WELLESLEY-COLE *v.* WELLESLEY-COLE

SUPREME COURT (Beoku-Betts, J.): February 20th, 1967
(Divorce Case No. 39/66)

[1] **Evidence—burden of proof—standard of proof—divorce—cruelty—proof on balance of probabilities:** Where a divorce is sought on the ground of cruelty, the standard of proof required is that the court should be satisfied on the balance of probabilities (page 69, lines 4–6).

[2] **Family Law—divorce—answer—amendment—where condonation relied on as bar but not pleaded, answer to be amended:** Where a party against whom a divorce is sought relies on condonation as a bar but has not pleaded it, the court should allow him to amend his pleading (page 68, line 40—page 69, line 2).

[3] **Family Law—divorce—condonation—husband's voluntary act of sexual intercourse establishes condonation:** A husband's voluntary act of sexual intercourse with his wife, in the absence of fraud or consent induced by fraud, is conclusive against him as establishing his condonation of the wife's misconduct (page 69, lines 16–18).

[4] **Family Law—divorce—condonation—may be proved even though not pleaded, to rebut cruelty though not as bar:** A party against whom a divorce is sought on the ground of cruelty, who has not pleaded condonation, may nevertheless adduce evidence of acts of condonation in support of a denial of the allegation of cruelty, though not as a bar to the relief sought (page 68, lines 36–40).

[5] **Family Law—divorce—condonation—revival of condoned cruelty—petitioner on ground of cruelty should plead any condonation and specific occasions of revival:** A party who seeks a divorce on the ground of misconduct which he has at one time condoned should plead the condonation and the specific occasions of the revival of the offence (page 68, lines 31–32).

[6] **Family Law—divorce—condonation—where set up as bar though not pleaded, pleading should be amended:** See [2] above.

[7] **Family Law—divorce—cruelty—evidence—condonation may be proved, even though not pleaded, in denial of cruelty:** See [4] above.

[8] **Family Law—divorce—cruelty—evidence—single act seldom establishes, accumulated minor acts may:** Although a single act may be so grievous as by itself to constitute cruelty, this is seldom the case; but a blow followed by minor acts may be enough; and continued acts of ill-usage, none of them in itself sufficient to support such a charge, may accumulate until a case of cruelty arises (page 67, lines 35–39).

[9] **Family Law—divorce—cruelty—standard of proof—proof on balance of probabilities:** See [1] above.

[10] Family Law—divorce—cruelty—test of cruelty—danger or reasonable apprehension of danger to life or health: Cruelty as a ground for divorce is conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger (page 67, lines 30–32).

[11] Family Law — divorce — petitions — cruelty alleged — petitioner to plead any condonation and specific occasions of revival: See [5] above.

The petitioner petitioned for a divorce on the ground of his wife's cruelty.

The parties were married in 1950 and lived together until the latter part of 1966, when the present proceedings were instituted. There were four children of the marriage, of whom the two youngest were born in 1963 and 1964 respectively. The petition alleged cruelty over the period from 1950 to November 1966 and consequent injury to the petitioner's health, but did not allege any condonation and revival of the cruelty. The respondent by her answer denied the alleged cruelty but did not plead condonation.

The petitioner said in evidence that he had not condoned the respondent's cruelty since 1964. In cross-examination, he admitted that he had had sexual intercourse with her in September 1966, and acknowledged two affectionate letters he had written to her in October 1965 and March 1966. There was evidence that up to the date of the petition, which was in December 1966, the petitioner and the respondent were attending parties together and gave a party of their own. In her evidence, which in the court's judgment was quite convincing, the respondent denied all the acts of cruelty alleged and represented the petitioner's health as good, and said they had lived together as man and wife up to and even after the service of the petition.

The petitioner contended that the respondent could not rely on any condonation of the alleged cruelty because condonation had not been pleaded. The respondent contended that the petitioner's having continued to cohabit normally with her, and in particular his having had sexual intercourse with her in September 1966, either established condonation which was a bar although not pleaded, or showed that the petitioner had suffered no cruelty.

