

1979 April 27

[L. LOIZOU, J.]

WILLIAM HENRY HOLROYD,

Petitioner,

v.

CAROL ANNE HOLROYD OTHERWISE
CAROL ANNE GODDEN,

Respondent,

and

IACOVOS ZISIMOS,

Co-respondent.

(*Matrimonial Petition No. 10/73*).

Matrimonial Causes—Jurisdiction—Husband's domicile of origin England—Acquiring a house and other property in Cyprus and coming here with the intention of living permanently—No property of any kind in England—Changed his domicile of origin and acquired a domicile of choice in Cyprus which he has not abandoned to this day—Court vested with jurisdiction to entertain the petition. 5

Matrimonial Causes—Divorce—Adultery—Standard of proof required—Court must be satisfied that there was more than opportunity before it will affix guilt—No direct evidence by any witness as to the actual act of adultery—Evidence in support of petition creating a suspicion but falling short of the standard of proof required—Petition dismissed. 10

Matrimonial Causes—Divorce—Adultery—Birth of child—Legitimacy—Presumption—Evidence by husband of non-access—Admissibility—Measure of proof—Evidence of non-access not such as to satisfy the Court that the presumption of Law in favour of legitimacy has been rebutted. 15

The parties to this petition were both British citizens and members of the Church of England. They were married on the 3rd December, 1966, at the Register Office of Chichester in the County of West Sussex in England. 20

5 The husband's domicile of origin was England. In about 1971 he started building a house of his own in Cyprus with the intention of making Cyprus his permanent residence and live here in semi-retirement. The house was completed in 1972 and he moved his furniture here from England. He also bought some land of an extent of about a hundred donums for farming purposes. On the 3rd April, 1973, the parties came to Cyprus with the intention of living here permanently and the husband was on the 11th January 1974 granted a permanent residence status. He invested a sum of £32,000 in a fruit exporting firm of which he became a co-director. He has not left Cyprus since then and he is engaged in his business as above. He has no house or any property of any kind in England.

15 Petitioner alleged that the respondent committed adultery with the co-respondent in May and June, 1973 and that, as a result, the respondent became pregnant and that he is not the father of the child. Petitioner stated in evidence that in about December, 1972 he called the co-respondent, who is an electrician, in his house to repair his washing machine; that thereafter
20 the co-respondent visited his house on many occasions as the petitioner had given him certain electrical jobs; that on many occasions he found the co-respondent in his house when he went home from work but always on some pretext that he was repairing some electrical appliance that had gone wrong; that
25 in May or June 1973 he saw the respondent and the co-respondent coming from the direction of Nicosia at about 6.00 p.m. in the respondent's car and when he asked her about this she told him that she had given the co-respondent a lift; that at about the end of May, 1973, respondent informed him that
30 she was pregnant and he told her that he could not possibly be the father as they were not having intercourse together; and that since August, 1972 he had no sexual relations with the respondent.

35 There was also evidence from other witnesses that the respondent and co-respondent were travelling in the latter's car; that the co-respondent went to the petitioner's house on many occasions when the petitioner was not there; and that the respondent and co-respondent were together in a café at Astromeritis.

40 *Held, (1) on the question whether the Court had jurisdiction to entertain the petition:*

That the husband changed his domicile of origin and acquired a domicile of choice in Cyprus which he has not abandoned to this day; and that, accordingly, this Court has jurisdiction to hear and determine this petition.

Held, (II) on the question whether the respondent has committed adultery: 5

(1) That the Court must be satisfied that there was more than opportunity before it will affix guilt; that there is no direct evidence of any eye witness as to the actual act of adultery; that the evidence adduced is mostly vague and inconclusive; and that though this evidence may create a suspicion it falls short of the standard required to prove the offence. 10

(2) That though the rule in *Russel v. Russel* [1924] A.C. 687 is no longer applicable in view of s. 32(1) of the Matrimonial Causes Act, 1950, by virtue of which evidence of non-access is now admissible, the measure of proof still is, indeed a strict one and the evidence required to displace the presumption of legitimacy must be strong, distinct, satisfactory and conclusive (see *Cotton v. Cotton* [1954] P. 305); that the evidence of the husband on the question of non-access is not such as to satisfy the Court, having regard to all the circumstances of the case, that the presumption of law in favour of legitimacy has been rebutted and that this issue has to be decided in favour of the wife; and that, accordingly, the petition must be dismissed. 15 20

Petition dismissed. 25

Cases referred to:

- Russel v. Russel* [1924] A.C. 687;
Cotton v. Cotton [1954] P. 305;
Nicou v. Nicou (1966) 1 C.L.R. 106.

