

written report of another police officer who had given evidence and has himself been cross-examined on some of these very contents.”

In my opinion the copy of the letter was not admissible. If the original was despatched to Mr. Writer, he should have produced it or explained why he could not. Had that been done, I think that I would have allowed the original, or copy, to be put in as secondary evidence of the contents of the missing report or some of them. But that was not done. Anyhow, the point seems to me unimportant. There was evidence that the premises were broken into and that is what the report had said. 5 10

I would dismiss the appeal.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed. 15

DAVIES v. DAVIES 20

COURT OF APPEAL (Ames, P., Bankole Jones, C.J. and Dove-Edwin, J.A.): November 18th, 1964
(Civil App. No. 12/64) 25

[1] **Family Law — divorce — cruelty—test of cruelty—grave and weighty cruelty to be judged subjectively:** Cruelty as a ground for divorce must be grave and weighty as between the parties themselves and should not be judged objectively (page 188, lines 16–20). 30

The appellant petitioned for divorce in the Supreme Court. 30

The petition was brought on the ground of cruelty; although the court considered that this was a marriage which ought to be dissolved, it refused to grant a decree because the evidence of legal cruelty did not come up to the required standard. The proceedings in the Supreme Court are reported at 1964–66 ALR S.L. 83. 35

The appellant contended that the lower court was wrong in applying an objective test in ascertaining the degree of cruelty required.

During for the appellant;
Miss Wright for the respondent. 40

AMES, P.:

The appellant is a husband who, in the court below, sought a decree of dissolution of his marriage to the respondent, his wife, on the ground of her cruelty to him. His petition was dismissed, and he now appeals to this court.

With all respect to the learned judge, his judgment is difficult to understand. He says: ". . . [T]his is a marriage that ought to be dissolved . . ." and yet he does not dissolve it, being of opinion "that the evidence of the legal cruelty alleged does not come up to the required standard."

If the latter is correct, it is not a marriage that ought to be dissolved. If the former is correct, the latter is something of a *non sequitur*. I think that the clue to the dilemma is to be seen in his reference to "the required standard." I think that he applied an objective test, such as one has to apply in, say, a case of negligence. The authorities show that in a sense there must be a standard, the matters complained of must extend much beyond the trivial or the casual; the causes must be weighty and grave; and so on. But it is not to be judged objectively, but it is to be seen as "this conduct by this woman to this man."

When, after reading the evidence and his findings of facts, I see it from that viewpoint, I find myself in agreement with his first comment and not with the second. I would allow the appeal, set aside the judgment appealed from and enter judgment of the pronouncement of a decree nisi.

The petition of the appellant prayed also that he be granted custody of the children. The merits, or lack of merit, of this prayer have not been investigated yet. I would send back the cause to the court below before the same judge for him to make what order he finds best as to the custody of the children, following the normal procedure and affording both parties an opportunity to be heard.

BANKOLE JONES, C.J. and DOVE-EDWIN, J.A. concurred.

Order accordingly.