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Judgment Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 14/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN MICHAEL LUTHER WILMOTT WILLIAMS

AND WINSOME ANGELA WILLIAMS

B.J. Scott, Q.C., for Appellant

September 22, 23; and October 20, 1987.

ROWE: P.

At the conclusion of the hearing of this appeal, we dismissed the appeal and promised to reduce our reasons into writing there being a paucity of reported cases on this aspect of the law in Jamaica.

The appellant, a clerk, then aged twenty-eight years, married Winsome Angela Cole, a student-teacher, aged twenty-four years on December 1, 1985 at the office of a Registrar of Marriages in St. Andrew. The union produced a child "Marvin" born on July 4, 1986. By an ex-parte Summons dated September, 15, 1986 the appellant sought the leave of the Court that he be at liberty to file a petition in the Supreme Court for the dissolution of the marriage, notwithstanding that three years had not elapsed since the date of the celebration of the marriage. He grounded this application with an affidavit which stated in the material parts:

"4. That on the night of Saturday, 2nd day of August, 1986, I refused to take my wife Winsome Angela Williams to a party because I was not satisfied that proper arrangements had been made or could have been made for the care and protection of our infant son, Marvin.

5. That my wife, Winsome Angela Williams and I argued about this on Saturday night, Sunday and on Monday.

6. That on Tuesday morning while I was sleeping in the marital bed, I felt a burning pain in my back. I believed that I had been stabbed. I jumped out of bed and discovered my wife Winsome Angela Williams with a hot electric iron and realized that she had used the hot electric iron to burn me. Exhibited hereto and marked 'B' for identification is an envelope containing three photographs of the wound that I suffered which I had taken on the same day after I had made a report to the Police and obtained medical attention.

8. That my wife, Winsome Angela Williams then left the house and our infant child Marvin."

The medical report dated the 5th August, 1986 from Dr. C.C. Jones stated that the appellant was suffering from a 2nd degree burn to the centre of his back and that there was a great probability of the area showing a permanent scar.

When the Summons came before the Master on February 17, 1987 she refused leave to the appellant to file his Petition for Divorce as requested but granted leave to appeal. As the matter was heard in Chambers there was no written judgment. We understand, however, from Counsel who appeared before the Master, that in dismissing the application the Master said that exceptional depravity must of necessity have a sexual connotation and there was no such evidence in this case.

Section 20 (5) (a) of the Divorce Act provides in part:

> "No petition for divorce shall be presented to the Court unless at the date of the presentation of the petition three years have passed since the date of the marriage. Provided that a Judge of the Court may, upon application being made to him in accordance with rules of court, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent."

This section was introduced into Jamaica as an amendment to the Divorce Act in the wake of the passing of the Matrimonial Causes Act 1937 in the United Kingdom Parliament and is now the equivalent of section 3 (2) of the Matrimonial Causes Act 1973 (U.K.). It follows that the Judicial decisions on the equivalent sections of the U.K. Act are highly persuasive authorities in determining the meaning and scope of the Jamaican statutory provision.

Fisher & Fisher (1948) P. 263 decided, quite early after the 1937 legislation, that it ought to be very clearly established that the facts do have a very serious effect on the health of the petitioner before one can say that the case is one to which leave ought to be granted for a petition to be filed within three years of the marriage. This case further decided that the court would not interfere with the exercise of discretion of the first instance judge unless it was clear that he had mis-applied the law, or misunderstood the evidence, or given excessive or insufficient weight thereto.

In the following year Bowman v. Bowman (1949) 2 All E.R. 127, was decided. Denning L.J. said that the only cases in which the question of exceptional hardship or exceptional depravity can arise are those of adultery and cruelty, and he continued:

> "Cruelty again, by itself, is I fear, not exceptional, but, if it is coupled with aggravating circumstances, as, for instance, drunkenness and neglect, or if it is exceptionally brutal or dangerous to health, then, even if it does not evidence exceptional depravity on the part of the respondent, it does, at least, cause exceptional hardship to the applicant. If it is coupled with perverted lust, it shows exceptional depravity on the part of the proposed respondent."

In Brewer v. Brewer (1964) 1 All E.R. 539 the Court made it clear that in the absence of affidavits to the contrary, the court must necessarily proceed on the basis that the affidavit evidence is substantially true. Willmer L.J. said at page 541C of the report:

> "I prefer the view presented to us by counsel on behalf of the husband, that, before one comes to the exercise of any discretion under the section, one must first determine as a provisional finding of fact that the case is one of exceptional depravity or exceptional hardship ..... one must look at the effect on the victim and decide whether it is such as to inflict exceptional hardship upon the victim."

