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ANTONIOS NICOU
v.
GLINDA A NICOU
(OTHERWISE
BORRILL)
AND
MICHAEL JAMES
WOOD

[JOSEPHIDES, J.]

ANTONIOS NICOU,

Petitioner

GLINDA A NICOU (OTHERWISE BORRILL)

Respondent

and

MICHAEL JAMES WOOD,

Co-Respondent

(Matrimonial Petition No 13,62)

Matrimonial Causes Divorce Adultery Husband's undefended petition for divorce on the ground of wife's adultery Evidence The Court must be satisfied on the evidence that the case for the petition has been proved The Matrimonial Causes Act 1950 (English) section 4 (2) The Court before affirming guilt must be satisfied that there was something more than opportunity for adultery Such as evidence of inclination to commit adultery or willingness to indulge in amorous dalliance falling short of adultery In the present case there is no such evidence

Matrimonial Causes Divorce Matrimonial Offences Adultery Evidence Corroborative evidence as a rule required Rule of practice only not of law Need for corroboration is necessarily greater in undefended cases -Confessions or admissions of adultery by a respondent They are jealously scrutinised especially if made by a spouse who desires to be divorced The Court will refuse to act on confessions or admissions alone unless strong surrounding circumstances indicate that the confession is true E.g. when made by a spouse who has everything to lose by such confession, or by a spouse who is anxious for forgiveness In such cases the Court may act upon a confession although uncorroborated

Matrimonial Causes Matrimonial Offences Divorce Petition for divorce on the ground of adultery Collusion and connivance Meaning and effect of Burden of proof Standard of proof If petitioner to succeed has to satisfy the Court inter alia that the petition is not presented or prosecuted in collusion with the respondent The English Matrimonial Causes Act, 1950 section 4 (2) (c)

Collusion is an agreement between the parties to a suit whereby the initiation of the suit is procured or its conduct provided for. An essential element in a collusive bargain is an attempt to pervert the course of justice--It applies particularly to an agreement not to defend--The fact above that both spouses desire a divorce does not make them guilty of a collusion

Collusion--Burden and standard of proof--The burden is on the petitioner to disprove collusion--It is initially discharged by the provisional presumption of innocence--But if some matters arouse suspicion, then the burden shifts back to the petitioner --The standard of proof is on the balance of probabilities.

Matrimonial Causes--Attorney-General--The Attorney-General of the Republic is the State's Proctor.

Matrimonial Causes--Marriage of convenience--To evade the Immigration Laws as regards employment in Cyprus.

This is a husband's undefended petition for divorce on the ground of the wife's adultery with the co-respondent. The latter although duly served, did not enter an appearance nor did he defend the proceedings. The respondent wife was represented by counsel who had instructions not to oppose the petition and admit the facts. The marriage was solemnized at the District Officer's Office in Larnaca on the 22nd September, 1962, under the provisions of the Marriage Law, Cap. 279.

The learned Justice, in dismissing the petition: -

Held, (1) (a) under the provisions of the English Matrimonial Causes Act, 1950, which is the law applicable to matrimonial causes in Cyprus, the Court has to be "satisfied on the evidence" that "the case for the petition has been proved and, *inter alia*, that the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, and if the Court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition" (section 4 of the said English Act, 1950). Needless to say that a fact may be inferred from circumstances which lead to it, by fair inference, as a necessary conclusion. But the Court must be satisfied that there was something more than opportunity before it will affix guilt; evidence of a guilty passion or inclination is needed in addition (see Rayden on Divorce 9th edition, page 151, paragraph 106, and the cases quoted in support of the statements in that paragraph).

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(b) In the present case however, there is no evidence of inclination to commit adultery or willingness to indulge in amorous dalliance falling short of adultery ; and there is no presumption of adultery simply because opportunity is there.

(2) (a) In an adultery case the evidence of the petitioner alone is seldom accepted without corroboration, either by a witness or, at least, by strong surrounding circumstances. On the question of corroboration the recent case of *Alli v. Alli* [1965] 3 All E.R. 480, restates the rule as to corroborative evidence, which is a rule of practice only and not of law. As Lord Merrivale P. said in *Williams v. Williams* [1932] All E.R. Rep. 907, at p. 908 : "It is obvious that in matters of the greatest consequence between man and wife it would be a dangerous thing to act upon the evidence of one party unsupported by a body of facts".

(b) On the other hand the need for corroboration is necessarily greater in an undefended than in a defended case, where the evidence of the petitioner, though uncorroborated, is tested by cross-examination and can be measured against the evidence given on the other side. (Principle laid down in *Kafton v. Kafton* [1948] 1 All E.R. 435, at p. 438, per *Cohen L.J.* adopted).

