

1981 March 7

[A. LOIZOU, J.]

WILLIAM HENRY HOLROYD,

Petitioner,

v.

CAROL ANNE HOLROYD, THEN CAROL ANNE GODDEN,

Respondent,

and

CHRISTAKIS ADONIS,

Co-Respondent.

(Matrimonial Petition No. 7/79).

*Matrimonial causes—Divorce—Adultery—Birth of child—Legitimacy
—Presumption—Rebuttal—Standard of proof—Evidence of non-
access—Registration of child and issue of passport under name
of co-respondent—Corroboration—Wife concealing her identity
from her doctor from time she was attending his antenatal clinic—
And hotly contested divorce proceedings between petitioner and
respondent pending at the material time—Decree nisi granted.*

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This was a husband's petition for divorce on the ground of his wife's adultery with the co-respondent. The petitioner and the respondent were married on the 3rd December, 1966 and they lived together until December, 1973 when the respondent left the matrimonial home. She returned during the first few days of January, 1974 but she was ordered out and the petitioner husband did not see her or come in contact with her since then. As proof of the alleged adultery the petitioner husband gave the fact that the respondent wife has given birth to a male child on November 18, 1978, whilst he could not be the father as having had no access to his wife at any time since they stopped co-habiting in 1973 and in any event at any time material to the conception of this child; the fact that the respondent wife concealed her identity and her true name from the doctor in whose clinic she was attended antenatally and in which she gave birth to the child; the fact that the wife

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5 confessed to a Police Superintendent, attached to the Immigration Department, that the father of the child was the co-respondent; the fact that the co-respondent duly signed the application form for the registration of the birth of the child at the District Officer's Office, with him named as the father; the fact that the co-respondent took all necessary steps for the issue of a passport to the child with him named again as the father of the child; and the fact that at the time of birth of the child there were pending hotly contested divorce proceedings between the petitioner and the respondent on the ground of adultery.

10 The version of the respondent was that since they were living apart with the petitioner she was visiting him at his house and he was paying visits to her at Nicosia; and that during those visits they had sexual intercourse as a result of which she became pregnant of the child born in November, 1978.

15 *Held*, that though there is a presumption that every child born of a married woman during the subsistence of the marriage is prima facie legitimate such presumption may be rebutted by evidence of circumstances proving the contrary, and such evidence must not be slight in its nature, but strong and satisfactory; that if the wife has given birth to a child and it is proved to the satisfaction of the Court by admissible evidence that the husband could not possibly be the father, that is sufficient proof of the wife's adultery; that on the totality of the evidence there is no doubt whatsoever that the adultery of the respondent with the co-respondent as a result of which the said child was conceived has been established by the petitioner on whom the burden of proof rested; that in addition to the declaration contained in the application for the registration of the child there were also the steps taken for the issue of a passport to it with the father once more stated to be Christakis Adonis; that though in the circumstances of this case this Court would have been prepared to act on uncorroborated evidence, yet it has looked for corroboration and found it in the fact that there was at the time a reserved judgment in respect of the hotly contested divorce proceedings and also the fact that the petitioner concealed her identity and true name from her very doctor as from the time she was attending his antenatal clinic; accordingly a decree of divorce is granted on the ground of adultery with the co-respondent named in the petition, with costs in favour of the petitioner.

Decree nisi with costs.

Cases referred to

Holroyd v. Holroyd and Another (1979) 1 C.L.R. 206 at p. 213,

Brierley v. Brierley and Williams [1918] P 257,

Cotton v Cotton [1954] P. 305,

Watson v. Watson [1954] P. 48.

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Matrimonial Petition.

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

A. Pandelides, for the petitioner.

D. Demetriades, for the respondent.

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No appearance for the co-respondent.

Cur. adv. vult.

A. LOIZOU J. read the following judgment. By the present petition the petitioner husband seeks the dissolution of his marriage with the respondent wife on the ground of adultery with the person named in the petition.

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The petitioner and the respondent are both British citizens and members of the Church of England. They were married on the 3rd day of December, 1966, at the Register Office of Chichester in the County of West Sussex, England. After the said marriage they lived in England until April 1973 when they came to Cyprus with the intention of living here permanently as in the meantime the petitioner had a house of his own built on the Troodos road near Koutrafa.

