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

APPEAL NO. 5 OF 1963

DENNIS BRIAN DOUGLAS
Appellant.

v.

SHIRLEY ESTELLE DOUGLAS
Respondent.

J U D G M E N T

PT. MORESBY.
MANN, C.J.
23/9/1963.

I think that the learned Magistrate has clearly misdirected himself. Fairman v. Fairman 1949 1 All.E.R.932, is a strong and clear case but it does not set out the Australian law as established by the High Court. The Magistrate appreciated this. I think that Fairman's case has led the learned Magistrate, at least at one stage, into the view that the facts of the case before him fell for determination according to a legal formula.

It is true that our Criminal Code requires corroboration of the evidence of an accomplice in stronger terms than the English Common Law rule and it follows that in any civil case where Fairman v. Fairman applied corroboration would be essential.

The learned Magistrate perceived that the wife's evidence did not provide direct corroboration of the fact of adultery but merely of the opportunity, which was not in issue. All the evidence negatived premeditation, and the Magistrate saw that on the only point in issue, Fritchard, admittedly the friend of the husband, and willing to help his cause, was in a position to do so either by getting the wife (very foolishly on her part) into such a compromising situation, or to add one fact to what was otherwise an agreed version of the facts. Moreover, adultery in such an isolated and peculiar situation is suggestive of a windfall for

the husband, and does not add merit to his own case.

These are sound reasons for supporting as a matter of weight of evidence the conclusion arrived at by the learned Magistrate. Although on Page 3 of his reasons the Magistrate's words do suggest that he was taking the weight of evidence into account in this way, it is not clear from his own words that he even decided this question as a question of fact.

Earlier in the judgment he poses the question of law which would arise if the English authorities were applicable and it is only in the course of resolving this question that he appears to consider weight. Although the effect of the Australian cases appears to have been understood, the Magistrate still asks himself whether Pritchard's evidence, which might have been corroborated by that of the wife, really was so corroborated. Looking at Pritchard's (not the wife's) evidence, he then says that he has substantial doubt and cannot be comfortably satisfied on the proof offered by the defendant. This part of the judgment has nothing to do with corroboration. It deals with the Defendant's case and the onus of proof which lies on him.

My problem is to decide whether the Magistrate has in fact dealt with the real question of substance and merely failed to explain it clearly, or whether the misdirection which he gave himself has led him away from the real question.

I think that he has in truth dealt with the real question when he rejected the defendant's case after analysing Pritchard's story. He refers to the wife's emphatic denial, not the corroboration value of her evidence, when he says that he cannot be comfortably satisfied. He does not say that he cannot be comfortably satisfied that Pritchard's evidence is corroborated, he says that he cannot be comfortably satisfied on the Defendant's case.

For these reasons I think that the Magistrate did decide the question of weight of evidence and decided it on sound grounds. Although the opposite

conclusion would have been easier to reach, the reasons show that the evidence was carefully weighed before the conclusion was reached.

Then the question arises whether the error in law which appears to have been made, and in at least one place repeated, should be taken to have influenced the decision on the evidence.

I think that it is clear that it did not. The learned Magistrate must have passed the point of law and approached the question of substance on a legal footing favourable to the husband's case. Otherwise on the views he expressed (and assuming that he acted on it) he would not have reached the substantial question at all.

The case having been fought out on the merits (or demerits) and decided on a view of the credibility of witnesses, there is no ground for interfering with it.

As to the amount of the order, one's impression is that it is unduly high, and can only be explained on the footing that the learned Magistrate overlooked the taxation assessments that were put in. This kind of evidence is very inconclusive, but without some cross-examination as to the truth of the income disclosed to the Tax Authorities one would expect the Magistrate to take it into account, which he does not appear to have done. He proceeds to fix the amount of the order from generalizations which do not afford any precise guidance, on the footing that no other evidence is available.

I think the amount of the order to be made should be assessed again on the evidence available. I do not express any view as to what the amount should be, because I think that unless the parties agree to an order by consent, this part of the case should be re-heard.

Order:- Order set aside so far as it fixes the amount payable for the wife's maintenance

and direct that this question be remitted to the Court of Petty Sessions for re-hearing.

Costs: Costs to be taxed and paid by Appellant to Respondent.