IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

CIVIL APPEAL No. 22 OF 1981

Between :

RATTAN MALA — Appellant

- and -

JAI RAM — Respondent

N. Mohammed for the Appellant
S.R. Shankar for the Respondent

Date of Hearing : 23rd November, 1981
Delivery of Judgment :

JUDGMENT OF THE COURT

Henry J.A.,

This is an appeal against the issue of a decree nisi for the dissolution of the marriage between appellant and respondent. It is convenient to refer to the spouses as the husband and wife respectively. The husband brought proceedings against the wife and a named co-respondent who has not been made a party to this appeal. The ground alleged is a single act of adultery which the husband said he witnessed at about 4 o'clock in the morning of April 2, 1980. The spouses were married on February 27, 1977. The husband was then 19 years of age whilst the wife was about one year older. There are two children of the marriage both males, being Dinesh Prasad Sahai born on July 25, 1978 and Abhinesh Prasad born on July 17, 1980.

The husband is a farmer. The spouses lived in a compound in which the father and mother of the husband also lived, but in a separate house. We will refer to them as "the father" and "the mother". At the time the first child was about 20 months old. The

second child was born about four months after the alleged act of adultery. He was a sickly child. The evidence is not clear whether he was a premature baby but it is clear that the wife had come pregnant some time before the alleged adultery.

There was no evidence of any prior association between the wife and the co-respondent. The spouses were living a normal conjugal life at the time.

Co-respondent lives 2½ miles from the husband's house. He said he had never worked or harvested cane for the father who apparently owns the farm of some 16 acres. He knew the husband and the father well and on one occasion carted cane for them in a cargo truck and he said the husband travelled once from Nadi with him. The co-respondent said this carting of cane was only for a period of 2 weeks either in the 1979 or 1980 season. The husband gave no evidence on this point. The father and mother referred to him as having cut cane but the father had retired and the husband appears to have been attending to the farm.

Neither the husband, the father nor the mother, who must have known, gave any evidence which would even tend to show that the wife had ever met the co-respondent in the course of farming operations or otherwise. Both the wife and the co-respondent stated categorically that they did not know each other and had never met. No evidence was given to show that this was false. Nor was any evidence given of possible communication or of any suspicious circumstances on other nights than the night in question. This is important in view of the evidence of a security guard later dealt with.

The husband said he and his wife were asleep in their house when they both woke up about 4 a.m. She said she wanted to make their breakfast. On work days they have an early breakfast. The evidence is conflicting but it is consistent with such an early start on work-days. The husband said to her it was not a work-day

(it was, in fact, a Wednesday) and so there was no need for an early breakfast. However, she got up and went to the kitchen which appears to be separate from their house. He said his wife came back into the house, and then went to the garage which he could see from where he was lying awake and still in his bed. The garage was apparently quite close. It was open at both ends, or, as he also said it was an open garage. It was provided with an electric light which he said he had left on all night, no doubt, to keep prowlers away. Why else keep the light on all night although he denies they had prowlers. There was a tractor or perhaps two tractors in the garage. It was a moonlight night.

What period elapsed between the time when the husband saw his wife go to the garage and the time when he himself went there, is not stated. It was important in view of what he claimed he saw when he reached the garage. It was an open lighted garage which he could see (and she would know he could see) from where he was lying awake in the room she had just left. According to the husband the wife had gone in his full view without any attempt at secrecy.

However, in whatever interval of time elapsed, the husband said he saw his wife having sex with Pratap Chand (the co-respondent). Later on in his evidence he said :

> "I had seen them in the sexual act, the Respondent lying down, the Co-respondent on top of her, the Respondent had no panties on, the Co-respondent naked waist down. When the Co-Respondent leaped up hearing me he went off half naked. I saw his organ inside her."

