

290

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

CORAM: OLLERENSHAW A.C.J.
24th July, 1963.

BETWEEN

PHYLLIS DOREEN HILLIARD

Appellant

AND

THOMAS MICHAEL HILLIARD

Respondent

Appeal from District Court, Lae.
Heard at Port Moresby the
24th, 25th and 26th June, 1963.

J U D G M E N T.

This is an appeal from the adjudication of a magistrate, sitting in the District Court at Lae, dismissing two complaints, brought by the appellant against the respondent in respect of the maintenance of herself and their two children and the custody of the children.

The parties were married on the 13th March, 1954, when the wife was nineteen years of age and the husband was ten years older. The first child, a boy, Garry Michael, is nine years of age and the second, a girl, Catherine Michel, is three years old.

During the course of the first eight years of their marriage the wife left the husband and their home on four occasions because of his behaviour towards her. The first departure was in May, 1954, when she seems to have remained away for about two months, and the third was at the end of 1958, when she remained away for three months. After each of the first three separations the wife returned to the husband at his request and upon his repeated promises to reform.

After her last departure from the home in February, 1962, the husband again requested her, on more than one occasion, to return and offered similar promises, although at first he ordered her to keep away, as he had done at first after one of her earlier departures. During the period between the wife's last departure and the commencement of these proceedings the husband also called upon the assistance of a practising accountant, whose client he was. The accountant interviewed the wife but she remained adamant in her refusal to trust the husband's promises again.

When she left the home the wife took with her the daughter. At this time the son was living with his maternal grandparents at Lae so that he could attend the school there. The home of the parties was in the Markham Valley, some twenty miles from Lae. The wife took up residence in a flat in Lae and was in control of the son. However, the husband took an occasion of the wife's absence to recover the boy and subsequently sent him to a boarding school in Australia.

He did not support the wife or their daughter after their departure from the home and there is no dispute that she did not have adequate means for their support at the material time.

The summonses first came on for hearing at Lae on the 6th July, 1962, when the learned magistrate was informed by counsel for the wife that the husband had agreed to orders being made in favour of the wife providing for the payment of maintenance by the husband for the wife and daughter for the period since the wife had left the home and for the future, at rates which had been agreed upon, and providing also for the wife to have the custody of the daughter. The magistrate asked the husband whether

he was agreeable to such orders and the husband replied that he was. However, the husband being unrepresented, the magistrate did not think that he should make the orders until he, the respondent, had taken legal advice and the magistrate adjourned the hearing of the summonses.

They came on again to be heard on the 2nd March, 1963, when both parties were represented by counsel and the husband contested the wife's claims to the orders which she sought.

On the 5th April, 1963, after a hearing which lasted some few days, the magistrate dismissed the complaints. Hence this appeal, which is brought pursuant to section 16 of the Deserted Wives and Children Ordinance, 1951, and section 227 of the District Courts Ordinance, 1924, as amended. These sections place no express restrictions upon the right of a person aggrieved by an adjudication, including an adjudication dismissing a complaint, to appeal to this Court and under section 234C of the District Courts Ordinance this Court may (inter alia) affirm or quash the magistrate's order and make any order or adjudication which ought to have been made in the first instance.

It was the magistrate's task, pursuant to section 6(1)(a) of the Deserted Wives and Children Ordinance, to enquire whether the wife was left without means of support, that is by section 4 "lawful and sufficient means of support other than her own earnings." It was conceded that the wife was in fact without means of support and the husband relied upon subsection (4) of section 6, claiming that he had reasonable cause for the leaving without support in that his wife left the home and refused to return. The wife asserted that she, on her part, had reasonable cause, in her husband's conduct towards her, justifying her withdrawal from her husband's residence and remaining away

from him. And so the issue was defined. Did she have such cause?

It has been said, in effect, that a wife in these circumstances is in the same position as a wife showing cause for refusing to live with her husband when resisting his petition for dissolution on the ground of desertion or for the restitution of conjugal rights : Ex Parte Scarlett (1921) 21 S.R. (N.S.W.) 148.

The cause need not amount to a matrimonial offence but, it has also been said, that it must, nevertheless, be grave and weighty.

The effect of the cases is summed-up neatly in MacKenzie's Practice in Divorce, 6th Ed. at page 24, where it is stated that in order to establish the defence it is necessary for the wife to shew:

(a) That the husband's conduct has been such, that having regard to the position in life of the parties and the general circumstances surrounding their married life, the wife has found it practically impossible to continue in a state of cohabitation with the husband, and

(b) That the wife has good reason to believe that such conduct is likely to be repeated if cohabitation is resumed.