Matrimonial Petition. 30

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

A. Pandelides, for the petitioner.

D. Demetriades, for the respondent and co-respondent.

Cur. adv. vult. 35

L. LOIZOU J. read the following judgment. The petitioner seeks the dissolution of his marriage with the respondent on the ground of adultery with the person named in the petition.

The petitioner and the respondent are both British citizens and members of the Church of England. They were married on the 3rd December, 1966, at the Register Office of Chichester in the County of West Sussex in England.

- 5 The first question which falls for consideration is the question of the husband's domicile as no decree on a petition for dissolution of marriage can be pronounced unless the husband is domiciled in Cyprus.

- 10 On the evidence it appears that the husband's domicile of origin, as indeed that of the wife, was England. Prior to 1973 he had visited Cyprus on many occasions and in fact, in about 1971, he started building a house of his own on the Troodos road near Koutrafas with the intention of making Cyprus his permanent residence and live here in semi-retirement. The house was completed in December, 1972 and he moved his furniture here from England. He also bought in this same area some land of an extent of about a hundred donums for farming purposes.

- 20 On the 3rd April, 1973, the parties came to Cyprus with the intention of living here permanently. The husband upon arrival applied for and was on the 11th January, 1974, granted by the authorities a permanent residence status. In addition to the land and the house he invested a sum of £32,000 in a fruit exporting firm of which he became a co-director. He has not left Cyprus since then and he is engaged in his business as above. He has no house or any property of any kind in England.

- 30 I am satisfied on the evidence with regard to this issue, which I accept, that the husband changed his domicile of origin and acquired a domicile of choice in Cyprus which he has not abandoned to this day. Consequently this Court has jurisdiction to hear and determine the present petition.

- 35 The second question for determination is whether the respondent wife has committed adultery. It is the allegation of the petitioner that the respondent has committed adultery with the co-respondent Iacovos Zisimos in May and June, 1973 and that, as a result, the respondent became pregnant and the petitioner is not the father of the child. He prays for a dissolution of the marriage on the ground of adultery, one thousand

pounds damages against the co-respondent and the costs incidental to these proceedings.

The respondent by her answer denies that she is guilty of adultery and further alleges that she and the petitioner have at all material times cohabited until the 4th January, 1974.

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The co-respondent by his answer also denies that he has committed adultery with the respondent as alleged or at all and that, therefore, the petitioner is not entitled to any damages. He further states that he was a family friend of the petitioner and the respondent and as an electrician he used to do certain jobs for them and that both prior to and after the dates he is accused of having committed adultery with the respondent he was allowed in the petitioner's house.

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In support of his case the petitioner gave evidence himself and called three witnesses. He stated in evidence that he first met the co-respondent in about December, 1972 when he moved his furniture from England to his new house in Cyprus. There was something wrong with his washing machine and the co-respondent was recommended to him and he called him to repair it. Thereafter the co-respondent visited his house on many occasions as the petitioner had given him certain electrical jobs to do such as the wiring of electric lines, fixing an aerial for the T.V. set, etc. On many occasions, he said, he found the co-respondent in his house when he went home from work but always on some pretext that he was repairing some electrical appliance that had gone wrong. He never asked him though how he happened to go to his house for repairs without his instructions because his wife always explained to him what job he had to do but he was not aware if his wife had called him. At the request of his wife, he said, he allowed him to have a swim in his swimming pool together with his (co-respondent's) wife and children. On another occasion the petitioner together with the respondent took the co-respondent and his family to the seaside for a swim and on the evening of the same day they had supper together in the house of the co-respondent. The petitioner bought a car for his wife and sometime in May or June, 1973, he saw her and the co-respondent, coming from the direction of Nicosia at about 6.00 p.m. and when he asked his wife in the evening about this she told him that she had given the co-respondent a lift.

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At about the end of May, 1973, his wife informed him that she was pregnant and he told her that he could not possibly be the father of the child as they were not having intercourse together and then he confronted her and the co-respondent with this fact and the co-respondent told him that he would find it difficult to prove such a thing. Thereafter, he said, he told his wife to request the co-respondent not to come to his house again but even after this she used to meet him. It was put to him in cross-examination that in October, 1973, he had sent his wife with the co-respondent to Famagusta to get some spare parts for his water pump and his reply was that he remembered that in October, 1973, his water pump broke down and that the co-respondent bought some spare parts in order to repair it but he did not know where he bought them from and did not remember sending his wife with him. He did admit however, that even after the institution of these proceedings his dynamo broke down and as he could not get anybody else to repair it, on the suggestion of his wife, he gave his consent for the co-respondent to do the repairs provided that he did not go anywhere near his house.

