

S. C.

1961

KAMARA
v.
GRAHAM.

Having decided to grant the application the only point is to extend the period for appellant to put down his appeal before court. I allow him 10 days within which he should lodge his appeal.

Freetown
Aug. 18,
1961

Luke Ag.P.J.

[SUPREME COURT]

FREDERICK B. WILLIAMS	<i>Petitioner</i>
v.	
VIRGINIA WILLIAMS	<i>Respondent</i>
AND	
ERNEST PYNE-BAILEY	<i>Co-Respondent</i>

[Divorce Case 13/60]

Divorce—Cruelty—Adultery—Burden of proof of adultery—Effect of confession—Condonation—Cancellation of condition.

Petitioner petitioned for the dissolution of his marriage with respondent. The main grounds for the petition were six alleged acts of cruelty on different dates and one act of adultery alleged to have been committed with the co-respondent. Respondent's answer denied that she was guilty of either adultery or cruelty, and co-respondent also denied having committed adultery.

During the trial, petitioner and a witness for petitioner testified that co-respondent had confessed that he had had sexual intercourse with respondent. Co-respondent denied that he had made such a confession, and respondent denied that she had committed adultery. There was also evidence that, after certain acts of cruelty by respondent, petitioner and respondent had cohabited, after which there had been further acts of cruelty.

Held, for the petitioner, but dismissing the case against the co-respondent.

- (1) There was ample proof of the acts of cruelty alleged by petitioner.
- (2) Although petitioner condoned some of the acts of cruelty by subsequently cohabiting with respondent, this condonation was cancelled by later acts of cruelty by respondent.
- (3) The burden of proof is on the person alleging adultery, there being a presumption of innocence and the same strict proof is required of adultery as is required in a criminal case.
- (4) The alleged act of adultery was not proved beyond a reasonable doubt.

Cases referred to: *Ginesi v. Ginesi* [1948] P. 179; *Worsley v. Worsley* (1730) 2 Lee 572; 161 E.R. 444; *Durant v. Durant* (1825) 1 Hag.Ecc. 733; 162 E.R. 734.

Manilius R. O. Garber for the petitioner.

Cyrus Rogers-Wright for the respondent.

Solomon A. J. Pratt for the co-respondent.

LUKE AG. P.J. This is a petition by the petitioner for the dissolution of his marriage with respondent. Marriage between the parties took place sometime in July 1958 and in order that petitioner could be able to bring his petition within three years as required by the Matrimonial Causes Ordinance, 1949, petitioner obtained an Order dated June 24, 1960.

The main grounds of the petition were six acts of cruelty on different dates and one act of adultery alleged to have been committed with the co-respondent on February 26, 1960, at petitioner's house at Lungi.

The respondent put in an answer denying that she is guilty either of adultery or of cruelty as alleged in the petition of the petitioner and the co-respondent put in a similar answer denying adultery with the respondent.

The facts briefly are that shortly after the marriage in December 1958, petitioner informed respondent that he was going out and went upstairs to dress. Respondent was not in favour of his going out and so tried to remonstrate with him that he should not go but he was adamant and as petitioner insisted on going respondent closed the room door where both of them were in and a struggle ensued. During this struggle respondent removed a wrist watch which petitioner had on him and threw it out of the window. Petitioner pushed respondent and she fell on the bed and in the course of the struggle respondent gave him two bites. The noise caused by the struggle brought petitioner's mother and sister who were then with them in the house and they settled the matter.

The next incident complained of was on October 8, 1959, when petitioner returned from work and went to his fridge to look for a cold drink of beer and there was none therein. He looked round the place where there should be some and none could be seen. He asked his wife as to what had happened to all the beer which should be in the house and respondent replied she was not there in the house as watchman. He was annoyed by this rather abrupt reply and as he said, "I gave her a slap on her back saying 'Don't talk to me like that.'" Respondent replied by throwing an empty bottle at him but he ducked and so escaped being hit by it. Respondent was not satisfied at not succeeding to hit him and so went and collected other pints from the neighbourhood which she shied at him, one of which hit him on the ankle. In consequence of this and other acts during this period petitioner sent respondent home to her parents.