The wife gave evidence before the magistrate and so, too, did her mother. The husband did not give or call any evidence. There is, therefore, no question of conflicting testimony nor does there appear to me to be anything of any substance in this appeal turning upon the credibility of the witnesses.

From her answers under cross-examination the wife appears to have been quite frank and so, too, does the mother in her short evidence, which related only to a few

incidents of which she was a witness. The wife appears to be inclined to use figures of speech, as when she compared the home on Friday nights to Central Railway Station, but these were not likely to be misleading or deceptive. Apart from shewing that the wife was, at some stages, at least, inclined to take her own part in the rows or arguments, which were started by the husband's conduct, and that he had been generous in such matters as housekeeping and presents, the cross-examination did not attempt to break down the wife's evidence as to the misconduct of her husband of which she complained. It concentrated, rather, on the immediate incident that led to the final parting. It attempted to divorce this from their earlier married life and to show that it was something unimportant and that she left merely from pique engendered in the incident. The magistrate appears to have accepted the wife's evidence with one exception and that was her evidence as to her husband's excessive drinking. This evidence was not attacked in cross-examination, yet the magistrate considered that it was exaggerated because, during the relevant period, the husband had improved his golf and made a considerable success of planting and farming in the Markham Valley, reasons which had nothing to do with the wife's demeanour.

I accept, for the purposes of this appeal, the principles indicated in : Barker v. Barker (1949) P. 219 at pages 221 to 223, and see also Rogers v. Rogers 3 F.L.R. 398 at p. 399. I consider, upon the evidence, that the magistrate did misdirect himself upon a number of matters. The most important of these is, I think, in his finding that at the time when the last incident arose the husband's prior conduct had been condoned by the wife and had become an accepted feature of their married life. He then considered this incident in isolation and held that it did not justify her withdrawal.

In my judgment the weight of the evidence is all the other way; particularly the evidence of the wife's departures from the home, the husband's promises, the evidence of how his conduct, going from worse to worse, continued to upset her. The second child was conceived when they were on their holiday to Japan and the wife says, in effect, that his conduct continued to deteriorate after this child's birth in spite of her hopes that if they had another child this would bring about a fresh start. During the last twelve months of their life together his conduct became much worse causing her to leave the home, sometimes as late as eleven o'clock at night, and drive to her parent's home in Lae, some twenty miles away, for the night. Towards the end this was as frequent as once a week. One night she slept in the car.

I do not think that the last incident should be looked at as separate from the married life that preceded it, particularly having regard to the twelve months or so that led up to it and gave this incident an importance, which the magistrate did not attach to it. The learned magistrate says in his statement of reasons that there was nothing in the evidence to show that if the incident of the evening of the wife's departure in February, 1962, had not occurred the marriage would not have continued as ever. Cohabitation had not been continuous and as I read and consider the evidence I think that a final parting was bound to come, sooner or later, unless of course the husband took the unlikely step of amending his conduct. I disagree with any suggestion that she had or should have become accustomed to his vagaries. I think that as time goes on the burden becomes more difficult to bear and in this case it was, in itself, becoming heavier because his conduct was deteriorating. It is true that she stood her ground, on

occasions, but she is a wife of this mid-century and not a creation of a novelist of the last, and she is the woman he married as he is the man she married. The importance of the last incident is that it was the occasion of such a parting even if it was not in itself more important than the magistrate thought.

However, that is not the end of the case and I must consider whether the wife had reasonable justification for her leaving and refusing to return.

The conduct she complained of and gave evidence about may be labelled thus: (1) His assaults upon her. (2) His habitual excessive drinking and all its consequences upon their married life. (3) His (a) foul, (b) abusive, and (c) expulsive (as it has been called) language towards her. (4) His insistence upon having his own way, ordering family life to suit himself and his pleasures and requiring her submission. (5) His nightmares.

1. Assaults. The first of which complaint is made occurred towards the end of 1958 and led to the third separation. An argument started at her parent's meal table because the husband was complaining violently about the way some man had treated him and the wife took the view that he should tell the man and not bring it home to them at the table. The husband struck her on the face with open hand, splitting her lip and knocking her to the floor. He appears to have used some of his customary and abusive language towards her. When her mother intercepted to prevent him continuing the assault upon the wife on the floor he attacked the mother, calling her a certain kind of bitch. When her father went to the aid of her mother the husband fought him, expressing himself as glad to have the opportunity of having the "old bastard on."