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He is a business director and his assertion in the petition, which is not disputed by the answer, that he is domiciled in Cyprus, is borne out by the facts of the case. Having acquired, therefore, a domicile of choice in Cyprus, this Court has no doubt jurisdiction to hear and determine the present petition.

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The parties lived together until December 1973, when, according to the petitioner, the respondent left the house. She returned, however, during the first few days of January 1974, but she was ordered out and did not see her or come in contact with her since then, except for the encounters that they had in this Court during the appearances here for the hearing of the first petition filed in this Court for the dissolution of this marri-

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age on the ground of adultery and which was dismissed by the Court on the 27th April, 1979.

5 The issue for determination in these proceedings is whether the respondent wife has committed adultery between January and April 1978 at Nicosia with the co-respondent Christakis Adonis. As proof of the alleged adultery is given the fact that the wife has given birth to a male child on the 18th November, 1978, whilst the husband could not be the father as having had no access to his wife at any time since they stopped
10 co-habiting in 1973 and in any event at any time material to the conception of this child.

On this point it is pertinent to quote from the case of *Holroyd v. Holroyd and Zisimos* (1979) 1 C.L.R. p. 206, where the position is aptly summed up at page 213. It reads:

15 “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-inter-
20 course 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 inter-
25 course 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).

30 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
35 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 support of his case the petitioner gave himself evidence and stated that he had no sexual relations with the respondent at any time or in particular that he visited her whilst residing at Ayios Antonios Street No. 12, at Ayios Dhometios in 1978 or that he had sexual intercourse with her then. 5

In addition to this, Dr. Christoforos Melaris, a gynaecologist, in whose clinic the respondent gave birth to the said child, stated that she had attended the antenatal clinic under the name of Mrs. Carol Anne Adonis. He also identified in the form for the registration of this birth, photocopy of which has been produced as *exhibit 1*, that he filled that part of it which certifies that he delivered alive in his clinic the child mentioned therein on the date in question and that the said entry was signed by him. According to this form the child was named Zacharias Chr. Adonis and the name of the father is stated to be Christakis Adonis, his identity card number being 240942 and his date and place of birth being 1942 at Ayios Dhometios, Nicosia, respectively. The mother's maiden name is given as being Carol Godden, with identity card number C.932367 born on the 21st October, 1947, at Ashford, Kent and that her ordinary place of residence was Ayios Antonios Street No. 12, Ayios Dhometios. 10 15 20

The next witness for the petitioner was Andreas Peristianis, a Police Superintendent, attached to the Immigration Dept. He knew the parties since they came to Cyprus and he testified about the conversation he had with the respondent having called her to his office, after the petitioner spoke to him early in 1973. She appeared with a two to three months old child, he asked her who was the father of the child that she was holding and she told him that it was Christakis Adonis. He then told her: "Why, what happened, you know that you have a case against you for divorce in the High Court and you had another child with somebody else?" and her reply was: "I am a woman, I want somebody, I want a man, do you like me to take every time another man, to take one from the street?". He also told her that the relatives of Christakis were complaining that he had a girl-friend although married with two daughters and she said to him that it is his relatives, not his wife that are complaining. He denied that what respondent said was "I am a woman, what is wrong with it, I can give birth to a child from my husband". 25 30 35 40

Stelios Malaos, in charge of the Births & Deaths Registration in the District Office of Nicosia, stated that because of the fact that under item 25 it was stated in the said form that this was the offspring of a second marriage celebrated in 1973, the father and mother must have been informed to attend and sign in his presence. He excluded the possibility of such signing having taken place in the presence of the mukhtar of that quarter as that mukhtar never brought the forms himself. Whilst on this point it may be stated that the respondent herself in giving evidence said that the registration form was filled in by the said Adonis and as far as she was concerned the necessary details were supplied by her and that she signed that form, though she did not attend the Registration Office herself. It was Christakis Adonis who brought the forms to her house and that after they were duly completed and signed he took them to the District Officer's Office and had the child registered, obviously, as a result of that application form, with the particulars that it so stands today.

Naturally, the only conclusion to be drawn from the combined effect of the evidence of Malaos and the respondent is that the co-respondent Christakis Adonis duly signed this application form for the registration of the birth of the said child. He also took all necessary steps for the issue of a passport to the said child with him named once more as the father of the child. The respondent in giving evidence stated that since they lived apart with the petitioner she was visiting him at his house and he was paying visits to her in Nicosia and that during those visits they had sexual intercourse and as a result of which she became pregnant of the child born in November 1978.

