

BETWEEN : LESLIE POWELL BERKEFELD
Plaintiff
AND
GLEND A BERKEFELD
Defendant

J U D G M E N T

In this case the Petitioner Leslie Powell Berkefeld seeks a Dissolution of his marriage with Glenda Berkefeld formerly Glenda McDonough upon the grounds of her adultery with the co-defendant named in the petition. No appearance has been entered either on behalf of the respondent or the co-respondent, and the petition, at the hearing, is unopposed.

The co-defendant appears to be quite wrongly joined in the petition, as there is no claim against him either for damages or costs (see Section 29) and it would seem, therefore, that the proper course was not to join him at all but to serve him with a notice as prescribed by Section 33.

In any event it turns out that, as Mr. Kirke of Counsel for the petitioner properly conceded, there is no evidence whatsoever against the alleged adulterer.

In these circumstances, I direct that he be dismissed from the proceedings and that his name be deleted from the Writ and Petition wherever it appears and that where appropriate the allegation "with a person unnamed" be substituted therein.

In view of the evidence of service, I direct that no further service upon the person charged with adultery be required and that the previous service be treated as a full compliance with the provisions of Section 33.

The evidence adduced by the petitioner is scanty and consists purely of his own testimony of a conversation with his wife when she confessed to her misconduct, and the production of written confessions by his wife of her adultery with the man whose name appeared originally in the pleadings.

The evidence, therefore, requires the most anxious scrutiny, both in regard to the quantum of proof and as to the question of collusion between the parties to the marriage.

It appears that the petitioner entered into the holy bonds of matrimony on 17th December 1930, he being a young man of twentyone and she a girl of twenty. Apparently the marriage proceeded on normal lines and with the blessing of children until 1940 when the husband joined the Army. Somewhere about this time, unpleasant rumours came to his ears. In the next year his wife moved from Wyatt Street, Portland, where they had lived together, back to her home town of Mount Gambier. She was joined by her husband there when on leave, but in 1943 in consequence of communications from the Police, he was compelled to take leave because his children were not being properly cared for by his wife, and in consequence of her failure to care for them adequately he was forced to negotiate an agreement with her as to their custody on the 12th day of April 1943. It seems apparent, as might have been expected, that this neglect had a deep effect upon the petitioner in regard to his feelings for his wife. There were four children of the marriage the subject of that agreement, namely, Maxwell Leslie, Patricia Winifred, Kevin and Robert John.

Towards the end of 1945 the petitioner heard from relatives that his wife was being unfaithful, and when he was on leave in 1947 prior to his discharge from the Army, he consulted his solicitor, a Mr. Pyne, with a view to taking the necessary steps to obtain a dissolution of his marriage, and somewhere about the same time, met his wife in the street in Mount Gambier and said to her - "You have been misconducting yourself with Jack White." She replied - "Of course I have. That should not worry you. There are no doubt plenty of native women in the Islands." The petitioner then asked her to go to see his lawyer, but she failed to appear at the appointed time.

Subsequently however, on 16th March 1949, she did attend at Mr. Pyne's office and made a confession in the following terms:

"I, Glenda Berkefeld of Mount Gambier in the State of South Australia, married woman, hereby make the following entirely voluntary confession:-

I am the wife of Lesley P. Berkefeld, formerly of Mount Gambier aforesaid but now of Rabaul, New Guinea. We were married at the Lutheran Church at Mount Gambier aforesaid about 19 years ago and thereafter lived in Mount Gambier until the outbreak of war when my husband enlisted in the Army and went away.

There are four children of the marriage namely:

Maxwell Lesley, born 12/1/1931
Patricia Winifred, born 27/8/1933
Kevin, born 5/7/1937 and
John Robert, born 27/2/1940.

All the above children are living. The eldest is with his father in Rabaul, the others are with my mother, an old-age pensioner, at Mount Gambier. They have been with her for some years now, practically since my husband went into the Army. I could not look after them and he wanted mother to have them.

I was born and have lived all my life in Mount Gambier. I was born on 16th March 1912. My domicile has always been in South Australia and I have no intention to change it.