The second assault did the appellant no physical hurt. It occurred, as the magistrate found, after April, 1960. The husband was drunk. Rain had prevented the usual activities of the property and this seems to have led to more than usual excessive drinking. He picked her up and threatened to throw her over the verandah and then tied her up in a blanket. She, I think wisely, had tried to prevent him paying his line of about a hundred native labourers in the drunken condition in which he was. She was prepared and able to pay the wages since, as part of her work in assisting the husband, she was at this time in charge of the trade store on the plantation. When she failed to prevail upon him she, as she frankly admits, did lose her temper and threw the money bag over the verandah. The husband threatened to make her pick up the money in front of the labourers and invited them to watch her do so, but desisted at her refusal and entreaty and then this assault took place. He paid the labourers with a glass of liquor still in his hand and there followed a night, which she described as terrifying. I have no doubt that it was. I will not describe all that happened. Peace seems to have come to the wife and family after she had, at his command, cleaned up his excreta where he had defecated on the back stairs. It appears that she did this in fear.

The third assault took place in October, 1961. They were driving home after their usual week-end in Lee. Although he had been drinking, he was able, apparently, to drive on this Sunday night. She did not want to have to listen to the second grievance which he aired on the journey, something concerning his brother, and so he gave her, what has been called, a backhander that split her lip.

These are the only specific instances of assault. The wife did say in evidence that there was a lot of violence about the time of the third assault. She was

not asked for details in chief or in cross-examination.

It is true that physical assault was not, as the other things were, a regular habit and Mr. Cory, for the wife, has indicated that her case is not that she fears for her safety. However, I do agree that these instances cannot be entirely overlooked in the circumstances, particularly as the last occurred not so many months before the final parting.

2. Excessive Drinking. This, the wife said, was one of the main problems. Its main or direct effects upon family life were felt at night and at the week-ends, which began in this family on Friday night. It was a habit and grew worse over the years as time and money afforded greater opportunities and it enlarged the husband's other failings. It appears to me from the uncontradicted evidence that the husband is a man over-much addicted to drink and that this, operating upon a temperament inclined to violent habits and speech, was a real problem in their married life. It was one of the subjects of his promises of reform.

3. Language. The husband was addicted to words beginning with "f" and "b" and applied them to his wife. He persisted, although he knew that she found them particularly offensive. She was also a "slut" and a "bitch" and these words were generally employed on the occasions when he ordered her to leave the home. It was at such times, apparently, that he told her to earn her living upon her back, starting under the tank with the cook-boy. This advice was repeated, at one stage, after her final departure.

4. His own way and her submission. There is evidence that, at first, he treated her as a child, controlling her even in the domestic matters that were her concern. It may have been due to her age as well as his temperament.

In any event his attitude and treatment persisted in other ways although it would appear that she was well able, not only to manage the home, but also to assist in plantation business, towards the not insubstantial financial position that has been achieved.

It appears from the evidence that he continued to be domineering and generally planned and required her submission to his way of life, ignoring her position and wishes. I think that it is fair to say that his attitude was, on the whole, take it my way or leave, as he not infrequently ordered her to do. An example of this was the way he spent the week-ends, pursuing his own interests, the golf, the club, the drinking and the poker, sometimes until after dawn on Sunday mornings, keeping his own hours in the daytime as well as at night, although they were guests in her parents' home, a home which was made available to them week-in and week-out for their regular visits to Lae.

It led to troubles. The wife was not without some spirit as is shown by her assistance in building up his fortune and her standing-up for her position on occasions. In cross-examination she frankly admitted that she came to lose her temper with him. There was the incident about the payment of the labourers and sometimes, when he had not stayed too late at the club and they were returning to the farm on Sunday night and she was driving because he was not fit to drive, he would criticise her driving, ordering her to "stop the car," to "start the car" and she would lose her temper and invite him to drive. There is no suggestion that she was, by nature, a bad-tempered woman.

5. Nightmares. As the wife knew when she married him, the husband was a victim of nightmares. They were treated as a joke, apparently by him, until she came to experience

them in their more violent forms. Her real complaint here is that while worry and upset would bring them on so, too, did liquor, "anything that depressed him." Drinking increased their frequency, until the average was one a week during the last twelve months, and, probably, it increased their intensity. They usually took the form of his waking up in bed screaming and then resisting something that, in his delusion, was attacking or eating him or his wife or a child. He would drag or tip them out of bed, apparently to protect them, jump over the bed or rush about the house kicking things. The magistrate found that the wife's complaint was legitimate in that some were induced by drink. No medical evidence was called on either side and upon the uncontradicted evidence I think that the only possible finding is that excessive drinking regularly brought on a goodly number of them.

