOFU . 19th January 1993.