(c) It will be seen that all these rules of practice spring from the gravity of the consequences of proof in a matrimonial offence, and from the fact that experience had shown the risk of a miscarriage of justice in acting upon the uncorroborated testimony of a spouse in this class of cases.

(3) Confessions or admissions of adultery by a respondent are jealously scrutinized, especially if made by a spouse who desires to be divorced. The Court will refuse to act upon confessions alone unless the surrounding circumstances indicate that the confession is true, e.g. where the confession is made by a spouse who is anxious for forgiveness, or by a wife who has everything to lose by such confession, and in such cases the Court may act upon a confession, although uncorroborated.

(4) In the present case I find the evidence of the petitioner and his witnesses unreliable. But even if I believed their evidence, that does not prove adultery, but only opportunity for adultery. On the whole, I am not satisfied that on the evidence the case for the petition has been proved and the petition fails (v. section 4 (2) of the English Matrimonial Causes Act, 1950, *supra*).

(5) (a) Even if adultery had been proved to my satisfaction under the provisions of section 4 (2) (c) of the said English Act the petitioner would still have to satisfy the Court on the evidence that the petition is not presented or prosecuted in collusion with the respondent.

(b) The burden of disproving collusion and connivance lies on the petitioner and it is initially discharged by the provisional presumption of innocence ; and it is only after there arises some matter which arouses the suspicion of the Court that the burden shifts back to the petitioner. At the end of the case the Court must be satisfied that there has been no collusion on the part of the petitioner, but the standard of proof is on the balance of probabilities.

(c) Collusion means an agreement or bargain entered into by parties to a suit whereby the initiation of the suit is procured or its conduct provided for, but not every bargain entered into by the parties to a pending divorce suit is collusive. An essential element in a collusive bargain is an attempt to pervert the course of justice. It applies particularly to an agreement not to defend: *Barnes v. Barnes and Grinwade* (the Queen's Proctor intervening) [1867] L.R. 1 P. and D. 505 ; *Bacon v. Bacon and Ashby* (1877) 25 W.R. 560 ; and the cases in the notes to paragraph 11. at p. 241. of Rayden op. cit. The fact that both spouses desire a divorce does not make them guilty of a collusion provided they have not entered into any agreement obnoxious to the Court.

(d) In the present case, certain matters regarding the conduct of the wife have aroused strong suspicion in the mind of the Court and the burden shifts back to the petitioner to disprove collusion. But on the evidence I am not prepared to say that I am not satisfied that the petition is not presented or prosecuted in collusion.

Petition dismissed. No order as to costs.

Per curiam : (a) Had the case for the petition been proved, then this would certainly be a proper case for the Attorney-General of the Republic as the State's Proctor, to look into it and consider whether to intervene or not.

(b) This was a marriage of convenience to evade the Immigration Law as regards employment in Cyprus, as the respondent wife had no permit to work as a

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waitress in the petitioner's bar and the police had been making enquiries. It was after those enquiries that the parties were married.

Cases referred to

All v. All [1965] 3 All L R 480, restatement of the rule as to corroborative evidence of matrimonial offences

Williams v Williams [1932] All E R Rep 907 at p. 908, per Lord Merrivale P followed.

Kafton v Kafton [1948] 1 All E R 435, at p. 438 per Cohen LJ, followed

Barnes v Barnes and Grimwade (the Queen's Proctor intervening) (1867) L R 1 P and D 505,

Bacon v Bacon and Ashby (1877) 25 W R 560

And the cases in the notes to paragraph 11, at p 241 of Rayden on Divorce 9th edition, and also the cases quoted in support to the statements in paragraph 106 on p 151 of the same book.

Matrimonial Petition.

Petition for dissolution of marriage because of the wife's adultery

S *Demetrios* for the petitioner

M *Cramvis* for the respondent

Co-respondent not appearing. Duly served

Cum adu vult

The following judgment was delivered by

JOSEPHIDES, J. This is a husband's petition for divorce on the ground of the wife's adultery with the co-respondent in this case. The latter, although duly served, did not enter an appearance nor did he defend the proceedings. The respondent was represented by counsel who had instructions not to oppose the petition and admit the facts, but I shall revert to that matter at a later stage of this judgment.

