YIU HING v. ULA YIU HING

SUPREME COURT. 1969. 2, 4, 15, July. SPRING C.J.

Divorce - parties living apart and unlikely to be reconciled - term "living apart" - discretion in granting decree.

In terms of sections 7 and 16 of the Divorce and Matrimonial Causes Ordinance 1961, the Court must be satisfied on the evidence that the parties are living apart; that they are unlikely to be reconciled; and that they have been living apart for not less than 5 years, before a decree of divorce will be granted.

Observations made on what amounts to "living apart", and the proper exercise of the Court's discretion in granting a decree.

M v. M [1967] N.Z.L.R. 931 and Fraser v. Fraser [1967] N.Z.L.R. 856 referred to.

PETITION for divorce.

Phillips, for petitioner.
Respondent in person.

Cur. adv. vult.

SPRING C.J.: This is an husband's petition for divorce based on section 7(1)(j) of the Divorce and Matrimonial Causes Ordinance 1961 which reads as follows:

> "That the petitioner and the respondent are living apart and are unlikely to be reconciled and have been living apart for not less than five years".

The wife filed an answer alleging (inter alia) that the petitioner by his own acts and behaviour caused the living apart of the parties since 5th November 1962. The wife asked that the Court in its discretion dismiss the petition.

Section 16 of the said Ordinance states -

> "In every case where the ground on which relief is sought is one of those specified in paragraphs (i), (j), (k) and (l) of section 7 of this Ordinance and the petitioner has proved his or her case, the Court shall have a discretion as to whether or not a decree shall be made, and in every other case where the petitioner has proved his or her case then subject to the special provisions hereinbefore contained, the Court shall pronounce a decree of divorce".

In my view section 16 of the said Ordinance gives the Court an unfettered discretion which requires a judicial weighing of all relevant factors as they appear in the setting of each individual case.

Before I grant a decree in divorce I must be satisfied that the evidence establishes -

(1) That the parties are living apart.

(2) Are unlikely to be reconciled; and

(3) Have been living apart for not less than 5 years.

The term "living apart" was considered in M v. M [1967] N.Z.L.R. 931 and at p. 934 Gresson J. stated -

"In Sullivan v. Sullivan /1938/ N.Z.L.R. 912, the equivalent of s. 21(1)(o) of the Matrimonial Proceedings Act 1963, was exhaustively considered by the Court of Appeal. Finlay J. observed: The expression 'living apart' was perhaps too general and imprecise...what the Legislature intended to convey by the expression 'living apart' was a state of affairs merely as such. The existence of a state of affairs which is the antithesis of living together; in other words, a state of affairs in which the parties are living separate and apart from each other, a state in which there is an absence of that consortium which is the essential characteristic of the proper relationship of husband and wife" (ibid, 918, 919).

"Hutchison J. expressed the opinion that 'living apart' involves both a physical separation and a mental attitude on the part of one or both of the spouses. My brother Turner considered that 'living apart' involves two essential ingredients - a physical separation and a mental attitude averse to cohabitation on the part of one or both of the spouses, and he agreed that something more than mere physical separation is involved in the phrase. The words in the section appeared to him to be the antonym of 'cohabitation', and he was of the opinion that 'cohabitation' and 'living apart' are mutually exclusive opposites, covering between them all possible relationships of the class between husband and wife. If spouses are 'cohabiting', they are not 'living apart', and if they are 'living apart', they are not 'cohabiting'. There can, moreover, be no possible intermediate stage."

"McCarthy J. was of opinion that the state of mind of the parties, like any other matter of fact, was material, but that it should not be elevated to the importance which it has assumed in the law relating to desertion, and his preference was to adopt an objective test, having regard to all the surrounding circumstances."

I respectfully adopt the reasoning suggested by McCarthy J. above. I turn now to the facts.

The parties were married on the 13th day of December 1954 at Apia, Western Samoa although they had lived together as man and wife in a de facto relationship since 1949. The petitioner is a Chinaman now aged 67 years and the respondent is a Samoan now aged 42 years. There were two children born of the union both before the date of the marriage and subsequently legitimated by the marriage. The elder child, Vaitolo, a son, is living with the father and is now aged 18, and the daughter, Sina, is living with her mother and is now aged 16.