On Christmas eve, December 24, 1959, respondent returned from Freetown where she had gone to do some shopping. She missed the Staff Launch and so she had to travel in one of the passenger launches. When petitioner went to meet her at the jetty, as she did not arrive, he returned and so when he again went to meet her they missed each other. Eventually he met her at home and so he asked her to serve the meal he had prepared during her absence, which she did. A friend of his by name of Moses was with him in the house and so he joined him at the meal. Whilst they both were eating he heard respondent make use of these words "dis Christmas go be Christmas for me and you" (meaning this Christmas will be a stormy one for both of us). Petitioner asked her, "V you and who dat?" (meaning V you and who are quarrelling) and in reply respondent said, "nar me and you" (meaning it is you and me). On further inquiry he got to know that on her return from town one of the children had told her that a woman came to him during her absence. He then went round and asked the children which of them had given her that information but none of them would answer and so he slapped each of them. Respondent then took off a pair of her shoes and started flogging him on the head with them. There ensued a fight and respondent caught hold of his penis and started pulling it hard. Petitioner said, "I gripped her hair whilst Moses and a Mr. Cole came to my rescue."

S. C.

1961

WILLIAMS
v.
WILLIAMS
AND
PYNE-
BAILEY.

Luke Ag.P.J.

S. C.

1961

WILLIAMS
v.
WILLIAMS
AND
PYNE-
BAILEY.

Luke Ag.P.J.

On the morning of the following day, which was Christmas day, petitioner testified that "Respondent said she would not prepare meals and so with the assistance of my ward I started making preparations for my meals. During this time respondent was drinking stout which was in the fridge. Whilst my back was turned instructing my ward who was grinding the pepper, respondent hit me on the head with a stick." Petitioner tendered stick in evidence and marked "B." As a result of that blow petitioner said he fell down on the ground and became unconscious for a while. He was removed to Lungi Hospital where he received six stitches. "The next act of cruelty took place after respondent had left my house on February 29, 1960. She came to the house for her clothes. I asked her for the duplicate key which she had with her, but she refused to deliver it. As I asked her for the key she then said if I didn't give her her clothes 'danger go play' (meaning that if I don't give her her clothes she will do some desperate act). I left her to go out and she came up to me and held me by my shirt and trousers saying I wouldn't go out. I retreated to the house and started mixing some mash for my fowls when she came upon me and dashed the whole contents on my face. As she did that she ran away and I ran after her. She went to a heap of empty pints, picked up one, broke it and gave me a slash on my left arm which necessitated my having no less than 12 stitches.

"On June 13, 1960, I was in a bar at Kissy with a friend drinking when she came into it and snatched the pint. I came out of the bar and she followed me and caught hold of both my hands. I tried and released myself from her grip and was running away when she threw a stone at me which hit me on my head resulting in my sustaining a wound for which I had to get hospital treatment."

This last incident concluded the acts of cruelty which petitioner stated in his petition. There was an act of adultery which he alleged between respondent and co-respondent as having taken place in his house, the matrimonial home, on February 26, 1960. Petitioner said that on the evening of that day he gave co-respondent a hair cut in his house and after doing so he asked him to accompany him to the hospital where he was going, but co-respondent said he was feeling sleepy and was going home. "We departed from the house together. On my return I saw Pyne-Bailey coming out of my bedroom. Respondent and I share the one and only bedroom." Petitioner then described what happened when co-respondent saw him. He then said, "I went into the room where I met my wife tidying the bed and as soon as I entered the room she ran out of it and I followed her passing through the parlour and met her on the porch by the way leading to the kitchen." Petitioner said, "I asked her what have you been doing with Pyne-Bailey inside my bedroom but she did not speak.