Two later cases must be mentioned. In C v. C (1980) L.R. Fam Div; (1979) 1 All E.R. 556, the court doubted whether there was any substance left in the ground of exceptional depravity and questioned whether there could be a case of exceptional depravity which would not at the same time cause exceptional hardship. At one time during the hearing of this appeal, Mr. Scott was saying that his case could rest on the exceptional depravity of the wife in scheming to burn her

sleeping husband, but as the argument developed, he founded himself for all relevant purposes on the ground of exceptional hardship. Fay v. Fay (1982) 2 All E.R. 922 went all the way to the House of Lords. Lord Scarman, with whose judgment the other Law Lords concurred, referred to the difficulty which the U.K. equivalent provision to section 20 (5) (a) of the Divorce Act of Jamaica had presented in its application to individual cases.

The decision in Fay v. Fay is admirably summarized in the headnote:

> "It is to be presumed that in choosing the imprecise concepts of 'exceptional hardship' or 'exceptional depravity' as the criteria which a petitioner has to meet in order to obtain leave under s. 3 (2) (a) of the Matrimonial Causes Act 1973 to petitions for divorce within three years of the date of marriage, Parliament deliberately intended that the decision on what is or is not exceptional hardship or depravity in a particular case should be a matter for the judge at first instance to decide by making his own subjective value judgment as to whether the hardship or depravity was out of the ordinary, when judged by prevailing standards of acceptable behaviour between spouses and after taking account of all relevant circumstances. It would be wrong therefore for an appellate court to attempt to define the concepts of 'exceptional hardship' or 'exceptional depravity' with any provision or to lay down guidelines as to how those concepts are to be applied. Furthermore, the decision of the judge at first instance should be treated as final unless it can be shown to have been clearly wrong. 'Exceptional hardship is not limited to past hardship but includes present and future hardship and therefore the court may properly take into account the hardship suffered by a young wife in having to wait for the elapse of three years from the date of marriage before petitioning for divorce.

> "Where 'exceptional hardship' is pleaded the facts and matters relied on to show that the applicant has suffered or is suffering exceptional hardship as a result of the respondent's conduct must be included in the evidence and it is not sufficient merely to comply with the evidential requirements set out in r (2) (a) of the Matrimonial Causes Rules 1977. Thus there must be evidence of the extent of the applicant's suffering, e.g. evidence of ill-health or of nervous sensitivity or tension resulting in severe emotional or mental stress or breakdown. In particular, there should be evidence of the circumstances relied on as constituting the exceptional character of the hardship suffered.

These cases disclose that an appellate court will be extremely reluctant to interfere with a provisional finding of fact of the trial judge as to whether exceptional hardship exists.

An example taken from Brewer v. Brewer (1964) 1 All E.R. 539 was confidently relied upon by Mr. Scott to induce the Court to hold that the learned Master was clearly wrong in refusing the application for leave. Willmer L.J., said at page 542:

> "Counsel for the wife asked the rhetorical question: If this is not a case of exceptional hardship inflicted on the wife, what is? I hazarded a reply, which I think is a sensible reply, that a case might be one of exceptional hardship if the conduct complained of in fact inflicted grievous bodily injury on the wife, an instance which springs to mind is one in which a husband, in a fit of temper, flings his wife downstairs, with the result that bones are broken. There it could fairly be said that such a wife has suffered exceptional hardship, that is to say, something, beyond that which is ordinarily suffered by the victim of cruel behaviour on the part of the other spouse."

The example given by Willmer L.J., is illustrative of the fact that one act of violence can be sufficiently excessive as to amount to exceptional hardship. One sees a picture of the assaulted wife in a hospital bed in traction and plaster-of-paris or the like, followed by a long period of pain and suffering.

Lord Scarman said in Fay v. Fay supra, that what is exceptional must be judged by prevailing standards of acceptable behaviour between spouses, but he refused the invitation of counsel to give any further guidance as to the meaning of 'exceptional,' except to say (1) that the facts and matters relied on as showing that the applicant has suffered, or is suffering exceptional hardship as a result of the respondent's conduct must be included in the evidence and (ii) that the suffering of exceptional hardship is an essential feature to the exercise of the law's power to allow the petition in the otherwise prohibited period.

The appellant failed to satisfy the learned Master that he had suffered exceptional hardship or that his wife was exceptionally depraved. Apart from the cold-blooded and pre-meditated nature of the attack, there was nothing upon which the court could find either exceptional hardship or exceptional depravity. There was no evidence of trauma apart from the burns, no hospitalization, no residuary disability, no evidence of the effect upon the mental health of the applicant. There was no evidence of the past relationship between the parties or of the behaviour of the respondent since the birth of the child only one month previously. In those circumstances we were quite unable to say that the learned Master was plainly wrong in finding that the evidence was insufficient upon which to make the provisional finding of exceptional hardship suffered by the appellant or exceptional depravity on the part of the wife respondent.

Accordingly we dismissed the appeal.