The husband said he picked up an iron bar but the co-respondent "seemed to hear" him and got up and fled. Again it is difficult to know what caused co-respondent "to seem to hear". There is no account of any attempt on the part of the husband to intercept or catch the co-respondent or call out or take any

steps at all. His description of the co-respondent being half naked below the waist is not further pursued. Did he leave any clothing? Did he take his clothing with him? Could the husband see whether this was so or not because it seems to be well lighted and he could, according to him, recognise the co-respondent.

The husband said he slapped his wife 3 or 4 times. He made no accusation against her and according to his evidence neither of them said anything. The wife started crying and yelling out for his parents. She went to them and complained of the assault. He does not say whether he was also either calling out or making accusations against her. This incident will be examined after an account is given of the wife's evidence.

The wife said she rose as she normally did, about 4 a.m. to cook breakfast. She went to the tap, which appears to be outside, to wash her face. She put the outside light on but had not yet gone to the kitchen. While at the tap she heard her husband call out. She saw a man run away and saw her husband chase him. She said her husband asked her who the man was - apparently connecting him in some way with his wife - and he assaulted her by slapping her and kicking her and pushing her to the ground. She ran to the mother and forced her and the father up out of bed and complained of the assault. That someone may have run away from the compounds is confirmed by the evidence of a security guard. This evidence is consistent with the version given by both the husband and the wife that there was a man who ran away.

The father's evidence is short. He said :

> "One morning the Petitioner complained to me about the Respondent. Firstly my daughter-in-law complained, saying "open the door, I am being assaulted by Jai Ram". I asked Petitioner why he was assaulting her. Petitioner then said he had seen

> Respondent having sexual intercourse with another man at 4 a.m., with Pratap (alias Sadhu) - he cut cane for us a year before. The Respondent was there when Petitioner said this. I questioned Respondent if it was true that Petitioner hit her, she said he gave her 2 slaps. She denied the sexual intercourse.
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> Then I asked again about the sexual intercourse. She stayed silent. I told her of the temple where we had prayed for 28 days. I asked her to tell the truth there. If not she would be punished before God. I asked her a third time about sexual intercourse. She then replied, verbatim as far as I can say "Father-in-law, this is my mistake". I asked if it was the boy who cut cane for us some time back. She again said she had made a mistake."

It is important to note that the name was given by the husband and not, as he said, by the wife. The husband said :

> "My father asked the man's name and she told him Pratap Chand."

The evidence of the mother is different. She fixes the time as 2.30 or thereabouts - long before any question of an early breakfast could arise. She said the wife woke up yelling she was being assaulted. The husband shouted he had caught her with another man and I should ask her. Her evidence is :

> "I asked Respondent why the Petitioner assaulted her. My husband did not question Petitioner then. I asked the Petitioner, he said he had seen the Respondent having sexual intercourse with another man. I asked the Respondent who he was, she said a man who had cut sugar cane. Next I advised them not to cause further trouble. The Respondent said she would go her own way, the Petitioner could go his."

In cross-examination she said :

> "Then the Petitioner asked by my husband again, said he had seen Respondent having sexual intercourse with another man, that was why. My son did not name him, my daughter-in-law identified him.

> We asked the Respondent, she stayed silent, we both, Husband and I. She never denied it, just firstly stay silent. My husband said to go to the temple to take oath; this is when she spoke, saying she had made a mis take. I heard what my husband said then, we were both together; yes we would have both heard it all, I suppose. I cannot remember everything for sure or know that he remembers what I said."

The only other evidence is that of a security guard who lives in the compound of the adjoining premises of the Sunlover Hotel. He knew the co-respondent as one who used to drive a tractor for the hotel. The witness said he saw a man on March 28 or 29 (i.e. Saturday or Sunday) cross the fence of the compound of the husband. About 20 minutes later the man returned. He caught up with the man and shone a torch in his face and recognised him. The man did not say anything. Three days later he said he saw the same man at the back of the hotel. He ran off and he did not talk to him. This could not be later than April 1 and might be March 31. Then he said altogether he saw the same man three times. The third time next to the husband's compound. He was not able to catch him. It was about 4.30 a.m. Strangely this is the only occasion when he fixes a time. The witness is able to fix the date from the first occasion which cannot be the night in question. He is able to give clear evidence of identification, which required the shining of a torch of the man's face, before he could tell who he was. He gave a description of the man on the occasion referred to as 2 or 3 days later which seems to refer to a date before April 2. He said :

> "Two to three days later I saw the same Sadhu behind the hotel. Yes, the hotel and compound are big. The man had singlet, short pants, this at 4.30 a.m. I do not know if this is properly dressed. I heard a woman's voice cry out on 1st or 2nd April morning."