The respondent left for England in December, 1973 and when she came back on January 5, 1974, the petitioner did not allow her to go back to his house. Finally the petitioner said that he had no sexual relations with his wife since August, 1972.

A witness called by the petitioner, a police constable, said that late one night sometime in 1973, he could not remember either the date or the month or the season of the year, he saw the respondent and the co-respondent travelling in the latter's car on the Nicosia-Morphou road. Yet another witness called by the petitioner, a co-director of the firm in which he invested as a shareholder and of which he became a co-director testified that he happened to see the co-respondent in the house of the petitioner on many occasions when the petitioner was not there and that on two occasions once at Nicosia and once at Kakopetria he saw the respondent in the car of the co-respondent. With regard to the occasion that he saw them at Kakopetria he said that he was coming from Troodos and he saw the co-respondent's car stationary outside a cafe and the respondent and co-respondent were in the car alone.

The last witness called by the petitioner said that he saw the

respondent and co-respondent once together in a cafe at Astromeritis and that on one occasion he visited the house of the petitioner on business but the petitioner was not at home but he saw the co-respondent in the house together with the respondent.

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The respondent gave evidence on oath in support of her own case. She denied that she ever committed adultery with the co-respondent and said that they were just family friends. She also denied that she did not have sexual relations with her husband and said that the child born to her on the 1st February, 1974, was that of her husband. She first informed him that she was pregnant, she said, at the beginning of August, 1973 and she was then three months pregnant. He was not very pleased because he did not want any children. With regard to the trips to Nicosia and Famagusta she said that she did go with the co-respondent at the request of her husband to Nicosia but that they went because she wanted to buy a radiogramme and the co-respondent could buy it cheaper for her. With regard to the trip to Famagusta they went, she said, in about October, 1973, in order to get some spare parts for her husband. She denied however, being in the car of the co-respondent either on the occasion that the policeman mentioned or at Kakopetria. Her husband's objection, she said, at the time he saw them returning from Nicosia was because she allowed the co-respondent to drive her car.

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The question which arises is whether upon this evidence the offence of adultery has been proved.

Under the provisions of s. 4 of the Matrimonial Causes Act, 1950, which is the English law applicable to Matrimonial Causes in Cyprus, the Court has to be satisfied on the evidence that the case for the petitioner has been proved and where the ground of the petition is adultery, the petitioner has not in any manner been accessory to or connived at, or condoned the adultery; and if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition. But the Court must be satisfied that there was more than opportunity before it will affix guilt.

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In an adultery case the evidence of the petitioner alone is, as a rule of practice, very seldom accepted without corroboration,

at least by strong surrounding circumstances. In the present case there is no direct evidence of any eye witness as to the actual act of adultery. Certain evidence has been adduced, mostly vague and inconclusive, and from that evidence the Court is invited to infer that adultery has actually taken place between the wife and the co-respondent.

In my view the evidence adduced in support of the petition may create a suspicion but falls short of the standard required to prove the offence.

10 Particularly with regard to the evidence of non-access which was put before the Court in order to prove the alleged adultery although the rule of law known as the rule in *Russel v. Russel* [1924] A.C. 687, whereby neither a husband nor a wife were permitted to give evidence of non-intercourse after marriage to bastardise a child born in wedlock is no longer applicable in view of the provisions of s. 32(1) of the 1950 Act by virtue of which such evidence is now admissible in any proceedings to prove that marital intercourse did or did not take place during any period, the measure of proof still is, indeed, a strict one and the evidence required to displace the presumption of legitimacy must be strong, distinct, satisfactory and conclusive (see *Cotton v. Cotton* [1954] P. 305, *Nicou v. Nicou* (1966) 1 C.L.R. 106).

And although in England the legal position now is that questions of this nature may be decided on the balance of possibilities in the sense that any presumption of law as to the legitimacy or illegitimacy of any person may in any civil proceedings be rebutted by evidence which shows that it is more probable than not that the person is illegitimate or legitimate, as the case may be, such change in the measure of proof was introduced by statutory provision (s. 26 of the Family Law Reform Act, 1969) which is not applicable in Cyprus.

In the present case the evidence of the husband on the question of non-access is not such as to satisfy the Court, having regard to all the circumstances of the case, that the presumption of law in favour of legitimacy has been rebutted and I have to decide this issue in favour of the wife.

In the light of all the foregoing this petition has to be dismissed.

In the circumstances I do not propose to make any order as to costs.

Petition dismissed. No order as to costs.