"Leaving her I came up to co-respondent and said to him, 'Pyne-Bailey, I don't like your coming to my house in my absence; you had sex relation with her. Out of my house.' When I said those words to him, he tried to make some excuse and rose from his chair, and in doing so I noticed the flaps on his trousers were unbuttoned, and I called his attention not only to that but to freshly soiled spots on the trousers. He attempted to look at them and in doing so the trousers dropped and so exposed his soiled pants (i.e., vest and drawers). Having noticed these things and co-respondent still trying to explain I pushed him out of my house and a fight ensued. Later that evening I went to a Mr. Moore who shares quarters with co-respondent and a conversation

sprung up and during it co-respondent told Moore that I had accused him of having had sexual intercourse with my wife and that I had told him his vest and trousers which he had on were soiled. To satisfy me he invited me to go and search his room to see if there was any such soiled linen. I accepted the challenge and went into the room and searched but found nothing. When I came out I told Moore and co-respondent that I had not seen the pants which he wore when he left my house that evening. I then said to him pull out the vest which you now have on and I drew it out and showed him and Moore the spots asking him, 'Isn't this spermatozoa? And you've been denying the issue?' Co-respondent then said, 'Freddy, I am sorry.' This incident took place in the presence of a Mr. Moore."

Under cross-examination witness said that from the manner of their married life and after the discovery of the alleged adultery in their matrimonial home he felt his marriage was at an end. He denied it when it was suggested that his reason for bringing his petition was to gain his freedom to marry a Mrs. Patience Domingo with whom he was on friendly terms. He admitted that he and co-respondent were friends but he was not the one who took him to the matrimonial home. Describing the incident of the evening of February 26, 1960, he said, "Co-respondent went to my house for a hair cut and after doing that we both left together to go to the hospital and he to his own house. He passed by the rear side and I rode from the front side. I was away for about 45 minutes. I had got to the porch when I saw Pyne-Bailey coming from the room. As I saw that I knew something funny had happened but said nothing to him but went straight to my wife. On entering the room I met my wife tidying the bed and as soon as I went in she rushed out." He also said that he had prepared the bed that morning as his wife had gone to town and in the interval no one had lain on it and that he saw tucked on the side of the bed his wife's knickers. No questions were asked him about the incidents which respondent in her evidence deposed he did to her when he charged her with this alleged adultery. He denied having at most of these incidents either assaulted or provoked her. He admitted that in connection with the incidents in December 1958 and October 1959 certain happenings had taken place, e.g., that it was after his wife refused to go and pick up the wrist watch which she threw out of the window that he pushed her and went out, and, regarding the October 1959 incident, his wife was rude to him, hence he slapped her on the back.

Petitioner called a Mr. Moore who deposed that he was present when co-respondent admitted, after a gruelling ordeal, having had sexual intercourse with respondent on that day. The witness described it as follows: "Petitioner then said, 'to satisfy my curiosity I would like to see your vest.' Co-respondent adhered to his request and raised up his shirt and showed him the vest. Petitioner then said, 'yes, I told you, you need my wife. Look at the spermatozoa; it is soiled with it.' I myself saw the vest. On it I saw some slimy substance. This slimy substance is on the tail end of vest.

"Co-respondent paused for a while and subsequently he said, 'I am sorry, Freddy, I won't do it again.' After this co-respondent has been seeking my good offices to settle this matter but petitioner refused."

Dealing with the incident of February 29, 1960, he said he and a friend were entering petitioner's compound when they noticed petitioner's left hand was bleeding profusely. Just then he saw respondent in the yard and she said to him, "I've wounded your friend." This witness was cross-examined by

S. C.

1961

WILLIAMS
v.
WILLIAMS
AND
PYNE-
BAILEY.