The petitioner-husband, who is aged 29, is a Greek Cypriot and a member of a Greek Orthodox Church. He was born in Ay Theodoros village, Larnaca District, from where his mother comes. His father, who was a Greek, came from

Smyrna in 1922 and settled in Cyprus and married the petitioner's mother. He lived and worked in Larnaca until he died some 11 years ago. The petitioner, while still in his teens, went to England where he was employed as a waiter for 7 years and returned to Larnaca in April 1962, where he has been running a bar since May 1962. On this evidence I am satisfied that the petitioner-husband is domiciled in Cyprus and that this Court has jurisdiction to hear and determine the present petition

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As regards the facts of the case : The husband gave evidence himself and called a witness in support of his case. It is the husband's version that he met his wife, the respondent, in a dance hall in London while he was working there a short time before he returned to Cyprus. They came together to Cyprus in April 1962 and until September 1962 she lived in his house. After he set up his bar business in May 1962 she went to work with him at the counter and, in fact, she worked in the bar from May 1962 until the 12th October, 1965.

The marriage was solemnized at the District Officer's Office in Larnaca on the 22nd September, 1962, under the provisions of the Marriage Law, Cap. 279. The certificate of marriage produced in evidence shows that the husband was then 25 years of age and a bar manager of Larnaca, and that the wife was then 21 years of age and a waitress of Larnaca. As already stated, the husband is a member of the Greek Orthodox Church of Cyprus and the wife a member of the Methodist Church, but there was no religious ceremony of marriage in any church. There is no issue of the marriage

It should, I think, be observed that this was a marriage of convenience to evade the Immigration Laws as regards employment in Cyprus, as the respondent had no permit to work as a waitress in the petitioner's bar and the police had been making enquiries. It was after those enquiries that the parties were married.

After their marriage the parties lived together at the house of the husband in Larnaca, and his mother lived with them. According to the husband, three or four months after the marriage the wife wanted to go to England to visit her parents and he sent her there about 9 or 10 months after the marriage. She spent some 7 months in England and then returned to Cyprus. Their relations became worse, according to the husband, though he did not state in what respect.

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The wife made the acquaintance of the co-respondent, some three months before October, 1965, while she was working in the husband's bar. The co-respondent used to frequent the bar regularly as a customer and he became friendly with the wife, and the husband stated that he suspected them. The co-respondent, who is a bachelor and an Englishman, is employed at the Sovereign Base Area at Dhekelia and lives in Larnaca.

The husband further stated that in the evening of the 12th October, 1965, he missed the wife and that he reported the matter to the police at about 8 p.m. At about 11 p.m. he went, together with Takis Koumis (witness 2) and Petros Christou to the house of the co-respondent in Larnaca and he knocked at the door. The co-respondent opened the door and the husband, together with his two friends, went into the house where he saw his wife sitting on an armchair in the sitting room in her night-dress. He then asked her to go home with him, she refused and he left. On the following day he met her in the street at about 3 or 3.30 p.m. accompanied by the co-respondent and he asked her again to return to him but she replied : " I have deserted you, I am not coming back ". On another occasion he saw her in the cinema accompanied by the co-respondent. They were holding hands when he saw them.

This is the husband's version as given in evidence by him.

The petition was filed 11 days after the 12th October, that is, on the 23rd October, 1965. It was served on the wife and the co-respondent on the 26th October. On the following day the wife signed a retainer to her advocate, Mr. M. Cramvis, and she left Cyprus two days after service, that is, on the 28th October, 1965, never to return. Her instructions to her lawyer, as given in the form of retainer, were " I instruct him not to oppose the application and admit facts as per application ". Mr. Cramvis stated on the date of the hearing that his client left Cyprus on the day following the signing of the retainer, that she left no address with him and that he has not communicated with her since that date. Respondent's counsel did not enter appearance at the proper time, nor did he file a reply or any other document on respondent's behalf. On the day of the hearing of this petition he was granted leave to enter an appearance on that day.

The husband's witness, Takis Koumis, did not attend Court on the day fixed for the hearing of the petition owing

as he explained, to some misunderstanding between the petitioner and the witness, but it should be stated that he was not *subpoenaed* to attend Court. On counsel's application the case was adjourned for two days to enable this witness to attend and give evidence in support of the husband's version. This witness, who comes from Larnaca, is a partner in a "flippers" amusement business. He stated that he had known the parties before and that the husband met him at the "Acropolis" cafe on the 12th October, 1965, at about 7 or 7.30 p.m. The husband appeared to be upset and, after some conversation, this witness together with a certain Petros Christou and the husband went to the police station at about 8 p.m. and then they returned to the "Acropolis" cafe. At about 11 p.m. on the same night all three of them went to an Englishman's house in Larnaca. According to this witness, the husband knocked at the door, the Englishman opened and all three of them went in. There this witness stated that he saw the wife lying on a sofa in the sitting room, holding a drink, that she was wearing a night-dress, that when she saw them she got up from the sofa and went to sit in an armchair, and that the husband became excited and said to the wife in English (the conversation is quoted verbatim) "Why you left me? You did not tell me anything. What you doing in this house?" The wife replied "I cannot live with you any more. I had enough from you. I know what I want. I found it. I am happy here." The witness then offered to reconcile them but, according to him, she replied "I cannot live with him any more. I cannot stand this kind of life with him and I never go back with him." Thereupon the husband, with his two friends, left the Englishman's house. Two or three days later the witness saw the wife together with the same Englishman at the cinema. The witness, who did not know the Englishman before the 12th October, 1965, has not seen him since.

