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BEHARI

v.

SIU KUAR alias SHIUKUMARI

B [COURT OF APPEAL, 1968 (Gould V.P., Trainor J.A. Knox-Mawer J.A.), 7th, 28th May]

Civil Jurisdiction

Divorce—summary procedure—evidence taken by magistrate—magistrate in best position to asess credibility of witnesses—Divorce (Summary Jurisdiction) Ordinance (Cap. C *29—1955) ss.10, 12—Court of Appeal Ordinance (Cap. 8—1967) ss.12 (1) (b), 13.*

Divorce—discretion—question of exercise of discretion does not arise unless and until petitioner proves his case.

Divorce—evidence and proof—proof of non-access—standard of proof required—evidence of spouse admissible to prove or disprove marital intercourse—Law Reform (Matrimonial Proceedings) Ordinance (Cap. 30—1955) s.3 (1).

Evidence and proof—divorce—non-access—standard of proof required—evidence taken D *by magistrate—assessment of credibility—Divorce (Summary Jurisdiction) Ordinance (Cap. 29—1955) ss.10, 12.*

Appeal—divorce—summary procedure—evidence taken by magistrate—credibility of witnesses—proceedings in Supreme Court and Court of Appeal based on magisterial record—Court of Appeal in as good a position as Supreme Court to assess credibility—power of Court of Appeal to direct decree—Divorce (Summary Jurisdiction) Ordinance (Cap. 29—1955) ss.10, 12—Court of Appeal Ordinance (Cap. 8—1967) s.13.

E In proceedings for dissolution of marriage brought under the provisions of the Divorce (Summary Jurisdiction) Ordinance (Cap. 29 — 1955) the magistrate, who hears the evidence and sees the witnesses, is in the best position to assess their credibility. The Supreme Court, in deciding the case, and the Court of Appeal on appeal, both act on the same material, i.e. the magisterial record, and the Court of Appeal is therefore in as good a position as the Supreme Court to assess the evidence.

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The standard of proof required to rebut the presumption that a child born during the subsistence of a marriage is a child of the marriage, is proof beyond reasonable doubt; where there is an intrinsic unlikelihood of intercourse between the spouses the burden may be lighter than it would have been had they been living in the same house.

G In dissolution proceedings the question of the exercise of discretion by the court does not arise until the court is satisfied that the petitioner has proved his case.

In proceedings under the Divorce (Summary Jurisdiction) Ordinance the Court of Appeal, having all the powers of the Supreme Court, may direct what decree (if any) is to be pronounced by the magistrate.

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Cases referred to: *Morris v. Davies* (1837) 5 Cl. & F. 163; 7 E.R. 365: *Piers v. Piers* (1849) 2 H.L. Cas. 331; 13 L.T. (O.S.) 41: *Watt v. Thomas* [1947] A.C. 484; [1947] 1 All E.R. 582: *Yuill v. Yuill* [1945] P.15;

[1945] 1 All E.R. 183: *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 1 All E.R. 326: *Croker v. Croker* [1932] P.173; 147 L.T. 464: *Burford v. Burford* [1955] 3 All E.R. 664; [1955] 1 W.L.R. 1242.

A

Appeal from a judgment of the Supreme Court exercising jurisdiction under the Divorce (Summary Jurisdiction) Ordinance.

D. N. Sahay for the appellant.

K. Parshotam and S. N. Nandan for the respondent.

The facts sufficiently appear from the judgment of GOULD V. P.

B

The following judgments were read :- GOULD V.P. : [28th May, 1968]—

The appellant filed a petition for the dissolution of his marriage with the respondent under the provisions of the Divorce (Summary Jurisdiction) Ordinance (at the relevant date Cap. 29 of the Laws of Fiji — 1955). The Ordinance makes provision which requires the magistrate to give a respondent in such cases time to prepare a defence but the court was informed that it is not the practice for any defence or answer in writing to be filed. There was none in the present case but it is common ground that it was a "defended" case. Under section 10 of the Ordinance the Magistrate records the evidence in writing and, under section 12, he forwards to the Supreme Court (*inter alia*) a certified copy thereof, and a statement of the decree (if any) to which the petitioner is in his opinion entitled, together with the points for determination in the suit, the decision thereon and the reasons for the decision. The Supreme Court may (and did in the present case) direct further evidence to be taken, and is required to "confirm reverse or vary" such decision and to "decide the case and direct what if any, decree shall be pronounced by the magistrate."