These are the headings of the main matters of which the wife complains. I have referred to them briefly and I will not spend time tracing them into and through the pattern of the life they led.

There is no complaint about the wife's behaviour other than as shown by her admissions in cross-examination as to her taking her part and losing her temper.

I should say that this is not a case of a wife too prone to return to her mother and there is no suggestion to that effect. Her first return took place after more than a year of married life. Her parents were not the interfering kind. It would appear from the evidence and reading here, perhaps, a little between the lines, that they did their best at all times to preserve their daughter's married life. Their home was regularly available for the family although, sometimes, this must have caused them more than inconvenience.

There was one night when the wife's mother woke up to discover that the naked body in bed beside her was that of her son-in-law and not her husband who was, as he usually was at such a time, sleeping in the other single bed in their bedroom. They had the boy, Garry, living with them to be near the school at Lae.

Mr. Jones makes this criticism of the wife's case and the way it has been presented. He says that a number of different matters, none of which, by itself, would justify a withdrawal are totalled together to make a cause. I cannot see anything wrong in this approach, even assuming that what he says of the husband's defaults, taken individually, were correct. Indeed, I think that it would be unreal not to approach the question in this way.

I consider that married life, as the wife was required to live it, would become intolerable to any self-respecting woman and I have no doubt that it became intolerable to the appellant. She did put up with it for as long as she could. There would be many reasons for this, including the prestige and security of a married woman in her husband's home and consideration for the children.

It is fair to say that the husband was generous with money and presents of jewellery and the like and she was able to dress well. He gave her a Mercedes motor car. While I would not care to doubt his generosity it does appear to me that it is not unlikely that prestige was a factor. The evidence that the purchase of the car involved some relief from another financial burden is not contradicted.

I come to the final parting. It is necessary to say that some twelve months or more before this evening the husband had installed, for recreation at the home, a ten-pin bowling alley, where bowls were played at his

instigation every friday night. There were a lot of guests at these games, sometimes sixteen and some of them sometimes stayed at the home for thenight. There was drinking and bowls and it sometimes went on until four o'clock in the morning. Their frequency and other features appear to have become wearisome, at least, to the wife. There were arguments between them and at times he confined her to her bedroom.

The final incident went like this: The husband had invited some foreign visitors to Lae to play bowls but there was some doubt about their ability to keep the engagement. The wife, for a relief for once from bowls on friday night, had asked the husband to take her to dinner at another home in the district, if the visitors could not come to their home for bowls. He, at first, agreed. The visitors could not come but when the woman next door wanted to have bowls the husband decided that bowls it would be. The wife refused to have bowls and begged him to keep to the arrangement to go out. He said that he would give her five hours to get off the property and that he would do exactly as he wanted to. She ignored this and went inside and read a magazine. He returned to the house at half past five and goaded her, asking hadn't she any pride and saying that if he told one of his native labourers to go he would go. She asked him would she pack his bag for the usual week-end at Lae and he said no. She packed his suitcase and a violent scene ensued. He said he would do exactly as he wanted and forbade her to interfere with any plans of his, she should get out and never come back, it was finished. She said, at some stage, that if he did go, as he indicated he would, to the neighbours to confirm the bowls she would go to them and tell them once and for all that she ran her own home. It would appear that when he persisted she said, in effect, that if he did go to confirm the bowls she would leave, as he had ordered her to; which

she did after he had left the house with the apparent intention of going to confirm the bowls. She returned some days later and collected the rest of her belongings.

The husband, in fact, did not go on with his intention to have bowls and did go to the place where they had agreed to go to dinner, but the wife did not know about this until a later day and it does not appear whether, when he did this, the husband knew or did not know of his wife's departure.

As I have said I do not think that this incident can be isolated from their married life as it was being lived at the time. I think, too, that it serves to illustrate some of the wife's complaints. It does not appear whether or not he was under the influence of excessive drinking on this occasion.

Applying the tests, which I have mentioned, I consider that the wife did have good and reasonable cause to leave the respondent and to remain away from him. If it were necessary I would find, too, that she was constructively deserted within the meaning of section 24 of the Deserted Wives and Children Ordinance.