Luke Ag.P.J.

solicitor for the respondent and co-respondent to create the impression that he had come to help his friend whom he had known for over ten years. Another witness called was Mustapha Massaquoi who was petitioner's houseboy. He told the court of the incident which took place on Christmas day when respondent hit petitioner on his head with the stick, Exh. "B." He described the blow as being a serious one which caused his master to fall on the ground and said that, noticing his condition, he rushed and called Messrs. Moses and Bull. He was cross-examined and he then told the court he was present during the fight between co-respondent and petitioner but could not tell the cause for the fight and that it was on that same day his master sacked him for leaving the house during his absence. Petitioner called other witnesses who testified to acts of cruelty which took place on February 29, 1960, and June 13, 1960, respectively when petitioner was wounded by acts of violence committed by respondent.

Respondent elected to give evidence and described what she said happened at 172 Blackhall Road, Kissy, shortly after their marriage. She said her husband left her downstairs where they were all sitting and went upstairs. She followed him and tried to remonstrate with him not to go out and leave her alone in the house. She was unable to convince him not to go out, and, as a result, not only did petitioner slap her but he beat her up. She, however, mentioned nothing of having bitten him on two parts of his body on that occasion. Dealing with the incident of the beer which took place on October 8, 1959, respondent said, "Petitioner came from work and met a Mrs. King with me. He asked me for beer and I said I had sold out. He repeated his question and I gave him the same answer and he then gave me a slap and Mrs. King told him not to do that." As a result of this incident petitioner went and packed her things and told her to go home to her mother. As she did not accede to his request, on the following day when petitioner came from work he brought her a travel pass to Freetown, and so she had to leave.

On arriving home her mother went over to see her husband to make it up but he refused. Eventually they both settled it together and she returned to his house.

She gave her version of what happened on Christmas eve after she returned from Freetown where she had gone. She said that it was what her youngest sister told her happened during her absence which annoyed her. During this time petitioner was out and on his return she asked him about what she had been told. She said, "As I did so he went and slapped my sisters saying they were the ones who told me. As he was doing that I held his hand and he pushed me over a ditch." She then said, "I see Exh. 'B.' I hit petitioner with it." She deposed that after this incident she and her husband made it up and marital relations continued between them. She also deposed that during their short married life of 18 months she had left their house three times.

Respondent then described the incident of February 26, 1960. Her version is different from that of her husband. She said that after the hair cut petitioner asked co-respondent to accompany him to hospital and co-respondent said he was not going. Petitioner then said to him he will not be long and co-respondent said he will meet him on his return. She then went on to describe the distance from their house to the hospital and said that on petitioner's return he met her in the parlour reading a poultry text-book and that co-respondent was sitting on a chair in the parlour with the door of the house wide open. She said that he was not away for long, about 15 minutes. She

said that when petitioner came, " he called me outside and I went to meet him. He took me to a room where there were some chicks and asked me to take off my drawers, and he then dipped his fingers into my vagina, but he said nothing to me about his findings. I asked him why he had done such a thing but he gave me no answer. He then asked me if co-respondent and I had done anything and I reprimanded him for such question. Leaving me he went up to co-respondent and accused him of having come to the house to befriend me and co-respondent took exception to such remarks and said he was leaving his house and won't come there any longer. As co-respondent was going away petitioner gave him a kick and they started fighting. I remonstrated with my husband for such bad conduct and my husband then left him and turned upon me beating me. As a result I went home."

I may here say that most of the incidents which respondent said took place that evening such as petitioner doing those abnormal acts in the chicks house were never put to him under cross-examination. Respondent's version of the incident of February 29, 1960, was that her husband refused to give her her things when she called for them and said he was going out. She held him by the waist saying he should give her her clothes. Petitioner refused and the outcome of this was "he kicked me and I fell on a pile of bottles some of which got broken and so I picked up one and said that if he came upon me again I would strike him with a broken piece of it I then had in hand." She further said, "It was during this time that petitioner fell and sustained the injury complained of."

When respondent was cross-examined she denied that she was prepared to use force to prevent her husband going out on December 28, 1958. She denied even hitting her husband on that occasion and said that as a matter of fact her husband did not sustain any wound that day as a result of the fracas. She also denied all the other acts of cruelty which petitioner in his petition has alleged except hitting him on the head with Ex. 'B' on Christmas day. She denied committing adultery.