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In the present case the magistrate (having granted leave to the appellant to proceed without joining a co-respondent) recorded the evidence and recommended that discretion should be exercised in favour of the petitioner and that a decree nisi should be issued. Having considered the matter, the Acting Chief Justice (as he then was) ordered that further evidence be taken, with particular reference to the question of access by the appellant to the respondent during a period relevant to the birth of a child to the latter. The magistrate recorded further evidence and repeated his recommendation that a decree nisi should be granted. The Acting Chief Justice, however, having considered the whole of the evidence, dismissed the petition. From this decision the present appeal has been brought under section 12 (1) (b) of the Court of Appeal Ordinance (Cap. 8 — Laws of Fiji, 1967).

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The appellant based his petition on adultery and alleged the birth of a child to the respondent; the relevant paragraphs of the petition are :-

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> "5. That the respondent has since February, 1965 the exact date whereof is unknown to the petitioner and on divers occasions committed adultery with some person or persons unknown to the petitioner.
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> 6. That the respondent was delivered of a child on or about the months of March or April, 1966 the exact date whereof is unknown to the petitioner at the free maternity annexe at the Colonial War Memorial Hospital, Suva."

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There is no pleading that the petitioner was not the father of the child, but no point has been taken on this, and in fact the whole basis of the appellant's case is that he is not in fact the father. I take the main facts relating to the history of the marriage from the record of evidence and the judgment under appeal. The marriage took place in 1950, and in 1957 the respondent brought maintenance proceedings against the appellant but these were not proceeded with and the parties resumed co-habitation. There were four children of the marriage, born respectively in 1953, 1954, 1957 and 1959. The appellant and respondent separated again about 1961 and in that year the respondent took maintenance proceedings under which the appellant was ordered to pay maintenance for the respondent and the children. He has not been regular in these payments and in fact the three eldest children have been living with the appellant. In 1961 and again in 1965 the appellant petitioned for divorce on the grounds of the respondent's adultery but in each case the allegations were not proved to the satisfaction of the court and the petitions were dismissed. From May, 1964, the appellant has been living with Bodmati d/o Mangaru and states that he wishes to marry her — she is the person named in his discretion statement.

The evidence given by and on behalf of the appellant before the magistrate was challenged only by cross-examination of the witnesses; the respondent gave no evidence herself and called none. The evidence falls naturally into two divisions — that tending to show that the respondent gave birth to a child on the 16th March, 1966, and that relied upon by the appellant to establish that he was not the father of the child. I will recapitulate the former very briefly as it was accepted by the magistrate and it is implicit in the judgment of the Acting Chief Justice that he also accepted it. Ram Narayan Singh, a telephone linesman, said he knew the respondent; he saw her on a bus on the 1st March, 1966, when she appeared to be in an advanced stage of pregnancy. Shanno Wati Singh, a nursing sister, was in March, 1966, employed at the Anderson Maternity Annexe, Suva. She identified the respondent as a person who gave birth to a female child on the 16th March, 1966, in the annexe; she was registered under the name of Nank f/n Sahdeo and wife of Banwari of Sabeto, Nadi. A woman, Bed Mati, from the same village as the respondent, testified that she knew the respondent and that she was a patient in the Maternity Annexe in 1966 when the respondent gave birth to a child. She said that when the respondent saw her in the annexe she hid her face.