It was her version that as soon as the petitioner found out that she was going to give birth to a child he said that he was going to deny again that the child was his as he did with the first child. Not wanting her child to be an illegitimate one she found the co-respondent, whom she vaguely knew and who promised to help her.

I have referred to the circumstances of the registration of the birth of this child and the application for the issue of a passport to it.

Having listened carefully to the evidence and watched the demeanour of the witnesses in Court I accept the version of the

petitioner and his witnesses as true and correct. I do not accept the version of the respondent and her explanations with regard to the circumstances under which she was compelled to have the child registered as the child of Christakis Adonis, the co-respondent in these proceedings. At the time of the conception, pregnancy, birth and registration of the child, there were pending divorce proceedings, which apparently had been hotly contested and the obvious reason for her to attend her doctor under an assumed name was to conceal her true identity with the hope of concealing the birth of the child.

On the question of an entry in the Register of Births of the birth of a child as evidence of adultery, reference may be made to *Rayden on Divorce* 8th edition p. 563 where it is stated:

“An entry in a register of births, deaths, and marriages is by statute prima facie, but not conclusive, evidence of all the facts required by statute to be entered therein. Therefore, where a husband, by admissible evidence has proved the impossibility of access to his wife for a certain period, an entry signed by the wife of the birth of a child during that period is prima facie evidence of the date as well as the fact of the birth, and, inferentially of the wife’s adultery; the Court may, however, require corroboration”.

The authority given for this proposition is the case of *Brierley v. Brierley and Williams*, [1918] P. 257.

Furthermore as stated in *Halsbury’s Laws of England* 3rd edition, volume 3, paragraph 139 “Every child born of a married woman during the subsistence of the marriage is prima facie legitimate, But in every case the husband and wife must have had opportunities of access to each other during the period in which the child could be begotten and born in the course of nature, and they must not be proved to be impotent. The presumption, however, is not a presumption juris et de jure, which cannot be rebutted, but a presumption only, which may be rebutted by evidence of circumstances proving the contrary, and such evidence must not be slight in its nature, but strong and satisfactory”. And further down at paragraph 141 it is stated: “The prima facie presumption of legitimacy, which arises when husband and wife have opportunities of access, may be rebutted by satisfactory evidence that such access did not take place between them as by the law of nature is necessary in order for the husband to be in fact the father of the child. The non existence of this access is a physical fact which may

be proved by means of such legal evidence as is admissible in every other case in which it is necessary to prove a physical fact”.

5 Furthermore as stated in *Rayden on Divorce* p. 156, paragraph 115:

10 “If the wife has given birth to a child, and it is proved to the satisfaction of the Court by admissible evidence that the husband could not possibly be the father, that is sufficient proof of the wife’s adultery. Both the husband and the wife are permitted not to give evidence of intercourse or non-intercourse after marriage with a view to establishing that a child born during wedlock is or is not the child of the husband. If the date of the birth shows that the child was conceived after the date of a decree of judicial separation or of a separation order under the Summary Jurisdiction (Married Women) Act, 1895, and amending Acts, there is a *presumptio juris* that the child is a bastard. If there is no such decree or order the presumption is that the child is legitimate. Where the result of a finding of adultery is to bastardise a child, that is a matter which must be established beyond reasonable doubt;”

20 The authorities given are *Cotton v. Cotton* [1954] P. 305, approving *Watson v. Watson*, [1954] P. 48.

25 Looking at the totality of the evidence I have no doubt whatsoever in my mind that the adultery of the respondent with the co-respondent as a result of which the said child was conceived has been established by the petitioner on whom the burden of proof rested. In addition to the declaration contained in the application for the registration of the child there were also the steps taken for the issue of a passport to it with the father once more stated to be Christakis Adonis. Though in the circumstances of this case I would have been prepared to act on uncorroborated evidence, yet I have looked for corroboration and found it in the fact that there was at the time a reserved judgment in respect of the holy contested divorce proceedings and also the fact that the petitioner concealed her identity and true name from her very doctor as from the time she was attending his antenatal clinic.

35 40 For all the above reasons a decree of divorce is granted on the ground of adultery with the co-respondent named in the petition, with costs in favour of the petitioner.

Decree nisi granted with costs.