

Pohahau and Taelangi v Kinikini

Privy Council
Appeal No 4/1985

21 April 1986

Appeal - assessment of credibility of witnesses by court appealed from not to be disturbed by appellate court.

10 *Appeal - discretion of court appealed from - not to be reversed unless exercised on wrong principles or on basis of irrelevant considerations or omission of relevant considerations.*

Divorce - discretion of court to refuse decree - not to be reversed on appealed unless exercised on wrong principles.

20 The parties were married in 1976, but in 1985 the husband petitioned for divorce on ground of wife's adultery. A decree for divorce was granted by the Supreme Court even although there had been delay on the part of the husband in presenting the petition, and there had also been desertion and adultery by him. The wife appealed to the Privy Council.

HELD:

Affirming the decision of the Supreme Court.

- 30 (1) The assessment by the Supreme Court of the credibility of the witnesses could not be held to be wrong.
- (2) The exercise of discretion by the Supreme Court had not been shown to have been made on wrong principles, or on the basis of irrelevant considerations or omission of relevant considerations.

Privy Council

Judgment

This is an appeal against a decision of Harwood J. in the Supreme Court on a petition by the Respondent for divorce on the ground of the Appellant's adultery with one Likutau Taelangi, during the month of April 1983 at Kahoua.

The parties were married in 1976 in New Zealand and have one child - a six year old girl. The marriage was happy at first but by 1983 had deteriorated to the extent that the husband left home. There had been talk of divorce at that time but the wife would not agree. The wife issued proceedings for maintenance on the grounds of her husband's desertion and he was ordered to pay maintenance on the 7th March 1983. On the 11th March 1985 the husband filed the present petition alleging adultery in April 1983. In the lower Court the wife complained that there had been unreasonable delay in the issue of the proceedings, but Harwood J. accepted that there were good grounds for the delay and that it was excusable. The evidence of adultery was this:-

1. The husband said that in April 1983, which was after the separation, he had seen his wife and the correspondent Likutau "kissing and talking". This had occurred at night, and in what had been the matrimonial home. Some time later he saw the same thing happening and later he approached Likutau about it. At first Likutau denied adultery but then admitted.
2. Kala Kinikini, father of the husband also gave evidence of having observed the wife and Likutau together in the house with Likutau leaving at a late hour. Eleni Kinikini, a 16 year old gave similar evidence and said that on one night she saw the couple kissing.
3. Likutau, who was not represented at the lower Court hearing, gave evidence confirming adultery in the month of April on at least four occasions.

The difficulty the Appellant faces in this appeal is that Harwood J. rejected her denials that adultery had taken place. He found her an untruthful and inventive witness. On the other hand he found the husband and his witnesses truthful, and accepted the evidence of Likutau who had not been the husband's witness. It came down to a question of credibility and it is impossible for us to say that Harwood J. erred in his assessment of the witnesses.

The Appellant's first ground of appeal was that the evidence did not justify a finding of adultery, but for the reasons stated that ground must fail. There was a further complaint concerning the delay in issuing the petition but Harwood J. found the delay excusable and there was no suggestion that the Appellant was prejudiced by it.

What we see as the main ground of this appeal is that Harwood J. erred in exercising his discretion in granting a decree.

S. 4(3) of the Divorce Act (Cap. 18) and the proviso thereto reads:-

"4.(3) If the Court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents the Court shall pronounce a decree for divorce.

Provided that the Court shall not be bound to pronounce a decree for divorce if it finds that the petitioner has during the marriage been guilty of adultery or if in the opinion of the Court he has been guilty -

- (a) of unreasonable delay in presenting or prosecuting the petition, or

- (b) of cruelty towards the other party to the marriage; or
- (c) of having without reasonable excuse deserted or of having without reasonable excuse wilfully separated himself from the other party before the adultery complained of; or
- (d) of such wilful neglect or misconduct as has conduced to the adultery.*

Harwood J. found that the husband himself had committed adultery but not until after the wife's acts of adultery; and there had been the earlier act of desertion by the husband. In those circumstances it was submitted that Harwood J. should have exercised his discretion against the husband and refused a decree.

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In his decision Harwood J. recognised that he had a discretion in the matter, and we could only interfere if it is shown that he exercised it on some wrong principle or because he took into account irrelevant considerations or ignored relevant ones. No such defect appears from a reading of his decision.

The appeal is therefore dismissed with no order for costs.