Case referred to:

(1) *Benton* v. *Benton,* [1958] P. 12; [1957] 3 All E.R. 544, *dictum* of Hodson, L.J. applied.

McCormack for the petitioner;
D.E.F. Luke for the respondent.

BEOKU-BETTS, J.:

The petitioner, the husband of the respondent, filed a petition on December 6th, 1966, asking this court for a dissolution of their marriage on the ground of cruelty. The petitioner and the respondent were married on May 1st, 1950, and lived in Nottingham and other places in the United Kingdom, in Ibadan in Nigeria and in Freetown in Sierra Leone. The union is blessed with four children, the eldest born on August 18th, 1952 and the youngest on June 22nd, 1964. The petitioner states in paras. 5, 6 and 7 of the petition that from the time of the celebration of the marriage the respondent has treated him with cruelty, namely, that she is of ungoverned temper, has habitually used violent and threatening language towards him, and has treated him with unkindness, callous indifference and neglectful conduct throughout the marriage. The petitioner complains that because of this cruelty he has suffered in his health, and that within the last few months he has been off duty suffering from hepatitis and is now suffering from scurvy and has developed symptoms of stomach ulcer. The petitioner filed details of the alleged cruelty, which covers a period from 1950 up to November 1966.

The evidence on the whole turned on the allegations that the respondent was constantly nagging at the petitioner and that she was extravagant. The petitioner gave instances of these matters from when they were in England and other places and in Sierra Leone.

[The learned judge summarised the evidence for the petitioner, and continued:]

The simplest definition of cruelty may be found in *Rayden on Divorce*, 5th ed., at 80 (1949): "'Legal cruelty' may be defined as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger: *Russell* v. *Russell*." On p. 81 of *Rayden* it is stated:

> "Although one act may be so grievous as by itself to constitute cruelty, this is seldom the case; but a blow, followed by minor acts, may be enough, and continued acts of ill usage, none of them in itself sufficient to support such a charge, may accumulate until a case of cruelty arises."

From this evidence of accumulated incidents, with the medical evidence, the petitioner hopes to succeed. But I am obliged by

law to look at the respondent's case as squarely as I have considered the petitioner's case.

The respondent filed an answer in these words: "That she is not guilty of cruelty as alleged or at all."

[The learned judge summarised the respondent's evidence, and continued:]

The foregoing narrative of the respondent's denials justifies my assessment that there is plenty of doubt as to whose story I should believe, especially as the incidents complained of are not supported by any worthwhile witness. The petitioner brought his clerk to give evidence that he prepared his breakfast. He brought another witness who wanted to buy their piano and a witness who testified about the advertisement. The medical evidence was given by a junior doctor who works under him now, when other senior doctors who he said actually treated him, like Dr. Thakurta or Dr. Stuart, were not called. I am not by this saying that the petitioner is not suffering from what he says, but that it would have helped the court more if the more senior doctors were called, especially as the respondent stated that the petitioner is a busy man and that apart from his profession he had outside commitments such as church matters and committee meetings to attend to. In any case, the court must first be satisfied that the respondent was cruel to him, before the effect of the cruelty can be considered.

There is however one aspect of this case which I have not dealt with, but which was much discussed by counsel on both sides. That is the question of condonation. The petitioner did not state that he condoned the cruelty alleged at any stage of the 17 years' marriage, although it is evident that there must have been some degree of condonation. All the children were born between 1950 and 1964; as a matter of fact, they had two children in 1963 and 1964. Condonation ought to have been pleaded, and the dates for revival of the cruelty specifically pleaded. It cannot be otherwise, because condonation is an absolute bar to success in this kind of case, and only when there is a revival of the cruelty can the case be considered.

The respondent did not plead condonation either, but her defence of a blank denial could allow evidence of condonation, especially as in this case the respondent did not rely on condonation as a bar to relief, but denies the allegations *in toto* and merely brings in acts of condonation in support. Had I at any stage of the case realised that the defence relied on condonation as a bar, I would have allowed

an amendment to the answer and allowed the issue to be contended on that basis.