The foregoing evidence was given at the first hearing before the magistrate; at that stage the only evidence that the appellant was not the father of the infant in question was his testimony that he had lived apart from his wife for some rather indeterminate period. When the case was remitted to the magistrate, first the appellant gave evidence in greater detail. He said that, since his wife left him in 1961 he had not had sexual intercourse with her. He lived for the most part at Tailevu (it is common ground that the respondent lived at Sawani) but stayed sometimes at Suva in connection with his work as a bus driver. He saw the respondent at Suva and Nausori but did not speak to her. The respondent visited the children at Tailevu at the school, but she had never come to his house and never stayed at Tailevu overnight. A witness, Yad Narayan, was then called to testify that he had shared a room in Suva with the appellant for about four years — since 1963. The appellant would be

there three or four days in a week; the witness had never seen the respondent and she had never visited the room in question. Mohammed Hanif, a taxi driver, gave evidence that he knew both apellant and respondent, that he was in the habit of driving the appellant twice a week from Tailevu to Korovou town, that the respondent left Tailevu about five or six years ago, and that he had not seen her there since. A

In making his recommendation the magistrate said — "The petitioner impressed me as a truthful witness. His evidence on this aspect was not challenged at all by the respondent who was represented by a counsel . . . . I am satisfied that the petitioner and his two witnesses were witnesses of truth." B

Before considering the judgment of the Acting Chief Justice it will be convenient to refer briefly to a matter of law. There was no direct evidence of adultery on the part of the respondent and the whole case stands or falls upon the evidence that the appellant had had no intercourse with the respondent for a number of years and could not possibly therefore, be the father of the child born on the 16th March, 1966. In Fiji, the evidence of a husband or wife is admissible in any proceedings to prove that marital intercourse did or did not take place between them at any period; at the relevant time this provision was contained in s.3 (1) of the Law Reform (Matrimonial Proceedings) Ordinance (Cap. 30 Laws of Fiji, 1955). What then, is the standard of proof required to rebut the presumption that the child born on the 16th March, 1966 was a child of the marriage? It is not in dispute that the standard is a high one, not to be discharged on a mere balance of probabilities. The words used by Lord Lyndhurst in *Morris v. Davies* (1837) 5 Cl. & F. 163, 265, "strong, distinct, satisfactory and conclusive," have received general approval, though the necessity for the word "conclusive' 'has been queried in *Piers v. Piers* (1849) 2 H.L. Cas. 331, 370. *Bromley on Family Law* (3rd Ed.) p.294 and *Rayden on Divorce* (8th Edn.) p.156, use the phrases "beyond all reasonable doubt" and "beyond reasonable doubt" respectively. Where there in an intrinsic unlikelihood of intercourse the burden may be lighter than it would be if the parties were living in the same house. It is put in Cross on Evidence (New Zealand Edition, 1963) p.104 — C D E

> "Circumstantial evidence, such as the fact that the mother has been living with another man as his wife for a considerable time before the birth of the child, the fact that the husband's opportunities of access to his wife were slight, while the circumstances were such as to render intercourse unlikely, and the conduct of the wife or her paramour with regard to the child may all be taken into account." F

In his judgment the Acting Chief Justice was critical of the pleadings and conduct of the case by or on behalf of the appellant. He considered that the sweeping allegations of adultery in paragraph 5 (quoted above) should not have been made and that in the light of the evidence that a child was born on the 16th March, 1966, this fact should have been alleged with particularity in the petition. He considered that the failure to give full particulars excited some suspicion and made it appear uncertain if the appellant really knew or had real confidence in what he was alleging. While I agree with the criticism of these defects, it could be that the way in which the petition was framed should be attributed more to the appellant's legal advisers than to him personally. It is not G H

known what the state of the appellant's knowledge was, when he instructed his lawyers, but it is clear that an attempt was made to keep the birth of the child from being known. If at first he acted upon hearsay it would seem that the appellant was not acting without justification, for in the event it was firmly established by the evidence that the respondent did in fact bear a child within the period mentioned in paragraph 6. I do not, therefore, fully appreciate why these considerations should, in the mind of the Acting Chief Justice, have been felt to detract from the appellant's credibility.