How he recognised the man without the use of torch, when he could not catch him, and what means of seeing him sufficiently for recognition and how close he got is not stated. This evidence compared with that

given on the first occasion is vague and unsatisfactory on the question of identification. The mention of 2 or 3 days later after March 28 or 29 is before this crucial date. He then added a third occasion which must be an attempt to give a date which would correspond with the date in question. Strangely dates are given but never the day of the week. However, from the point of view of the wife this evidence is consistent with the presence of someone who ran away and whom she could not recognise. It does not implicate her in adultery.

What is of crucial importance is the fact that however innocent the wife may be, she was placed in a position where she could do no more than deny what was said against her. There were no other witnesses and she was powerless to do other than give emphatic denials which she says she has always given. Even, according to the evidence against her, any admission was under pressure in the face of earlier strong denials. She was virtually faced with proving a negative. Her only protection was a careful scrutiny of the evidence - testing it for accuracy, giving careful consideration to the alleged sudden lapse of an otherwise moral wife and mother-to-be - and constant reminder of the presumption of innocence. The circumstances of the alleged adultery require careful consideration and the probabilities ought to be carefully weighed. There was no evidence of previous association, innocent or otherwise. The act, if committed, was done in a lighted open garage to which she walked in plain view of her husband whom she knew was awake. She would know what could be seen from where he was lying awake. It was a brazen act if it happened and required a previous assignation about the time when she could not, so it seems and did not, get up without disturbing her husband. The palpable exaggeration or deliberate attempt to make sure that adultery took place by saying "I saw his organ inside her" should have been carefully weighed to see whether his description was even inherently probable. Particularly in view of there being no evidence to show what

period of time was available between the time when the wife went into the garage and his description of seeing them in the act. The witnesses are not independent in that they are the husband and his father and mother, a matter which required careful consideration.

What did he really see? As we have already said what happened to the clothing from the man's lower body - did he leave it or did he take it with him? If he did why did the husband not see this? Why not challenge and chase the man? Altogether there are many facets of the evidence which required careful scrutiny. The question whether the wife identified the man or whether the information came from the husband ought to have been carefully weighed, especially in view of his determined attempts to obtain confessions.

We have taken some space to give an indication of the issues and the important circumstances to which critical consideration ought to have been given. The finding of the magistrate is short and uninformative. He said after a short statement of the conflicting accounts :

> "Here was a young marriage, one which had had its ups and downs but, reviewing the Petitioner's and Respondent's evidence basically not more than general "wear and tear". The couple had a baby son, the Respondent was pregnant for her second son. The Petitioner and Respondent are clearly both much attached to the elder son. <u>On the face of it there would seem to be no reason for invention by the Petitioner to bring the marriage to a sudden end</u>. Corroboration is sought and found in the accepted admissions to PW3 and 4. The court is convinced that the Petitioner's parents are not lying. Corroboration as regards the Co-respondent is found in the evidence of PW2."

The evidence is not examined and evaluated. The credibility of the evidence of the wife is dismissed with the statement that "there would seem to be no reason for invention by the petitioner to bring the marriage to a sudden end". This appears to be elevated to a matter of prime consideration with no critical

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examination of the evidence. It is an attempt to read the mind of the husband and to put on the wife some requirement to show why he should invent the evidence. At best such a test of credibility may only be brought into the scales after a thorough scrutiny of the evidence. Equally it might be said that here was a hitherto virtuous wife and mother, why should she risk her marriage and her future by committing adultery with some one in respect of whom there is no evidence that she ever knew the man and to commit the act in a lighted garage to which she went in plain sight of her husband?