Co-respondent elected to give evidence and his story in certain aspects is similar to that of respondent. The points of dissimilarity are what blows preceded and who separated the fighting. He denied that any of the incidents which petitioner and Moore said took place in his quarters, which Moore shared, ever happened and said that they are a fabrication.

Neither respondent nor co-respondent called any witness. Of the six acts of cruelty complained of, at least three of them were deposed to not only by the evidence of petitioner but by eyewitnesses such as Moses, Mustapha, Bull and Macauley who testified either that they had seen them inflicted or that they had been told by respondent that she had inflicted them on her husband. Regarding the act of cruelty of December 25, 1959, it was not only savage but to say the least wicked. Respondent's conduct really constitutes a danger to the life, health and future happiness of her husband. The burden of proving these acts of cruelty which lies on the petitioner has been discharged, and I am satisfied that these acts of cruelty have been proved.

I now turn to the alleged act of adultery committed by respondent. There was no direct evidence. Petitioner's case is based on suspicion of having seen co-respondent coming out of his bedroom with his flap unbuttoned and having seen some stained spots on his vest when he looked at it on two occasions, viz.: First, when, as he deposed, his (co-respondent's) trousers dropped when he reprimanded him shortly after the incident, and, secondly, when he went to

S. C.

1961

WILLIAMS
v.
WILLIAMS
AND
PYNE-
BAILEY.

Luke Ag.P.J.

S. C.
1961

WILLIAMS
v.
WILLIAMS
AND
PYNE-
BAILEY.
Luke Ag.P.J.

the quarters where co-respondent and Moore live and co-respondent, to prove his innocence, lifted up his vest to show him.

According to petitioner's evidence it was after the discovery of these stained spots which they called "slimy substance" or "spermatozoa" that co-respondent admitted and begged. Moore corroborated petitioner's story of this incident but co-respondent, in his answer filed, has denied it and in his evidence given at the trial in the witness-box has maintained his story. Needless to say that respondent has consistently maintained that she has not committed any act of adultery with co-respondent. This confession was made outside and not in court and at the most will only be evidence against the co-respondent. Rayden on Divorce, 7th ed., p. 133, states:

"The burden of proof is throughout on the person alleging adultery there being a presumption of innocence. A suit for divorce is a civil and not a criminal proceeding but the same strict proof is required of adultery as is required in a criminal case before an accused person is found guilty; that is the tribunal must be satisfied on proof beyond all reasonable doubt."

See case of *Ginesi v. Ginesi* [1948] P. 179.

In the present case, apart from the confession of co-respondent which he has denied, there is no evidence which could be said to establish the guilt of the parties. Rayden on Divorce dealing with confessions said, "The court will refuse to act upon confessions alone unless the surrounding circumstances indicate that the confession is true. . . . It is to be observed, however, that a confession out of court is evidence against the person making it, but not against another person implicated by it."

During the course of the case evidence was given that after some of those acts of cruelty by respondent she and her husband became reconciled and resumed cohabitation. Subsequent to those previous acts of cruelty which had been condoned respondent committed similar acts on February 29, 1960, and June 13, 1960, respectively, renewing the previous acts. As Rayden, on p. 217, puts it:

"The reinstatement and forgiveness of a guilty spouse is subject to a condition implied by law that he or she shall commit no further matrimonial offence. If therefore a further matrimonial offence is committed, the condonation is cancelled and the old cause of complaint is revived."

See *Worsley v. Worsley* (1730) 2 Lee 572; *Durant v. Durant* (1825) 1 Hag.Ecc. 733.

There has been sufficient evidence adduced by the petitioner to prove several of these acts of cruelty complained of and as I mentioned earlier three of them have been proved. The evidence led in so far as the act of adultery is concerned is not such as court could say it has been proved beyond any reasonable doubt. Under the circumstances the co-respondent is dismissed from the petition. There will be a decree nisi in favour of petitioner on the ground of cruelty. Each party will pay his costs.