NG LAM v NG LAM
(NO. 2)

Supreme Court Apia
17 February 1972
Spring CJ

HUSBAND AND WIFE (Matrimonial proceedings) - Husband's petition for divorce on the grounds of separation for not less than five years and unlikelihood of reconciliation (Divorce and Matrimonial Causes Ordinance 1961 s 7(j)) - Wife's answer denying separation for not less than five years, alleging wilful desertion by husband, and asking that petition be dismissed - Paternity issue between parties determined pursuant to direction of Court preliminary to consideration of petition - Wife swearing to acts of intercourse with husband which resulted in the birth of a child while the parties were "living apart" - Husband denying paternity - Independent evidence of familiarities between parties prior to alleged intercourse held sufficient to corroborate wife's testimony in a material particular - Husband adjudged father of child: Dalton v Rigney [1916] NZLR considered and applied.

- Divorce (Grounds) - Whether parties "living apart" or whether there had been a mutual reconciliation and resumption of cohabitation is to be ascertained from the whole of the circumstances - Casual and intermittent acts of sexual intercourse during the relevant time not necessarily terminating separation - Court finding parties unlikely to be reconciled and that the marriage had completely broken down - Court's discretion under s 16 Divorce and Matrimonial Causes Ordinance 1961 unfettered by Legislative restrictions: vide Hing v Hing [1960-1969] WSLR 236 in which it was observed that "the general policy of the law is, if it is otherwise just to do so, to get rid of 'limping marriages' and marriages that have irretrievably failed" - Discretion exercised in favour of petitioner despite his alleged wrongful conduct - Decree in divorce granted.

EVIDENCE (Corroboration) - Paternity issue - Mother's evidence must be corroborated in a material particular: Dalton v Rigney, supra, applied.

PETITION in divorce.

Loe for petitioner.
Clarke for respondent.

SPRING CJ (orally). This is a petition in divorce brought by To'aono Ng Lam against his wife seeking a decree in divorce on the grounds that the parties have been living apart and are unlikely to be reconciled and have been living apart for not less than five years, namely, from the month of August, 1963 down to the present time. An answer was filed by the respondent Ivona Ng Lam denying that the parties have been living apart for more than five years; further that the petitioner's own conduct caused the separation in that he wilfully deserted the respondent. The respondent has since filed an application to Court after the issue of the interim Judgment herein asking the Court to adjudge the petitioner to be the father of the child Nolepeto. It is acknowledged by both parties that the respondent is the mother of the child Nolepeto, and she has sworn in evidence that the petitioner To'aono Ng Lam is the father of the child. Now it is true that in a paternity

suit the evidence of the mother must be corroborated in some material particular before the Court will adjudge a person to be the father of a child. There must be some other evidence independent of the evidence of the mother, which corroborates in some material particular that To'aono Ng Lam is the father of this child. There is abundant evidence that the parties were associating together at some time in the later part of 1966. Towards the end of that year, proceedings for disobedience of a maintenance Order were issued. On the 25th October, 1966, there was a warrant of committal issued against To'aono Ng Lam for the sum of £19.11.0. arrears, including solicitor's fee. Evidence was given by the respondent that after the warrant was applied for on the 9th September, 1966 To'aono Ng Lam approached Ivona to withdraw the warrant. The petitioner in his evidence in cross-examination admitted that he saw Ivona about the warrant of committal. He admitted taking her out on his motor car at night on at least two occasions, and admitted that he asked her to live with him again as man and wife. He stated in cross-examination that he picked up Ivona one night in 1966 outside McFarland's store when there was a dance at Kame's house, and after Ivona got into the car they drove down to Mulinu'u Point near the rubbish dump and close to a fau tree. He was asked whether intercourse took place, but he denied this. He admitted, however, that they both got into the back of the vehicle and after embracing his wife he kissed her. He also admitted that he asked her to have sexual intercourse, and at the same time he tried to make love to her and admitted trying to touch her. He said that he did not have intercourse, and that his wife indicated that she had another boyfriend. He admitted that after the warrant was paid by some relations of his he did not go back to Ivona, and it is pertinent to note that at all material times he was living with another woman, who had borne him some children. The respondent was questioned whether intercourse took place and she claimed that it took place at Mulinu'u and also at Vaivase. The petitioner admitted taking the respondent to Vaivase, but denied that intercourse took place. He admitted that there were familiarities between them at Mulinu'u and that he tried to have sexual intercourse. There was independent evidence from two girls that the petitioner was associating with the respondent towards the end of 1966. The respondent swears intercourse took place between the petitioner and herself, and that the petitioner is the father of the child Nolepeto. In the case of Dalton v. Rigney [1916] N.Z.L.R. 1183 the headnote reads:-

> Although in affiliation proceedings mere proof of opportunity does not amount to corroboration within the meaning of s. 10(2) of the Destitute Persons Act, 1910, proof of familiarities prior to the date of the intercourse resulting in the birth of a child is sufficient corroboration of the evidence of the mother - in some material particular - within the meaning of the Act.

The learned Chief Justice Stout says at pp. 1184, 1185:-

> Now, in this case there is no denial that there were opportunities. The question is, Were there familiarities? There is the evidence of at least two independent witnesses to that effect. There is the evidence of Miss Murphy, whom the appellant admits to be a respectable woman. She says, amongst other things, "He was too familiar with the girl. He would go into the pantry when he came from the office. When he saw me he went upstairs." Again, "I never saw other boarders behave the same way. The girl was an innocent girl." She speaks of one occasion when the appellant was either in the kitchen or the respondent was going out of the smoke-room when the witness came in at night. She says further that she has no reason to suspect any one but the appellant. "He went into the pantry, or Mary went into the smoke-room. This was about an hour and a half before the others came in." She also said that she had "to watch him." Then there is the evidence of the complainant's sister. She states that she has come in and found the appellant and the respondent in the kitchen. That was before Christmas. She also says that the appellant was more free

> with the girl than any other boarder. Further, that he was always after her sister. The evidence, therefore, of Miss Murphy, an entirely independent witness, and also of the complainant's sister is strong corroborative evidence of her story. I see no ground for treating it as not true.