I think that it is proper that the daughter should remain with the mother and I agree with the learned magistrate that the position of Garry should not be disturbed at this stage. It is often a regrettable result of children being so separated that they do not see as much of each other as they should at a time when a life-long friendship should begin. In this case the requirements of schooling would have parted them for periods, in a few years time. I hope, I earnestly hope that the good sense of the parents will prevail to see that these two children do not become really separated as I hope, too, that the same good sense will prevail to ensure that, as far as

humanly possible, the separation of the parents will have the least possible ill effect upon the children.

It appears that the wife still lives at Lae and to his father's property near Lae, doubtless, Garry will go for some of his holidays and the parties should be able amicably to work out suitable arrangements for access on both sides.

I have had to consider what would be proper and adequate maintenance with the assistance of little more than general evidence. The husband had a taxable income of £8,339 as at June, 1961, and £9,463 as at June, 1962, and this income is backed by substantial assets. Financially, the wife had a very comfortable position, as it appears from the evidence. She was also accustomed to an annual holiday to Australia and had and still has her own motor car, a present from the husband. There is an additional reason for visits to Australia now that Garry is at school there and she will have the girl's expenses as well as her own. I do not think that her parents should have to provide a home for her and it is not suggested that they should. There is uncontradicted evidence that she paid £10 a week rent for a flat at Lae. It is not my task completely to restore the appellant to the position she was in before this separation but to determine what would be proper and adequate maintenance in all the circumstances, paying regard to her former situation and her present needs. I am not concerned with any earning capacity that she may have.

Mr. Jones has submitted that I should make orders on the basis of the amount which the wife was prepared to accept before the hearing in the District Court, namely £20 a week for herself and daughter, although he does suggest that a small increase might not be inappropriate.

As Mr. Cory, who asks for £25 a week for the wife, and £5 a week for the daughter, points out, the wife's acceptance of £20 was before the husband's actual income was known and I think that her position has been under-estimated. In all the circumstances I consider that weekly sums of £25 and £5, for the wife and daughter respectively, are reasonable and there is no suggestion that the husband's income will not continue in the order of his present income, as indicated by his last two annual taxable incomes, to which I have referred. If future circumstances should require it either party may have recourse to the District Court's power to vary this order as provided for in section 15 of the Deserted Wives and Children Ordinance, 1951.

While the summonses were pending in the District Court provision for maintenance was made by the respondent up to the sixth day of July, 1962, and subsequently he paid further sums amounting to £80. It has been agreed that, in the event of an order being made in favour of the appellant, it should provide for the period since the sixth July, 1962, credit to be given for this sum of £80, and the amount, if any, to be allowed for costs in the District Court has been agreed upon after taking into consideration certain allowances.

I allow the appeal and quash the dismissal of the complaints.

I order :

(1) (a). That the respondent pay to the appellant for her use a weekly sum of twenty-five pounds (£25) to commence as from the sixth day of July, 1962, and

(b). That the respondent pay the sum of the arrears of such weekly sum of twenty-five

pounds (£25) calculated from the sixth day of July, 1962, to friday next, the twenty-sixth day of July, 1963, in the manner and at the times provided for in clause (4) hereof, and

(c). That the respondent pay the weekly sum of twenty-five pounds (£25) provided for in subclause (a) of this clause on each friday hereafter commencing on friday next, the twenty-sixth day of July, 1963.

(2) That the appellant have the custody of the child Catherine Michel.

(3) (a). That the respondent pay to the appellant for the support of the said Catherine Michel a weekly sum of five pounds (£5) to commence as from the sixth day of July, 1962, and

(b). That the respondent pay the sum of the arrears of such weekly sum of five pounds (£5) calculated from the sixth day of July, 1962, to friday next the twenty-sixth day of July, 1963, in the manner and at the times provided for in clause (4) hereof, and

(c). That the respondent pay the weekly sum of five pounds (£5) provided for in subclause (a) of this clause on each friday hereafter commencing on friday next the twenty-sixth day of July, 1963.

(4) That the respondent pay to the appellant the sum of the arrears mentioned in subclause (b) of clause (1) and subclause (b) of clause (3) hereof by four equal instalments and that he pay the first one of such instalments, less the sum of eighty pounds (£80),

on wednesday the twenty-eighth day of August, 1963, and that he pay another one of such instalments on each of the twenty-eighth days of the month of November in the year, 1963, and the months of February and May in the year, 1964.

(5) That the respondent pay to the appellant the sum of £113.14.0. for her costs of the proceedings in the District Court.

(6) That the appellant recover from the respondent her costs of and incidental to this appeal, to be taxed, if not assessed by agreement.

(7) That the exhibits remain in Court until after the time for appeal has elapsed when they may be returned to the District Court at Lae to be handed out to the persons entitled thereto.