

1979 March 17

{STAVRINIDES, J.}

ANNE MARIE PHILIPPOU SOLOMOU,

Petitioner,

v.

ANDREAS PHILIPPOU SOLOMOU,

Respondent.

(Matrimonial Petition No. 8/76).

5 *Matrimonial Causes—Divorce—Cruelty—What amounts to cruelty—
Whether spouse who provokes conduct complained of entitled to
relief—Principles applicable—Following provocation by wife,
husband hitting her on the face, seizing her by the throat and
causing her actual bodily harm—Though provocation such as to
deprive a reasonable man of his self-control, husband's reaction
went beyond what was excusable in the circumstances—Assault
such as to have caused danger to the wife's health, bodily or mental
or to give rise to reasonable apprehension of such danger—Hus-
band guilty of cruelty—Decree nisi to wife.*

10 *Matrimonial Causes—Divorce—Adultery—Standard of proof—Whe-
ther direct evidence of adultery necessary—Wife seen by husband
coming naked out of the bathroom with a naked man—Guilty of
adultery—Decree nisi to husband.*

15 *Matrimonial Causes—Practice—Prayer for custody of children and
maintenance—Such orders may be made at a later stage, and in
all the circumstances this would be the best course in this case.*

20 The parties to this petition were married on December 14,
1969, at the District Office, Larnaca. They have two children,
a girl and a boy, aged respectively nine and four years.

25 The wife petitioned for dissolution of marriage on the ground
of cruelty and the husband opposed the petition and cross-
prayed for dissolution on the ground of adultery. In support
of her petition the wife relied on "continual nagging" by the
respondent; on his "refusing or making no real effort to work

or stay in work so as to support his family"; on his "constant quarrelling over money matters"; on his "throwing jealous tantrums"; and on two alleged incidents of violence.

The latter incident of violence occurred upon the petitioner's return from a night out in the company of a Lebanese couple named the Elmirs and a Lebanese man by the name of Aswad. It was common ground that the respondent had consented to the outing, although wondering why he himself had not been invited. In giving his consent the respondent asked her "not to be late" and she told him that she would be back "at about 11 p.m.". In the event she returned at 4 a.m. The respondent asked her whom she had been with and she mentioned only the Elmirs. Following an inquiry at the hotel, he learned that Aswad also had been one of the party, whereupon he said to the petitioner:

"You are a liar. You were not only with the Elmirs. Aswad was with you",

to which she replied:

"Yes, he was with us; I want to live the way I like",
adding

"Next time I go out I will telephone you so that you may see us one on top of the other".

Upon this the respondent hit her with both hands across the face, seized her by the throat and caused a scratch on her neck and an ear.

The respondent alleged that the petitioner has condoned the above cruelty because at the hearing of the criminal charge against him for assaulting her she stated that she had no complaint against him.

The petitioner alleged that as a result of the matters complained of she had become nervous, run down and apprehensive and has started to smoke and has also lost her appetite and over thirteen kilos in weight. These allegations were supported by the evidence of her father.

In support of the cross-prayer there was evidence from the respondent (see pp. 109-110 *post*) that on November 19-20, 1979 he was keeping watch of the flat of the petitioner and that he saw the petitioner and a man (named Karam) coming out of the

bathroom and going into the bedroom and that both she and the man were naked.

Held, (I) on the wife's petition:

5 (1) That, with the exception of the complaint relating to the last incident, there is no evidence to support the petitioner's complaints and that they must be dismissed.

10 (2) That cruelty as a ground of divorce is conduct of such a character as to have caused danger to life, limb, or health (bodily or mental) or to give rise to a reasonable apprehension of such danger; that a spouse who provokes the conduct complained of is not entitled to relief; that in order to constitute a valid defence the provocation must be such as to deprive a reasonable man of his self-control and the mode of resentment must bear a reasonable relationship to the provocation offered (see Rayden on Divorce 8th ed. pp. 135, 136, para. 95); that while the provocation offered in this case was such as to deprive a reasonable man of his self-control the respondent's reaction in hitting the petitioner, seizing her by the throat and causing her actual bodily harm went beyond what was excusable in the circumstances; that the assault was such as to have caused danger to the petitioner's health, bodily or mental, or to give rise to reasonable apprehension of such danger; and that, accordingly the respondent has been guilty of cruelty towards the petitioner.

25 (3) That as the petitioner has not condoned the cruelty because there was no evidence that she "withdrew her complaint" before the Judge and because she has not resumed cohabitation with him since she left him after the assault, she is entitled to a decree of dissolution on the ground of cruelty.

Held, (II) on the respondent's cross-prayer:

30 That direct evidence of adultery is not necessary; that as far as the standard of proof is concerned adultery may be proved by a preponderance of probability (see Rayden on Divorce 8th ed. pp. 193, 194, 196); that accepting the evidence of the respondent this Court is satisfied to the extent of holding that there is no reasonable doubt, that on the night of November 19-20, 1976, the petitioner committed adultery with the man named Karam; and that, accordingly, the respondent is entitled to a decree of dissolution on that ground.