According to the judgment the reason given for the acceptance of the father and mother is that the magistrate was convinced they were not lying. This means the wife was lying. This is an opinion only - there is no factual evidence to support perjury on the part of the wife. There is no record. It is a matter of memory and re-construction. Was the sequence, content and context of the conversations correctly recollected? Both the husband and the father were pressing the wife to make a confession. The husband had shouted his accusation according to his mother and the wife was earlier yelling for help. She protested her innocence and still continues to do so. Is it possible to say that the whole of the episode, tense and highly emotional as it was, with a wife suffering from an assault and accusations she was denying, was properly recollected so that the court could say there is a clear and unequivocal confession? Is the evidence tinged with bias or wishful thinking? Merely for the magistrate to say that he was convinced that the father and mother were not lying is not a judicial determination of this issue. The judgment based only on a lack of evidence of an invented story by the husband and a conviction that the parents were not lying, is an exceedingly unsatisfactory and dangerous basis for a decision on the evidence in this case.

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The proceedings were taken under Part XI of the Matrimonial Causes Act (Cap 51). Section 69 is important. It reads :

> "69. (1) As soon as possible after the termination of the hearing, the magistrate shall forward to the Court a certified copy of the evidence taken, together with copies of all process and other documents in the proceedings and a statement of his opinion as to the decree, if any, to which the petitioner is entitled, and the Court may, upon consideration thereof, either accept, reject or modify such opinion, or order -
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> (i) that further evidence be taken by the magistrate;
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> (ii) that the case be reheard by that or another magistrate; or
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> (iii) that the case be transferred to itself for hearing.
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> (2) Unless the Court makes any of the orders specified in subsection (1), it shall decide the case and direct what decree shall be pronounced by the magistrate."

The judicial decision is that of the Supreme Court, not the magistrate who only expresses an opinion and makes a recommendation. The decision of the Supreme Court was :

> "I have perused the record and concur in the magistrate's recommendations in general."

This is a mere concurrence in the recommendations. It does not deal with the evidence at all. The opinion of the magistrate, as a decision on the evidence, was entirely inadequate and unsatisfactory. This court has no findings by the Supreme Court. Justice can now be done only by this court performing the duty of the Supreme Court and exercising the powers under Section 69.

In Jamisha Ali and Hasiman Nisha & Anor. Civil Appeal No.33/1976 this court when dealing with a judgment of the Supreme Court on a consideration under Section 69 said :

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"Stress was laid on the opportunity the magistrate had of seeing and hearing the witnesses whilst the Supreme Court only perused the record. It cannot be denied that this is a factor which ought to be considered carefully and given proper weight in the Supreme Court. It was said by this Court in Behari v. Siukuar alias Shiukumari 14 F.L.R. 101, 106 :-

> 'On the other hand, the magistrate did see and hear the witnesses, and was therefore in a better position than either the Supreme Court or this Court, to make an assessment of their credibility.'

The ultimate question is not whether the magistrate was satisfied but whether, keeping in mind the fact that the magistrate had that advantage, the Supreme Court was wrong in holding that it was not satisfied. Sections 57 and 70(b). It is the duty of the Supreme Court to satisfy itself that the ground has been proved and to decide the case and this duty cannot be performed unless the opinion of the magistrate is critically examined. It is insufficient in a case such as this to say one version is preferred to another. What was the onus which was placed on appellant? What were the factors which weighed in determining that preference? What were the probabilities which brought the scales down in favour of appellant? It is not enough to say the tribunal which has given no reasons saw and heard the witnesses. To say that is to take from the Supreme Court its duty to satisfy itself and to permit the magistrate to usurp that function. It must appear, so that the Supreme Court can examine the position for itself, that the magistrate did apply a correct onus and did use the opportunity of judging the relative credibility of the parties in the light of that onus and was justified in coming to the opinion given. A bald statement of preference is insufficient in a case like the present one.