That it did so appears from the following passage of the judgment, where the Acting Chief Justice deals with the vital issue in the case ;-

> "I have now perused the evidence called by the petitioner on the question of non-access. It consists of the sworn general evidence of the petitioner himself that since 1961 he has not had sexual intercourse with his wife. There were two other witnesses who gave evidence to the effect that since 1963 or so the petitioner has not lived with his wife and has not been seen in her company. No evidence has been given of the dates between which the act of sexual intercourse resulting in the birth of the respondent's child must have taken place and no attempt has been made to prove where either the petitioner or the respondent were in that period. It has not been proved that no access by the petitioner to his wife was possible. The wife herself had not given any evidence on the issue and the matter must largely be determined on whether the sworn assertion of the petitioner on this issue should be accepted.
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> The conduct and the evidence of the petitioner in these proceedings, coupled with the strong incentive he must have both to rid himself of the Maintenance Order against him and of his unwanted wife, make it clear that his evidence must be treated with circumspection. I do not feel satised that he is a witness in whose evidence it would be safe or prudent to repose any real confidence. I have considerable doubt whether I can or do accept his general assertions in this case as being of sufficient cogency to rebut the presumption of legitimacy that arises in respect of children born of a married woman during the subsistence of the marriage, where it is clear that there is no suggestion or evidence that access was not possible."

In the first of these paragraphs there is reference to the absence of evidence of the dates of sexual intercourse resulting in the birth of the child and of proof where the parties to the proceedings were at that period. I would have thought that once the date of birth was established the normal period of gestation would become a matter of which judicial notice could be taken, and the evidence on the record appears to show that the appellant and respondent were living in their respective towns during the whole of the relevant period, except for the appellant's visits to Suva for the purposes of his work.

The position of this court as an appellate tribunal in this case is an unusual one. It has not had the advantage of seeing and hearing the witnesses, but neither has the Supreme Court as such. From that point of view the well known principles stated in such cases as *Watt v. Thomas* [1947] A.C. 484, *Yuill v. Yuill* [1945] 1 All E.R. 183 and *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370 have no application and this court, having

exactly the same material before it, is in as good a position as was the Supreme Court to assess the evidence. On the other hand, the magistrate did see and hear the witnesses, and was therefore in a better position then either the Supreme Court or this Court, to make an assessment of their credibility. I think that fact is quite unaffected by the consideration that the function of the Supreme Court was one more akin to review than to the exercise of an appellate jurisdiction. The Acting Chief Justice had of course the widest experience in assessing the weight of evidence but, in questions of credibility based partly on demeanour, the magistrate was in a position of advantage. The magistrate appears to have relied at least partly on demeanour when he said — "The petitioner impressed me as a truthful witness."

Having considered all the relevant material with care I am, with all due deference to the conclusion of the Acting Chief Justice, satisfied that the requisite standard of proof of the absence of intercourse between the appellant and the respondent at any time possibly relevant to the birth of the child, has been attained. I will set out the factors by which I am influenced. While the two additional witnesses Yad Narayan and Mohammed Hanif, do not add a great deal to the appellant's own evidence, they confirm generally that the appellant and respondent had been living separately for years. There is no challenge at all to the evidence that the appellant has been living with another woman since 1964. There has been no suggestion of any resumption of co-habitation even temporarily — the proceedings in relation to the maintenance order tend to show that the relations between husband and wife were not good. There is no reason at all to assume, particularly in the absence of any allegation by the respondent that such was the case, that the appellant ever visited the respondent, incidentally or even surreptitiously, for the purpose of sexual intercourse. Then, to my mind, the behaviour of the respondent is important. She entered the hospital under a false name and address, and gave an incorrect name as that of her husband. There is evidence that she hid her face when seen by an acquaintance in hospital, and that she was prepared to give the child away. It may be possible to conjure up unlikely explanations for this behaviour but the obvious one is that she acted from a sense of shame, and not as a woman bearing her husband's child. It is not necessary for the appellant to show that it was impossible for him to have had intercourse with his wife — in the circumstances to prove such a negative would itself have been impossible. It was incumbent upon him only to prove beyond reasonable doubt that, within any possibly relevant period, he did not. As I have indicated, I am not in full sympathy with the Acting Chief Justice's reasons for doubting the veracity of the appellant, and relying, as I do, perhaps a little more heavily on the magistrate's asessment of credibility, I consider that the necessary burden of proof has been discharged and that (subject to the question of discretion) the appellant is entitled to a decree nisi. This Court, under section 13 of the Court of Appeal Ordinance (Cap. 8 — Laws of Fiji, 1967) has all the powers of the Supreme Court, and therefore power, under section 12 of the Divorce (Summary Jurisdiction) Ordinance, to direct what decree shall be pronounced by the magistrate. A case in which a decree nisi was pronounced by the Court of Appeal in England, in somewhat similar circumstances, is *Croker v. Croker* [1932] P.173.