After my husband went into the Army I had nothing much to do and got lonely. He came home on leave now and again but the time in between was very long. I got very sick of it; it was no good to me living like that.

In 1945 I became friendly with a Mount Gambier man, a married man, named Jack White, and in that year had sexual intercourse with him on frequent occasions. I became fond of him but he let me down in the end. When my husband was home on leave in 1945 he apparently was suspicious of me or had been told something because he accused me of adultery. I denied it then, but it was true enough. I was still fond of him at that time but gradually became very friendly and too fond of Jack White. I came to the conclusion that I would have a better chance in life if I got divorced; I was not getting any younger and life as I was then living, was getting me down.

In May 1945 I wrote to my husband at Rabaul telling him that I had committed adultery with White and that I wanted a divorce. He did not answer the letter or write to me until 28th February 1949. In his letter he said that he had just found my letter amongst some old papers that he was clearing up; he could not have been very interested in me or what I was doing when he left my letter unopened so long, but I think he had got tired of me. I loved him alright, but I felt that he was either tired or ashamed of me and blamed me for our unhappiness. If the war had not come about we might have made the grade. I deliver up his letter herewith and have acknowledged and signed it as requested by Mr. Pyne.

At my husband's request, contained in his letter, I visited his solicitor, Mr. W.E. Pyne of Mount Gambier, who asked me was I prepared to make a free statement or confession and I agreed to do so. I do not remember the dates too well but on two occasions after 1945 I became pregnant to Jack White, on each occasion having a miscarriage. Sexual intercourse between us took place frequently at my house in Vesper Street, Mount Gambier, where he visited me at night-time, and also elsewhere. On the occasion of each miscarriage I went into the Mount Gambier Public Hospital for treatment.

The first pregnancy and miscarriage occurred early in 1946 and on that occasion I was attended by Dr. F.H. Stegmann of Mount Gambier. I got the hospital account about February 1946 and paid 10/- off it, I think, and no more if I remember rightly.

After this miscarriage I renewed sexual intercourse with Jack White and as a result became pregnant to him a second time. I do not remember the date; it is long ago now. On this occasion Dr. Charles T. Turner, then practising at Mount Gambier and in charge of the Mount Gambier Public Hospital, attended me at the hospital. Each miscarriage was at about 'three months' pregnancy. I don't remember paying any hospital bill and I have not paid Dr. Stegmann or Dr. Turner. I was not long in the hospital on either occasion. I continued to have sexual intercourse with Jack White right through from 1945 up to 1948, but when I told him of my husband's letter and that Mr. Pyne would like to see him, and that I had told Mr. Pyne everything, he turned me down and I turned him down too.

I am now interested in another man who wants to marry me and I want to marry him. It is useless for my husband and me to go on like this as we can not ever come together again. I might have a chance with the man who wants to marry me.

DATED 16th March 1949.

(Sgd) GLENDA BERKEFELD.

Witness (Sgd) W.E. PYNE. "

She also produced to Mr. Pyne a letter written by her husband to her from Rabaul dated 25th February 1949 in which he renewed his suggestion to her that she go to his solicitor to make a full confession. This letter is as follows:

Rabaul
25/2/49.

Mrs. G. Berkefeld.

Last week during a clean up of old papers I located an unopened letter from you. On opening it I find that it is dated 6 May presumably 1948.

In this letter you make an admission of adultery with one Jack White and ask for a divorce.

If you remember some time ago about 1945 I accused you of this and you denied it, also I said I was thinking of taking action.

What you have overlooked is this. The mere writing this to me is evidence but not sufficient to allow a court ruling for divorce.

I still desire to divorce you and on the face of this I intend taking it further.

I suggest that you visit Mr. W.E. Pyne at my expense and make a sworn declaration regarding this matter. It will also be necessary to have White make a statement admitting same. I am awaiting a reply as to your actions regarding this.

I remain

(Sgd) LES P. BERKEFELD
Mechanical Engineer
Dept. Public Works
Rabaul
T.N.G."

It is a matter for reflection that neither the wife nor the husband in their correspondence ever referred to the verbal admission by the wife in 1947 mentioned in the evidence in this Court.