In this case, the mother has sworn on oath that the petitioner is the father of the child. She details where the acts of intercourse took place at Mulinu'u and at Vaivase. She gives the reason why attention was paid to her by To'aono Ng Lam and why intercourse took place. He approached her to withdraw the warrant of committal and said they would live together again. He admits familiarity occurred, but he denies intercourse took place. I am satisfied on the evidence that the allegation by the respondent that the petitioner is the father of this child Nolepeto has been proved, and accordingly, I adjudge the petitioner to be the true father of the child Nolepeto born on the 6th June, 1967. This brings me now to the question of the divorce. The petitioner seeks a decree in divorce on the grounds that the parties are living apart and are unlikely to be reconciled and have been living apart for more than five years, namely, from August, 1963 down to the present time. I have found that at least one act of intercourse took place in the latter half of 1966 resulting in the birth of the child Nolepeto. The respondent argues that the prayer of the petition should be dismissed as the act of intercourse precludes the petitioner from claiming that the parties have "lived apart" continuously since August, 1963. One has to have regard to the facts of the case. In Sullivan v. Sullivan [1958] N.Z.L.R. 912 Finlay J. said at p. 921:-

> In this state of the law, it seems proper to say not only that one single act of intercourse, taken alone, will not terminate a state of living apart, but that several such acts will not do so, and that the significance of every such act must be determined in the light of the circumstances in which the act or acts took place. Eloquent as those acts are as an indication of the resumption of cohabitation, they must, in the light of their circumstances, be considered from the point of view whether there was at any point of time some reality of resumed cohabitation. It is a question of fact. Kelman v. Kelman [1956] N.Z.L.R. 74. It is this test that it would seem proper to apply to the present case.
>
> In determining the quality of the various acts of intercourse and the significance to be attached to them from the point of view of whether they are indicative of a return to what has been defined as "something resembling the re-establishment of the matrimonial relationship" (Timms v. Timms [1925] V.L.R. 597), it is impossible to overlook various crucial features. These are of moment as providing indiciae from which it may be determined whether cohabitation was, in fact, resumed or whether the acts of intercourse were merely spontaneous and incidental acts without any real implication as evidence of a return to cohabitation.

In M v. M [1967] N.Z.L.R. 931 the term "living apart" was considered. Applying the law enunciated in this decision, I am satisfied on the facts of the instant case that the parties were "living apart" since August, 1963 down to the present time and are unlikely to be reconciled. The act of intercourse resulting in the birth of Nolepeto occurred as a result of the petitioner endeavouring to have the warrant of committal withdrawn. There was not, in my view, any intention on the part of the petitioner to resume cohabitation. I apply the reasoning in Sullivan v. Sullivan, supra, where it is summarized in the headnote:-

> Casual and intermittent acts of sexual intercourse between the spouses, merely as such and by their mere occurrence, do not constitute a resumption of cohabitation and end a period of living apart. In every case the inquiry must be the same: whether, in the whole of the circumstances, the proper inference

is that there has been a mutual reconciliation and that the state of cohabitation has been resumed.

Accordingly, I find that the parties were living apart since August, 1963 notwithstanding the act or acts of intercourse, and I further find that they are unlikely to be reconciled.

This brings me to the next point which is the allegation by the respondent that it was the wrongful conduct of the petitioner which caused the separation.

I have already considered the matter as to the Court's discretion in Yiu Hing v. Ula Yiu Hing [1960-1969] W.S.L.R. 236 where I stated:-

> The Legislative has not placed any restriction on the exercise of the discretion given by section 16 of the Ordinance, which, although a judicial one, is still unfettered. In Fraser v. Fraser [1967] N.Z.L.R. 856 at p. 859 Henry J. said: "Cases vary infinitely in their facts. Prima facie, if the ground of divorce is proved, the decree ought to follow unless there are good reasons why relief should be refused: Lodder v. Lodder [1923] N.Z.L.R. 19." If the Legislature intended the grounds to be categorized, it would have done so itself. The general policy of the law is, if it is otherwise just to do so, to get rid of "limping" marriages and marriages that have irretrievably failed as this one has: Mason v. Mason [1921] N.Z.L.R. 955. In my respectful view, the Court should look at all the circumstances of each case and then decide whether or not it would be against the justice of the case to grant the divorce. I respectfully turn again to the judgment of Sir Raymond Evershed M.R. (concurred in by Jenkins and Hodson L.JJ.), which is not reported as a case but is cited with approval by Lord Merriman P. in Simpson v. Simpson [1951] p. 320; [1951] 1 All E.R. 955 where the learned Master of the Rolls is cited as saying: "It has so often been said that it is obvious, yet it is worth repeating that all cases that come before this Court must be determined upon their own particular facts, and I should imagine that in no class of case is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case."

I have formed a clear view after considering all matters advanced in this case and it is apparent that the marriage has completely broken down. I am prepared to exercise my discretion in favour of the petitioner and grant a decree in divorce.

The question of maintenance for the child Nolepeto can be settled between counsel for the parties, but in the event of no agreement being reached, then the normal procedures under the Maintenance and Affiliation Act 1967 can be invoked.

I make no order as to costs.