It is for a petitioner to show that the magistrate took proper advantage of his having seen and heard the witnesses and that the conclusion reached was justified. This is to be contrasted with an appeal where the appellant must show the conclusion reached was wrong or could not be supported."

On the question of proof we said :

"Section 57 is explicit that the Supreme Court must determine the ground upon which a petition is based. It reads -

'57. Except as provided by this Ordinance, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree. '

Section 70(b) states specifically that the Supreme Court shall decide the case.

We turn now to consider the terms "satisfied" and "reasonably satisfied" as they appear in Sections 57 and 91. In Briginshaw v. Briginshaw (1938) 60 CLR 336, 362 Dixon J. said :-

'But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates, an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.'

Dixon J. also said at p.368, 369 :-

'Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further,

> circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation. But if the proofs adduced, when subjected to these tests, satisfy the tribunal of fact that the adultery alleged was committed, it should so find.'"

We also said :

> This question was further considered by Dixon J. in Wright v. Wright (1948) 77 CLR 191 when he said at p.210
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> 'While our decision is that the civil and not the criminal standard of persuasion applies to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because, as is pointed out in the judgments in Briginshaw v. Briginshaw (1) the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account :'
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> This passage was approved by Lord Denning in Blyth v. Blyth (1966) A.C. 643."

Before dealing further with our opinion on the evidence we wish to refer to a piece of evidence which was not referred to by the magistrate, and, in respect of which we do not know the weight which the Supreme Court gave to it. No doubt it weighed heavily in both courts below. The husband, not being satisfied with what had happened before his parents, took his wife the same morning to a Welfare Officer. According to the husband he made the accusation of adultery before the welfare officer who asked the wife if it was true. The wife denied it. The husband said he then produced a Bible and asked the Welfare Officer to make her tell the truth on oath. The wife then started crying and made a confession. The Welfare Officer was not called. The explanation was that he had been shifted to Suva. Whether this evidence is true or not we do not know. The wife was not questioned on it by either counsel or the magistrate. In our

view, if this happened it was a gross abuse of the official office of the Welfare Officer. Under section 5 of the Matrimonial Causes Act (Cap.51) absolute privilege from disclosure is enacted in respect of all official interviews. If this type of interrogation is to be condoned then it is a gross abuse of the office. It matters not in our view that it was not an occasion for an official interview ordered by a Court. It had all the appearance of such. We have no hesitation in holding that any such confession, if so obtained, ought to be rejected. The real importance of this piece of evidence now is that it shows the husband was prepared and determined to go any lengths to put pressure on his wife to extract a confessional despite her denials.

In our view the magistrate did not apply a proper test of credibility in respect of the evidence of the husband. His evidence of the circumstances leading up to and surrounding the act of adultery is unsatisfactory and unsafe as a basis to accept that evidence. His description of what he saw is false. No proper consideration and weight were given of the probabilities that a wife and mother would commit adultery in the circumstances stated, almost in the husband's sight with a man in respect of whom there was no evidence she had ever met before. The general situation and all other circumstances were such that the story is inherently improbable and his description of the act seen by him was an impossibility. The question was not whether the parents lied but whether their recollection is correct. The husband appeared to be determined to get a confession. He still, according to him despite what happened at his parent's home continued pressing his wife. We are not prepared to accept that the wife did in fact make a confession even if the parent's later thought that she had. This type of discussion under pressure following an assault can only too easily be re-constructed as an acceptance

of allegations as being true. In our judgment the Supreme Court should have rejected the opinion of the magistrate and the petition should have been dismissed.

The result of our findings is that the decree nisi, which includes an order for custody and access, will be set aside. In the circumstances of this case we are not prepared to make a custody order under the provisions of Section 89 of the Matrimonial Causes Act.

The appeal will be allowed and the decree nisi will be set aside. Respondent will pay the costs of appellant in this court and in the Supreme Court, such costs to be fixed, if necessary by the Registrar.

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