Held, (III) with regard to the prayer of the petitioner for custody of the children and for an order for maintenance for herself and the children :

That such orders may be made at a later stage and having regard to all the circumstances this would be the best course in the present case. 5

Decree nisi of divorce to each party. No order as to costs.

Matrimonial Petition.

Petition by the wife for the dissolution of the marriage on the ground of cruelty and cross-petition by the husband for the dissolution of the marriage on the ground of adultery. 10

St. G. McBride, for the petitioner.

A. Andreou, for the respondent.

Cur. adv. vult. 15

The facts sufficiently appear in the judgment delivered by:

STAVRINIDES J. This is a petition by a wife for dissolution of marriage on the ground of cruelty. The husband opposes it and cross-prays for dissolution on the ground of adultery.

The parties were married on December 14, 1969, at the District Office, Larnaca. They have two children, a girl and boy, aged respectively nine and four years. 20

In the petition reliance is placed on "continual nagging" by the respondent; on his "refusing or making no real effort to work or stay in work so as to support his family"; on his "constant quarrelling over money matters"; on his "throwing jealous tantrums"; and on two alleged incidents of violence against the petitioner. 25

From the petitioner's evidence at the hearing it appears that such "nagging" as there may have been had been done, not by the respondent himself, but by his mother. She suggested that it was done at his instigation; but for this I have only the petitioner's word, and she has not explained what she based it on. So on this score he is absolved. 30

Going on to the complaint about the respondent's "refusing or making no real effort to work or stay in work", no evidence has been given at the hearing to support it, and on the contrary the petitioner told the Court that in search of work the respon- 35

dent had gone with her as far as the Belgian Congo. So here, too, she fails.

Then as to the respondent's "constant quarrelling over money matters", there is no evidence of such "quarrelling" either and therefore this ground also is dismissed.

Nor is there any evidence of "jealous tantrums", as distinct from evidence regarding the two incidents in which violence is alleged to have been used by respondent against the petitioner.

Now as to the incidents of violence. The earlier of them is thus described in para. 12 of the petitioner's affidavit accompanying the petition:

"On a day in or about the month of June, 1976, the said respondent locked your petitioner in a room at 12, General Timayia Street with him and prevented her from leaving and by his behaviour in the said room caused your petitioner great stress and put her in fear of her bodily safety. Before locking your petitioner in the said room the said respondent behaved in an ungovernable manner throwing objects about the house and breaking some."

In her evidence before me the petitioner said she stood by that affidavit. But neither in it nor in her oral evidence did she explain what started that incident.

According to the respondent, at about 1.30 or 2 p.m. on the day referred to in the affidavit the petitioner asked him to lend her his car "to come to Nicosia with her sisters". He said:

"I suspected that her motive was wrong and I refused. This was at about 1.30 or 2 p.m. At 3 p.m. a taxi pulled up outside 12, General Timayia Street, where we were staying at the time. Petitioner went down and entered the taxi. I looked to see if her sisters were in it; they were not. There was one other passenger—a Larnaca man. The taxi left. I followed it in my own car. When we reached the point where the road forks into two—one leading to Nicosia and the other to Limassol—it took the road leading to Limassol. I followed it to Limassol and saw it pulling up in front of the Astir Hotel. I stopped the car and went up to her. I caught up with her before she had gone upstairs. I said to her: 'What are you doing here?' She said: 'That is

no concern of yours; I live my own life'. I begged her to return home with me and she said: 'I do not want you; I do not love you. Go wherever you want'. I asked her whether it was for Sterghios Arabadjis that she had gone there. She said she did not know if he was living there. She said that she wanted to go to Limassol and meet men with whom for 2 or 3 hours she was happy, which she was not with me. All this was outside the hotel. Then she went up to a near-by cafe, where she made a telephone call. I could not hear what she was saying. There was further argument after the call was over".

He went on:

" Then I went to the hotel and asked if Sterghios Arabadjis was staying there. I got a negative reply. As I turned to leave I saw that person coming down the stairs. I knew him, as he had been staying at the Maison Belge. So I called out to him and we had a chat."

He said he returned to Larnaca at about 8.30 p.m. and went on:

" There was an exchange between us. At first it was an angry one; then we made it up."

In cross-examination he said the time of his arrival in Limassol must have been 4.45 p.m. and on the way back from Limassol he was driving at 95 m.p.h. He specifically denied that he locked up the petitioner in a room and threw things at her. She returned at 8.30 p.m., he said, and he went on:

" There was an exchange between us. At first it was an angry one; then we made it up... The exchange lasted for about one hour. I was pacified when she said that what she did was intended to make me jealous."