As I have said, I am now only considering the evidence as a whole with the evidence of condonation forming only a part. The standard of proof required in these cases (that is, cruelty) is that the court need only be satisfied on the balance of probabilities. There are several authorities cited. The issue of condonation was first raised in this case by the petitioner when he said in evidence as follows: "After 1964 I have not condoned my wife's cruelty"; the issue is not referred to in the petition itself. The respondent took advantage of this, which she was entitled to do, by challenging this positive statement. The petitioner was asked whether he had had sexual intercourse with her in November 1966, and he said he had sexual intercourse with her in September 1966. In the case of *Benton* v. *Benton* (1) Hodson, L.J. said: ([1958] P. at 23; [1957] 3 All E.R. at 548): "In the absence of fraud, or consent induced by fraud, the voluntary act of sexual intercourse is conclusive against this man, in my opinion, in settling the question of condonation." This evidence of the petitioner's was followed by two very affectionate letters written by the petitioner to the respondent, one dated March 23rd, 1966. That letter does not support the evidence of the petitioner that he had not condoned the cruelty after 1964, nor does the earlier letter, dated October 8th, 1965. Evidence that up to the date of the petition they were both going out to parties and had given at least one party of their own, and were having sexual intercourse, makes me believe the respondent when she says she was surprised to receive the petition as they lived in normal circumstances. If I accept the evidence of the petitioner that he did not condone the cruelty after 1964, then the answer to that provided by the respondent is that he must have condoned whatever cruelty he complained of by his subsequent acts in 1965 and September 1966 (although she said it was about a couple of weeks before the petition was served that they had sexual intercourse). The evidence of the respondent impresses me more favourably on the issue of cruelty, quite apart from her evidence on the issue of condonation, which is also quite convincing as part of the defence of absolute denial of cruelty. I need not go into the evidence of Mr. Hotobah During, the father-in-law of the petitioner, who denied that he had received any complaint by the petitioner of the respondent's conduct. If the issue of cruelty is not proved, as I have found, the question of the health of the petitioner could be

explained by inferring that, if the health of the petitioner had deteriorated, it could not be due to the respondent's cruelty.

I therefore dismiss the petition with costs to be taxed.

Petition dismissed.

COKER *v.* BONO

SUPREME COURT (Harding, J.): March 2nd, 1967
(Civil Case No. 67/66)

[1] **Tort—defamation—defamatory statements—construction—innuendo—circumstances of publication relevant:** Where words are alleged by innuendo or otherwise to have an extended or secondary meaning, the manner and occasion of their publication, the person to whom they were published, and all the circumstances affecting their meaning in the particular case, must be taken into consideration in determining whether they are defamatory or not (page 72, line 38—page 73, line 3).

[2] **Tort—defamation—defamatory statements—construction—words to be construed as a whole and in context:** Words alleged to be defamatory must be construed as a whole and their context taken into consideration (page 73, lines 3–5).

[3] **Tort—defamation—defamatory statements—statements imputing dishonesty—statement that storekeeper must pay for property missing from store:** To say that a storekeeper is responsible for property missing from the store and must contribute towards its cost or resign, is reasonably capable of a defamatory meaning concerning the storekeeper; but it is not defamatory of a storekeeper for his superior officer to say that the storekeeper, together with his assistants in the store and the superior officer himself, must contribute towards the cost of goods missing from the store (page 72, lines 11–14; page 73, lines 26–27; page 73, line 40—page 74, line 10).

[4] **Tort—defamation—functions of court—innuendo—trial by judge alone—judge to determine whether words reasonably capable of meaning ascribed and whether they have it in fact:** A judge sitting by himself for the trial of an action for defamation where an innuendo is pleaded must first determine whether the words are reasonably capable of being understood in the meaning ascribed to them and then consider whether in fact they have that meaning (page 73, lines 6–9).

[5] **Tort—defamation—innuendo—evidence—circumstances of publication relevant:** See [1] above.