

were witnesses about the planting of trees along the boundary, about the putting in and pulling out of beacons and also other evidence as well. The learned judge visited the land with the parties and surveyors and measurements were taken, and at the end of everything he gave judgment for the respondent. I see no reason to disagree and I would dismiss this appeal.

*Appeal dismissed*

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TIPSON v. TIPSON

COURT OF APPEAL (Ames, P., Dove-Edwin, J.A. and Marke, J.):  
October 30th, 1964  
(Civil App. No. 11/64)

- [1] Family Law—divorce—adultery—evidence—discretion statement does not support decree in favour of opponent not alleging adultery: Where a petition is not grounded on adultery and no case has been made out in support of it or of the respondent's cross-petition, the petition will not be granted on the respondent's admission of adultery in a discretion statement (page 163, lines 18-21).
- [2] Family Law—divorce—petition—adultery not alleged—petition not granted on admission in cross-petitioner's discretion statement: See [1] above.
- [3] Family Law — divorce—petitioner's adultery—discretion of court—to be exercised only when case for divorce made out: The court's discretion as regards adultery admitted by a party to divorce proceedings may only properly be exercised when the court is satisfied that the party has made out a case entitling him to a divorce (page 163, lines 21-25).

The respondent petitioned the Supreme Court for a decree of divorce from the appellant on grounds of cruelty and desertion. The appellant cross-petitioned on grounds of adultery and desertion and asked the court to exercise its discretion as to his own adultery.

The Supreme Court dismissed the allegations of cruelty and adultery; the question of desertion was not considered as counsel for each party conceded that the statutory period had not run. The respondent was granted a decree, however, upon the appellant's admission of adultery in his discretion statement.

On appeal the appellant contended that the Supreme Court was

wrong in granting the respondent a decree upon grounds not alleged in her petition.

*S. H. Harding* for the appellant.

5 The respondent did not appear and was not represented.

DOVE-EDWIN, J.A.:

10 The appellant and respondent were lawfully married at Christ Church, Pademba Road in the parish of St. George in Freetown on June 26th, 1957. There is one child of the marriage born on June 27th, 1958. On July 9th, 1963, the respondent, Audrey Bola Tipson, petitioned for a decree of divorce complaining in her petition that the appellant had been cruel to her, had assaulted and disgraced her and had deserted her.

15 In his answer the appellant, Chuku Omeka Tipson, denied the allegations of cruelty and desertion and complained in turn in his petition for a divorce that the respondent had committed adultery with a person whose name he did not know but whom he had seen in the respondent's bedroom in circumstances which led him to  
20 conclude that she had committed adultery, and that she had deserted him three years before the presentation of his petition; and he asked the court to use its discretion in his favour as he admits that he had since his wife's desertion committed adultery with another woman.

25 After the learned trial judge had gone into the matter, he said in his judgment:

30 "Counsel on both sides conceded that the statutory period of three years had not run out before the petition was presented to this court. This, they agree, disposes of consideration of the question of desertion alleged on both sides. This leaves, as to the petitioner, the allegation of cruelty and, as to the respondent, that of adultery."

35 On the question of cruelty the respondent's petition was dismissed. On the part of the appellant, the learned judge did not accept the evidence given against the respondent as to adultery and accepted the respondent's evidence and dismissed the appellant's petition. In his judgment the learned trial judge refused to exercise his discretion in favour of the appellant on his admitted adultery because, as he puts it, "there are no convincing circumstances" why the court should  
40 exercise its discretion in his favour.

The learned judge then went further and said: "There being an

admission of adultery by the appellant, the court is left with no alternative but to pronounce a decree against him." He dissolved the marriage in the respondent's favour, granting her the custody of the child and £7 per month for his maintenance till he attains the age of 21 years. Against this decision the appellant has appealed to this court. 5

The first ground of appeal challenges the learned trial judge's decision that both sides had conceded that the statutory period of three years had not run out before the petitions were presented. Mr. S. H. Harding for the appellant—the respondent did not appear neither was she represented although she was served—said the allegation of desertion was filed on September 3rd, 1963 and that he alleged desertion as from August 1960 and therefore the three years had run out as far as his petition was concerned. On this the learned judge seems to me to have acted in error and I think he ought to have dealt with the appellant's complaint of desertion on its merits. 10 15

Again, was the learned judge right in granting a divorce to the respondent on grounds not asked by her? She did not allege adultery in her petition and could the judge use his discretion on the admission of the appellant in favour of the respondent? I think not. I feel that the discretion of the trial judge with reference to the discretion statement in this case could only properly have been exercised where the judge was satisfied that the appellant had made a case entitling him to a divorce. In this case, the appellant having so failed to satisfy the judge, there was nothing on which he could have exercised his discretion. 20 25

If the appellant's petition failed, as indeed it did, and so did the respondent's, it is my opinion that that would be the end of the matter. However, in the circumstances of this particular case it would appear to me to be just for the appellant to be heard as to his allegation of desertion. 30

I would allow the appeal and remit this case to the court below for the appellant's allegation of desertion to be gone into and decided on its merits. That part of the judgment granting a divorce to the respondent on the appellant's admission of adultery is set aside. 35

AMES, P. and MARKE, J. concurred.

*Order accordingly.* 40