That letter referred to another one from her which he had received years previously dated 6th May in the following terms:

"
Dear Les,
6th May

I would like a divorce from you on account of adultery with Jack White as it is no use to me like this. I am sick of it. I am not getting any further ahead and am getting no younger so see what you can do very soon.

Thanking you.

(Sgd) GLENDA BERKEFELD
Vesper Street

I Glenda Berkefeld of Mount Gambier acknowledge the above letter to be in my handwriting and the signature 'Glenda Berkefeld' thereto to be my signature.

Dated this 16th March 1949.

Witness

(Sgd) W.E. PYNE X Glenda Berkefeld
Solicitor
Mount Gambier "

The petitioner's Mr. Pyne took care when she came in to get her to identify the signature of that letter as being her own.

When the petition was served upon her, to make doubly certain that there would be no possible doubt so far as she could dispel it of her adultery, she endorsed on the Writ of Summons which was to be attached to the Affidavit of Service an acknowledgment (inter alia) of Paragraphs 3 and 4 which were the paragraphs alleging the adultery.

The first matter for consideration is consideration of the standard of proof, and in regard to this, I am bound to follow the authority quoted to me by a learned Counsel for the petitioner, namely, Briginshaw and Briginshaw & Anor. 1938, 60 C.L.R. 336, which was applied in Wright and Wright 1947, 77 C.L.R. 191, and those authorities established that the standard of proof required in a criminal offence is not applicable to the proof of adultery in a Matrimonial Cause, but nevertheless of course proof of such a matrimonial offence entails strict proof, and the Court should be satisfied from the evidence and the surrounding circumstances disclosed by the evidence that, in fact, the adultery alleged took place.

This brings me to the question of whether, where the confession of adultery is uncorroborated, it should be accepted, the real question then being whether I can safely act upon the wife's confession or whether I should adjourn the case for evidence in corroboration. (Wilkins v. Wilkins 43 W.N. (N.S.W.) 167. Osborne v. Osborne 29 W.N. 74).

It is plain that where a husband is resident out of Australia, obtaining such evidence is both extremely difficult and usually expensive. However, the rule of requiring corroboration is merely one of prudence and the Court, if satisfied that the confession is bona fide, may safely act upon it. In the present case it would appear that for all practical purposes, except the liability of the husband to support the wife, the marriage had become defunct in 1943 and in consequence it is clear that both parties are anxious to be freed from a bond which has no happiness in it for them.

I see no reason to conclude that the confession made by the wife verbally to the husband, and later in the writings produced to this Court, are other than bona fide, though I should be sorry if my view should encourage persons seeking matrimonial relief in this Court to the belief that a written confession uncorroborated is ordinarily sufficient.

Finally the question arises as to whether or not there has been collusion between the parties to the marriage in order to obtain the relief that the husband now seeks and which clearly the wife desires.

At one time collusion was construed in a very broad sense and it sufficed to show that the parties were acting together and assisting each other to work and present a true case for the Court. (French v. French & Kelleher, 1910 St.R. Qd. 190) but the more modern construction, and I think a proper one to apply now, is that collusion is established if there be an agreement or understanding or concerted action between the parties which has the effect of deceiving the Court either by causing untrue facts to be placed before the Court or by suppressing facts which are material or pertinent, and also if there be an agreement or understanding or concerted action between the parties which, from the nature of such an agreement or understanding or action, may be calculated to have that effect. (Doutrebande v. Doutrebande 29 N.S.W. St.R. 456, followed in Cohen v. Cohen 43 N.S.W. St.R) which was cited to me by learned Counsel for the petitioner.

I have examined with anxious care the letters written by the parties and have come to the conclusion that they do not constitute evidence of collusion, and the petitioner has, of course, specifically sworn that no collusion in fact exists between him and his wife.

I find the domicile proved.

I find the marriage proved.

I find the adultery of the wife alleged proved.

I find that there was no collusion, connivance or condonation.

I therefore make an Order Nisi returnable within six months.

As regards the prayer for custody of the children, I make no order.

29/5/53.