It was conceded by the respondent that she and the petitioner had not lived together since 5th November 1962 down to the present time. The husband stated in evidence that he would not be reconciled with his wife and gave evidence of marital discord between the parties culminating in an assault by the wife on the husband on the 5th November 1962. After this assault, which necessitated the husband's attendance at the Motootua Hospital for medical treatment, the husband formed, in my view, the clear intention that he would not live with his wife again. He instructed his solicitor to write to his wife to this effect and requested that the wife leave the matrimonial home.

I am satisfied on the evidence that the parties are living apart and have in fact lived apart since 5th November 1962. I am further satisfied that the parties are unlikely to be reconciled although the wife claimed that she wished to have her husband back, but I have grave doubts as to her sincerity in this regard as she made no attempt to reconcile with her husband after December 1962. In cross examination she was asked the following question -

"Do you think it is likely that you will be reconciled in the future?" to which she replied, "I feel that we will be very unlikely to reconcile again because I want to effect reconciliation but Yiu Hing does not".

I am also satisfied on the evidence that the parties have been living apart for not less than 5 years.

I turn now to the matters developed by the respondent. She claimed that it was the petitioner's conduct which had brought about the separation of the parties. There was evidence of frequent arguments over money. The wife demanding more money than the petitioner claimed he was able to afford. The evidence established that when the wife was rebuffed in these demands she did, on occasions, assault the petitioner. The assault made by the wife on the petitioner on the 5th November 1962, and for which she was subsequently charged and convicted in the Magistrate's Court, Apia, was a serious one. The wife frankly admitted that there had been fights between them but she passed them off as "a couple's fight". The Legislative has not placed any restriction on the exercise of the discretion given by section 16 of the Ordinance, which although a judicial one is still unfettered. In Fraser v. Fraser /1967/ N.Z.L.R. 856 at p. 859 Henry J. said -

"Cases vary infinitely in their facts. Prima facie, if the ground of divorce is proved, the decree ought to follow unless there are good reasons why relief should be refused: Lodder v. Lodder /1923/ N.Z.L.R. 19. If the Legislature intended the grounds to be categorised, it would have done so itself. The general policy of the law is, if it is otherwise just to do so, to get rid of 'limping' marriages and marriages that have irretrievably failed as this one has: Mason v. Mason /1921/ N.Z.L.R. 955. In my respectful view, the Court should look at all the circumstances of each case and then decide whether or not it would be against the justice of the case to grant the divorce. I respectfully turn again to the judgment of Sir Raymond Evershed M.R. (concurred in by Jenkins and Hodson L.JJ., which is not reported as a case but is cited with approval by Lord Merriman P. in Simpson v. Simpson /1951/ P. 320; /1951/ 1 All E.R. 955.) where the learned Master of the Rolls is cited as saying: 'It has so often been said that it is obvious, yet it is worth repeating that all cases that come before this Court must be determined upon their own particular facts, and I should imagine that in no class of case is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case."

I have formed a clear view after considering all matters advanced in this case and it is apparent that the marriage has completely broken down. I am prepared to exercise my discretion in favour of the petitioner and grant a decree in divorce.

The respondent expressed concern regarding the matter of maintenance. I am advised from the Bar that $12 a month is being paid by Yiu Hing to his solicitor Mr R.P. Phillips for the maintenance of the respondent and the child Sina. The respondent claimed that this was not so and further that $12 a month was too little.

The Court has power under section 22 of the Ordinance (inter alia) to order the husband to pay to the wife such weekly or monthly sum for her maintenance and support as the Court deems reasonable. I have had insufficient evidence upon this matter to form any clear conclusions and accordingly I direct that the pronouncement of the decree in divorce be suspended for four weeks to enable the parties to come to an agreement on maintenance. If they cannot the wife can apply to this Court under the provisions of the said Ordinance. No application was made for costs and I accordingly make no order in respect thereof.