Pausing there, I think that this witness has given evidence as to a conversation alleged to have taken place in the co-respondent's house, which the husband himself never alleged in his evidence before the Court. The only thing which the husband said was that he asked the wife to follow him and she refused and he then left. A material contradiction in the evidence of these two witnesses is that the husband, who entered the room first, stated that his wife was *sitting* in an armchair while his witness Koumis stated that when they entered she was *lying on a sofa* and when she saw them she got up and went and sat on an armchair. Another discrepancy in the

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evidence of these two witnesses is that Koumis stated that the wife was holding a drink when they entered while the husband said nothing about a drink.

Under the provisions of the English Matrimonial Causes Act, 1950, which is the law applicable to matrimonial causes in Cyprus, the Court has to be "satisfied on the evidence" that "the case for the petition has been proved" and, *inter alia*, that the petition is not presented or prosecuted in collusion with the respondent or either of the respondents, and if the Court is not satisfied with respect to any of the aforesaid matters it shall dismiss the petition (section 4 of the English Act of 1950). Needless to say that a fact may be inferred from circumstances which lead to it, by fair inference, as a necessary conclusion. But the Court must be satisfied that there was something more than opportunity before it will affix guilt; evidence of a guilty inclination or passion is needed in addition (see *Rayden on Divorce*, 9th edition, page 151; paragraph 106, and the cases quoted in support of the statements in that paragraph).

In the present case, however, there is no evidence of inclination to commit adultery or willingness to indulge in amorous dalliance falling short of adultery; and there is no presumption of adultery simply because opportunity is there.

In an adultery case the evidence of the petitioner alone is seldom accepted without corroboration, either by a witness or, at least, by strong surrounding circumstances. In this case there is no direct evidence of eye-witnesses as to the actual act of adultery. Certain evidence is given to the Court and from that evidence the Court is invited to infer that adultery has actually taken place between the wife and the co-respondent. On the question of corroboration the recent case of *Alli v. Alli* [1965] 3 All E.R. 480 restates the rule as to corroborative evidence. The following is taken from the headnote:

"In regard to corroborative evidence of alleged matrimonial offences the authorities justify the following rules, applicable in proceedings in Courts of summary jurisdiction and in the High Court—(i) that where a matrimonial offence is alleged, the Court will look for corroboration of the complainant's evidence; and (ii) that the Court will normally, before finding a matrimonial offence proved, require such corroboration if, on the complainant's own evidence, it is available. These are rules of practice only, not of law. They spring from the gravity

of the consequences of proof in a matrimonial offence ; and from the fact that experience has shown the risk of a miscarriage of justice in acting on the uncorroborated testimony of a spouse in this class of case. It is, nevertheless, open to a Court to act on the uncorroborated evidence of a spouse if the Court is not in doubt where the truth lies (see p. 484, letters E to G, post).

Dictum of SIR BOYD MERRIMAN, P., in *B. v. B.* ([1935] All E.R. at p. 429) applied".

As Lord Merrivale P. said in *Williams v. Williams* [1932] All E.R. Rep. 907, at page 908 : " It is obvious that in matters of the greatest consequence between man and wife it would be a dangerous thing to act upon the evidence of one party unsupported by a body of facts ". On the other hand, in *Kafton v. Kafton* [1948] 1 All E.R. 435, at page 438, Cohen, 1 J., was of the view that the need for corroboration is necessarily greater in an undefended than in a defended case, where the evidence of the petitioner, though uncorroborated, is tested by cross examination and can be measured against the evidence given on the other side.

It will be seen that all these rules of practice spring from the gravity of the consequences of proof in a matrimonial offence, and from the fact that experience has shown the risk of a miscarriage of justice in acting upon the uncorroborated testimony of a spouse in this class of cases.