The petitioner agreed that she and the respondent had met outside the Astir hotel, but denied that the incident referred to in para. 12 of the affidavit occurred on the date of that meeting. However, as already stated, she did not explain what had caused it. Thus, while on the respondent's side I have a full and credible version of the sequel of the Limassol meeting, on the other side there is nothing but an allegation of violent behaviour without any explanation of its cause, which is all the more unsatisfactory because, according to her, the incident in question

occurred on a day other than that of the Limassol meeting. Hence she failed to establish this part of her case as well.

The later incident—which occurred on July 29, 1976—was the subject of a prosecution against the respondent, the petitioner having made a complaint regarding it to the police. The prosecution was for assault on the petitioner causing her actual bodily harm, to which the respondent pleaded guilty. This incident followed upon the petitioner's return from a night out in the company of a Lebanese couple named the Elmirs and a Lebanese man by the name of Aswad. It is common ground that the respondent had consented to the outing, although wondering why he himself had not been invited. In giving his consent the respondent asked her "not to be late" and she told him that she would be back "at about 11 p.m." In the event she returned at 4 a.m. The respondent asked her whom she had been with and she mentioned only the Elmirs. Following an inquiry at the hotel, he learned that Aswad also had been one of the party, whereupon he said to the petitioner:

"You are a liar. You were not only with the Elmirs. Aswad was with you",

to which she replied:

"Yes, he was with us; I want to live the way I like",

adding

"Next time I go out I will telephone you so that you may see us one on top of the other".

Upon this the respondent hit her with both hands across the face, seized her by the throat and caused a scratch on her neck and an ear. She went as far as to say that he actually tried to strangle her, but I am clear that there is no foundation for that assertion.

The question then in so far as the petitioner's claim for dissolution is concerned is, what is the effect of that assault, as I found it to be, in the particular circumstances in which it was committed? Cruelty as a ground of divorce has been described as "conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or to give rise to a reasonable apprehension of such danger": See Rayden on Divorce, (8th Edn.), p. 120, para. 79. Provocation is relevant to

an issue as to cruelty. As Rayden, pp. 135, 136, para. 95, puts it,

“ A spouse who provokes the conduct which causes actual or apprehended danger to life, limb or health is not entitled to relief; but, to constitute a valid defence within this rule, the provocation must be such as to deprive a reasonable man of his self-control; the party charged must in fact be acting under the stress of such provocation, and the mode of resentment must bear a reasonable relationship to the provocation offered.”

In my view while the provocation offered in this case was such as to deprive a reasonable man of his self-control, the respondent's reaction in hitting the petitioner, seizing her by the throat and causing her actual bodily harm went beyond what was excusable in the circumstances. Was the assault such as to have caused danger to the petitioner's health, bodily or mental, or to give rise to reasonable apprehension of such danger? The petitioner said nothing directly bearing on this topic in her oral evidence, but in para. 18 of her affidavit accompanying the petition it is stated that

“ As a result of the matters aforesaid (*i.e.* including the assault in question, she) “has become nervous, run down and apprehensive and has started to smoke and has also lost her appetite and over thirteen kilos in weight.”

This has not been disputed and in fact is supported by the evidence of her father (p.w.2), who said that “the incident the subject of (the prosecution) made her unhappy” and that “she would often cry”. Altogether I am satisfied to the extent of holding that there is no reasonable doubt, that the respondent has been guilty of cruelty towards the petitioner.

It follows that, unless there is substance in a plea set up by the respondent that the cruelty has been condoned, the petitioner is entitled to a decree of dissolution on the ground of cruelty. The plea is based on para. 1 of the affidavit accompanying the respondent's answer, where it is alleged that

“ The petitioner stated in Court (at the hearing of the criminal charge against the respondent for assaulting the petitioner) that she had no complaint whatever against him on account of his behaviour on July 29, 1976.”

The fact is that the petitioner was not present in Court when the charge was dealt with. Nor, having left him after the assault but on the same day, has she resumed cohabitation with him since. It follows that the petitioner is entitled to a decree of
5 dissolution on the ground of cruelty.

I now go on to deal with the cross-prayer. This relates to events that happened starting at 11 o'clock on November 19-20, 1976, and continued until shortly after 7 o'clock next morning. These are thus described by the respondent in his evidence in
10 chief:

“ On the night of November 19 suspecting, as I did, that petitioner was deceiving me I kept watch over the flat where she was staying from the side street. I was with p.c. Eleftheriou. We were in my car. The watch started at 11
15 p.m. At about 2.15 a.m. a car pulled up outside the block of flats. My wife and a man came out and went into that building. There were some other passengers in the car and it left. Presently I saw a light in the flat. Leaving the policeman behind, I went up to the flat. I stayed outside until petitioner left. Soon after I reached the flat I saw a light in the bedroom; at about 3.15 a.m. it was switched off. At 3.30 a.m. the policeman came up and I asked him to go and call petitioner's father and another policeman. At 4 p.m. p.c. Eleftheriou came with another
20 policeman and petitioner's father. Her father knocked at the door and called out to her, but there was no reply. Then he and the other policeman left. Presently I asked Eleftheriou to go and bring S. Himonides, and at 5 or 5.10 a.m. they came.

