

IN THE SUPREME COURT OF FIJI

In Divorce

Action No. 15 of 1961

Between:

DORIS FROW

Petitioner

v.

RONALD HENRY FROW

Respondent

and a WOMAN NAMED

Divorce—adultery—standard of proof

The petitioner sought a decree of dissolution of marriage on the grounds of adultery by the respondent with the woman named. The respondent did not contest the allegation but the woman named intervened in order to do so. The court found that the respondent had associated with the woman named during the relevant period, that she had a key to his flat, that he had had the opportunity and the wish to commit adultery with her, and that he had written a letter to the petitioner couched in ambiguous terms from which it was only logical to infer that he did not deny that he had committed adultery with the woman named. The woman named denied that adultery as such had ever taken place, although she admitted in evidence that she and the respondent had lain naked on a bed together for about half an hour during which time she had permitted him to make love to her; she conceded that the respondent was then in a state of tumescence but denied even partial penetration. Medical evidence established that she was still virgo intacta.

In his judgment the trial judge observed that from the evidence of the woman named, and the circumstances under which they associated, it would be open to the court to infer that adultery had taken place. Nevertheless the woman named was an impressive witness who appeared to be a witness of truth.

Held.—The petitioner had not discharged the burden of proving the alleged adultery.

Petition dismissed.

R. L. Munro for the Petitioner.

Respondent absent and not represented.

D. M. N. McFarlane for the Woman named.

HAMMETT, Ag. C.J. (24th August, 1961).

This Petition was presented on 1st March, 1961, by the wife on the grounds of the husband's adultery with the woman named between April and September, 1960.

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The husband-respondent has not appeared but the woman named has intervened and opposed the Petition on the grounds—

- (a) that the petitioner is not domiciled in Fiji; and
- (b) that the allegations of adultery are not true.

The petitioner married the respondent in Fiji on 28th June, 1947. There are no issue of the marriage. They first resided in Suva from 1947 to 1950 when they went to Queensland where the husband obtained employment. They resided together in Queensland from 1950 to 1955 when they returned to Fiji. In 1958 they went to England on vacation and returned the same year to Fiji where they lived together until the wife left the husband in August, 1959.

The petitioner gave evidence, which I have no hesitation in accepting, that she left her husband because she could not stand any longer his indifference towards her and neglect, which had persisted for a period of about 12 months, the cumulative effect of which was adversely affecting her health. She then went to live nearby with her sister. When living there she saw that her husband did from time to time entertain the woman named in the matrimonial home prior to April, 1960. It is not, however, suggested that any adultery took place in this period.

In April, 1960, the husband moved from the former matrimonial home in Knollys Street to a flat in Queen Elizabeth Drive. There is evidence that between April and September, 1960, the woman named was a regular visitor to the husband's flat to which she had a key and that they attended social functions and frequently went to public places of entertainment together. There is no evidence that the woman named ever spent a whole night in the flat or actually slept there.

In September, 1960, the wife went to New Zealand to live, feeling that the change of scene and environment would be better for her.

Towards the end of September, 1960, she decided that she would not return to her husband and made up her mind to divorce him. She suspected that he had committed adultery and so she wrote him and asked him straight out if he had in fact done so.

The husband wrote to the petitioner in reply, in terms which whilst not expressly stating he had committed adultery with the woman named, described what their relationship had been. He wrote in terms from which it was only logical to infer that he did not deny that he had committed adultery with her and had wished to marry her but that she had broken off their relationship and they were no longer on friendly terms.

On the strength of the husband's admissions and the evidence of a neighbour which tended to confirm them the wife then presented this Petition for divorce.

I will first deal with the issue of domicile. The husband was born in England in 1903. In 1924 he went to New Zealand where he married in 1927. He lived in New Zealand until he enlisted in the Army there in 1942. In 1943 he came to Fiji with the Army and he returned to New Zealand in 1946 when he was demobilised. In 1946 his first wife divorced him in New Zealand on the ground of desertion. He returned to Fiji to take up civilian employment in 1946 and in 1947 he married the petitioner, who was a resident of Fiji. I am quite satisfied that the husband has expressed his intention on several occasions not to return to reside in either England, his domicile of origin, or

New Zealand, his domicile of choice up to 1946, that he has expressed the intention of residing permanently in Fiji where he is at present and has been for some time in regular and more or less permanent employment in the same organisation. There is, in my opinion, ample evidence which I accept, that the past and present residence, employment, speech and actions of the husband show that he not only has expressed an intention of residing permanently in Fiji but in fact does so intend. This coupled with the evidence of his actual residence here satisfies me that he has now acquired a domicile of choice in Fiji and I do so find.

On the issue of adultery, I am quite satisfied that the husband did, between April and September, 1960, associate with the woman named and that he had not only the opportunity of committing adultery with her but that he did, as he himself has indicated in his letter to his wife, also wish to do so. The evidence of their regular association both in public and private is indicative of terms of friendship and opportunity from which, coupled with the husband's letter to his wife, it would be possible, in the absence of any evidence to the contrary, to infer that adultery had taken place. The husband did not however expressly state in his letter to his wife that he had committed adultery. What he did was to set out certain facts from which he obviously expected and intended his wife to infer that adultery had taken place.

In the absence of any evidence to the contrary however I do not think that any court would have had much hesitation in inferring on this evidence that adultery had in fact taken place.

The woman named has however given evidence expressly and categorically denying that the husband-respondent committed adultery with her. She is a spinster aged 33 and the respondent is a twice married man aged 58. She arrived in Fiji to take up employment early in 1960. She has told how she was grateful for the assistance of the respondent who met her on her arrival in the course of his duties as the Patrol Officer of the local Automobile Association in connection with a motor cycle she brought to Fiji with her. He later taught her to drive a car and to select the second-hand car which she bought. She was obviously not only grateful to him for his assistance but appreciative of his attention and kindness to her when she was a stranger in a new country. These feelings ripened to friendship and affection but she insisted that at no time was she in love with him and that at no time did she want to have sexual relations with him. She has related how his feelings of friendship obviously grew faster and stronger than hers and how she refused his offer of marriage. She had said quite frankly that she now realises she was indiscreet and allowed herself to become compromised by not repudiating with sufficient firmness his attentions to her. She has however firmly denied that at any time she was in love with him or that she ever committed adultery with him.

From her own evidence and that of the circumstances under which they associated, however, it would still be open to the court to infer that adultery had taken place. Nevertheless, I must admit that she was an impressive witness. I find it difficult to believe that if she was not a truthful witness on the issue of adultery she would have admitted some of the facts she did admit from which learned Counsel for the petitioner has asked that the court infer that adultery did in fact take place.

The onus of proof rests on the petitioner to establish the adultery alleged beyond reasonable doubt.

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Not only did the woman named appear to me to be a witness of truth as she made her denials that adultery had in fact taken place, but also she had called medical evidence to prove conclusively that she is in fact still "virgo intacta". Whilst this fact alone is not conclusive it does impose a very heavy burden on the person charging adultery against her, and, in my opinion, the evidence in this case, when considered as a whole, has not discharged that burden.

In these circumstances I am not satisfied that adultery did in fact take place between the respondent and the woman named and I direct that she be dismissed from the suit.

The Petition is dismissed.