Confessions or admissions of adultery by a respondent are jealously scrutinized, especially if made by a spouse who desires to be divorced. The Court will refuse to act upon confessions alone unless the surrounding circumstances indicate that the confession is true, e.g. where the confession is made by a spouse who is anxious for forgiveness, or by a wife who has everything to lose by such confession, and in such cases the Court may act upon a confession, although uncorroborated (see *Rayden on Divorce*, page 153, paragraph 109 and the cases in support).

In the present case it is the version of the husband and his witness that the wife was seen at 11 p.m. in the co-respondent's house wearing a night dress. One of the questions to be considered is : Are these two witnesses telling the truth ? In weighing their evidence it should be borne in mind that the wife left the matrimonial home on that very evening, and we have no evidence whether she moved her personal clothing

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and belongings from the house and, if she did, at what time. How did she come to be in a night-dress in the sitting room of the co-respondent? I entertain considerable doubts whether she was actually in her night-dress. The petitioner's story would have been more probable if the wife was found in some state of undress, rather than in her night-dress in the sitting room, considering that it was her first evening there. On the other hand, why should she be wearing her night-dress and sitting in the sitting room and not taking any precaution when there was a knock at the door, by moving into another room. Further more, there is no evidence as to the state of dress of the co-respondent. I think that it can be reasonably assumed that he was properly dressed, and not undressed or in pyjamas, otherwise the husband and his witness would have stated so. Another factor to be considered in weighing the evidence is that there was no scene between the husband and the wife and/or the co-respondent when it is alleged that the husband caught his wife in a night-dress in the co-respondent's house. Would that be probable, considering the type of the husband, that is to say, that he is a young bar manager and not a sophisticated University don to take matters lying down with a cool head.

Following that, the husband goes to his lawyer and the petition is filed and served on the wife. She very conveniently instructs her advocate not to oppose the petition and to admit the facts and she leaves Cyprus on the following day leaving no address and not returning to Cyprus.

Having watched the demeanour of the husband and his witness in the witness box, and considering the discrepancies in their evidence, I have formed the impression that they are not witnesses of truth. I find their evidence unreliable and I am not prepared to accept it. But, even if I believed their evidence, that does not prove adultery. I do not have any evidence that the wife spent the night with the co-respondent and on the other evidence I am not prepared to draw the inference that adultery took place on that night.

To sum up, having regard to the nature and quality of the evidence before me I am not prepared to draw the inference that in the circumstances of this case the wife committed adultery with the co-respondent. On the whole, I am not satisfied that on the evidence the case has been proved and the petition should accordingly fail (section 4 (2) of the Matrimonial Causes Act, 1950).

Even if adultery had been proved to my satisfaction, under the provisions of section 4 (2) (c) of the 1950 Act the petitioner would still have to satisfy the Court on the evidence that the petition is not presented or prosecuted in collusion with the respondent, and I think that I should deal shortly with that point

The burden of disproving collusion and connivance lies on the petitioner and it is initially discharged by the provisional presumption of innocence, and it is only after there arises some matter which arouses the suspicion of the Court that the burden shifts back to the petitioner (see Rayden on Divorce, page 231, paragraph 3, and the cases in support). At the end of the case the Court must be satisfied that there has been no collusion on the part of the petitioner but the standard of proof is on the balance of probabilities. Collusion means an agreement or bargain between the parties to a suit whereby the institution of the suit is procured or its conduct provided for, but not every bargain entered into by the parties to a pending divorce suit is collusive. An essential element in a collusive bargain is an attempt to pervert the course of justice. It applies particularly to an agreement not to defend *Barnes v Barnes and Grimwade* (the Queen's Proctor intervening) [1867], 1 R 1 P & D 505, *Bacon v Bacon and Ashby* (1877), 25 W R 560, and the cases in the notes to paragraph 11, at page 241, of Rayden on Divorce. The fact that both spouses desire a divorce does not make them guilty of a collusion provided they have not entered into any agreement obnoxious to the Court.

As already stated, the burden of disproving collusion is on the petitioner. In the present case I have to consider the following facts: (a) the express instructions given by the respondent to her advocate not to defend the petition and to admit facts, (b) her departure from Cyprus on the day following the signing of the retainer to her advocate, (c) that she left no address with her advocate, and (d) that she has not given further instructions to her advocate or written to him at all since her departure from Cyprus.

All these matters have aroused strong suspicion in the mind of the Court and the burden shifts back to the petitioner but on the evidence before me I would not be prepared to say that I am not satisfied that the petition is not presented or prosecuted in collusion. Had the case for the petition been proved, then this would certainly be a proper case for the

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Attorney-General of the Republic, as the State's Proctor, to
look into it and consider whether to intervene or not.

In the result the petition is dismissed.

No order as to costs

*Petition dismissed. No order
as to costs.*