I come now to the question of discretion. In his judgment the Acting Chief Justice said that even if he did accept the evidence of the appellant

he would not exercise the discretion of the court in his favour. It must be noted that this was not in fact or law the exercise, or refusal to exercise, a discretion. The question of discretion does not arise until the court is satisfied that the case has been proved by the petitioner, and, in the present case, the Acting Chief Justice was not so satisfied. The authority for this proposition is *Burford v. Burford* [1955] 3 All E.R. 664, where at p.665, Hodson L.J. said:—

> "In my judgment, it is only in cases where the court is satisfied on the evidence that the case has been proved that the following proviso comes into operation:
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> 'Provided that the court shall not be bound to pronounce a decree of divorce and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery . . . '
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> That was this case. The commissioner was not in a position to consider the question of discretion without deciding the matter of desertion first. Not only is that right according to the plain reading of the statute, but also it makes good sense, because, in order to determine whether or not the discretion of the court ought to be exercised in the petitioner's favour, the court ought at the same time to make up its mind regarding the circumstances in which the parties separated, and whether or not (as counsel for the husband rightly put it) it was indeed the wife who was to blame for breaking up the home. That task the commissioner did not perform and the question, therefore, arises what ought to be done."

In a sense, what the Acting Chief Justice has said on the subject is *obiter*, though his views are of course entitled to due weight. The principles concerning an appeal from a discretion do not apply, and it is open to this court to make its own order on the question or to remit it to the Supreme Court. I think the interests of convenience require that the question be decided here.

The Acting Chief Justice gave a number of reasons for his opinion. He referred to the failure to prove the charges of adultery in the previous proceedings. This is not very relevant, I think, now that the appellant has proved those in the present proceedings. He referred also to the sweeping allegations in paragraph 5 of the petition, as to which I have earlier expressed my view. More cogent, in my respectful opinion, is the assertion that "he apparently deserted his wife and failed to pay her maintenance," and "he then took up with another woman." As to the "apparent" desertion, there is no evidence of it in the record; in his evidence the appellant made reference to his wife leaving him in 1961 and I think that, as the respondent did not think fit to give any evidence whatever, I am not entitled to assume that she was in fact deserted. I think there are two factors that must be noticed. One is that the marriage appears to be irretrievably at an end. The other is that the appellant wishes to marry the woman Bhodmati with whom he has been living for some years. A social Report on the record indicates that the three children who are living with the appellant and Bhodmati are well cared for and doing well at their school. I think their interests and that of Bhodmati are entitled to serious consideration.

Having considered these matters I am of opinion that the better view is that the discretion of the court should be exercised in favour of the petitioner. I would therefore direct that the magistrate pronounce a

decree nisi for dissolution of marriage, to be made absolute after three months. No question of custody has been mentioned before this court but it appears to have been common ground that the custody of the children Ram Bijendra, Shilawati and Paras Ram should remain with the appellant. I would so order with leave to the respondent to make further application; she is to have custody of Sumintra Wati. I would quash such order for costs as has been made in the courts below and make no order for costs of the appeal or any of the proceedings below. As all members of the court are in agreement there will be orders in the terms I have proposed.

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TRAINOR J.A.:

I have had the opportunity of reading the judgment of the learned Vice President. I agree with it and have nothing to add.

KNOX-MAWER J.A.:

I also concur.

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Appeal allowed — decree nisi directed.