We stayed in the corridor outside the flat until 6.45 a.m., when the light of the bathroom was switched on. Through the bathroom window pane I saw the silhouette of a woman and then that of a man. I could hear a conversation in
35 English and French. Then I opened the door with one of the keys that I had with me and went in, followed by the policeman. We saw petitioner and a man coming out of the bathroom and going into the bedroom. Both were naked. They saw us. On entering the bedroom one of them locked the door. Both Himonides and I looked
40 through the keyhole and I saw them dressing.

After about half an hour, during which we were waiting in the hall of the flat, petitioner and the man in question came out. I used abusive language to her, asking her if she had been paid by the man in question. As they were leaving we went out of the flat; and petitioner locked the door and left with that man.” 5

In cross-examination this evidence was challenged only by a single general question, to which the petitioner replied:

“ I insist that my account of what passed on 19–20 November is true.” 10

The only reference to that incident in the petitioner’s oral evidence is to be found in her cross-examination, where she said:

“ Karam only came to the flat at about 7 or 7.30 a.m. on November 19. He knew my sisters and he came looking for them; sometimes they would stay with me. The flat has two bedrooms, a dining-cum-sitting-room, a kitchen and a bathroom. When respondent came in I locked myself in the bedroom where Karam was”; 15

and in her answer to a question put to her by the Court,

“ Karam had been in the flat for about half an hour when respondent came”. 20

In my judgment the only possible view of the evidence relating to the cross-prayer is that the respondent’s version is the true one. The question then arises, does it justify a finding of adultery? This involves two inquiries, namely (i) whether direct evidence of adultery is necessary and (ii) what standard of proof is required. As to both I will content myself with two quotations from Rayden, *op. cit.* Regarding (i), at p. 196 it is stated that 25

“ To succeed on such an issue it is not necessary to prove the direct fact, or even an act of adultery in time and place, or even necessarily the name of the person with whom the respondent is alleged to have committed adultery. It is rare that parties are surprised in the direct act of adultery, and such evidence, because of its unusual nature, used to be looked at carefully, and still would be when the adultery is in dispute. In nearly every case, where there is no 30 35

confession, the fact is inferred from circumstances which lead to it, by fair inference, as a necessary conclusion.”

As to, the second inquiry, at pp. 193, 194 it is stated that

5 “ As far as the standard of proof is concerned, adultery, like any other fact. ... may be proved by a preponderance of probability; and although it has been said that in proportion as the offence is grave, so ought the proof to be clear, and that even in these days there is a stigma in adultery, nevertheless views on adultery have
10 changed and it no longer generally entails the serious social consequences that in some former times resulted from its discovery.”

15 Accepting, as I do, the above passages are accurate statements of the law, I proceed to answer the first question. In my judgment if the evidence of the respondent is accepted the charge of adultery has been amply proved. Now how does the charge stand in the face of the evidence for the petitioner? That in the morning in question Karam was in her flat where at the time she was alone she did not dispute. She said he had gone there
20 at 7 or 7.30 a.m. looking for her sisters, “whom he knew and who sometimes would stay with her”. Unnatural as this version is, to accept it I must reject the respondent’s and p.c. Eleftheriou’s evidence about the flat having been watched by them continually since 11 p.m. on the previous night and their
25 having seen her arriving there in a car with a number of other persons including a man who alighted with her and went with her into the building of which the flat forms part. I would have accepted this evidence, detailed, natural and unshaken as it was, in any event, but if anything more were required it
30 would be found in the contents of a letter from the petitioner received by the latter during the pendency of this case and put in evidence by her (*exhibit 2*), which bears eloquent testimony to the respondent’s passionate love for the petitioner and rules out all question of his having fabricated or distorted evidence
35 to obtain an unjust verdict of adultery.

40 For these reasons I am satisfied to the extent of holding that there is no reasonable doubt, that on the night of November 19–20, 1976, the petitioner committed adultery with Karam. Therefore the respondent is entitled to a decree of dissolution on that ground.

Now the petition includes a prayer that custody of the children be given to the petitioner and for an order of maintenance for herself and the children. Such orders may be made at a later stage, and having regard to all the circumstances I think that in the present case this would be the best course. 5

Decree nisi of divorce granted to each party, not to be made absolute for three months from today.

As both sides succeed I am making no order as to costs.

Decree nisi granted to each party.

No order as to costs. 10