ELAINE BUI -v- ANTHONY MAKASI

High Court sitting at Gizo
(Palmer J.)
Civil Case No. 108 of 1992
Hearing: 16 August 1993
Judgment: 17 August 1993

P. Lavery for Appellant
B. Titiulu for the Respondent

PALMER J: The petitioner was lawfully married to the respondent on the 24th of April 1978 at St Alban's Chapel, Honiara. There are four children to the said marriage, namely; Stanley Waita Makasi (d.o.b. 18/3/78), Brown Bule Makasi (d.o.b. 16/8/79), Cynthia Noqa Makasi (d.o.b. 29/7/81) and Anthony Darcy Makasi (d.o.b. 25/6/90).

The parties have lived separately since April of 1991. The petitioner alleges that she left the respondent because of his cruelty to her.

Both the petitioner and respondent gave evidence.

In **'Rayden on Divorce' Seventh Edition, at page 111,** the learned authors defined cruelty as **"conduct ..... of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger."** At page 112, they added:

> "To find cruelty it is not necessary to find physical violence."

and at page 113, I quote:

> *"The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injuries reproaches, complaints, accusations or taunts. In determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status."*

Bearing these in mind I now turn to the allegations raised in the petition.

The first allegation is that the respondent has on several occasions assaulted the petitioner when drunk. In her evidence under oath, the petitioner recalled the first incident of assault which occurred on Queens birthday of 1978. She recounted how the respondent had returned home drunk and wanted to carry their 3 months old baby. When she refused he slapped her. She therefore had to run away. When she returned the respondent swore at her. She described this behaviour or conduct of the respondent as typical. When the respondent was cross or angry he would keep his anger bottled up for even up to one week at a time and would refuse to talk to her. At the end of it he would get drunk, return home and assault her.

The respondent on the other hand denies ever assaulting the petitioner. He admits to talking to her but never assaulting or touching her body. He denies any incident on Queens birth-day of 1978 in which he assaulted the petitioner.

Under cross-examination he admits to having family arguments but denies any form of assaults.

He admitted that he would drink on occasions but was never too drunk not to remember what he did. The 1978 Queens birthday incident alleged by the petitioner according to him was a false one.

The petitioner on the other hand when cross-examined about the 1978 queens birthday incident explained in detail what took place. She stated that the incident occurred at Rove. She was sitting outside with the respondents sisters when he came home and asked to carry their baby. She refused to give him the baby because she said that he was quite drunk and feared for the safety of the child. When it was put to her that the respondent is the father and therefore was confident about carrying their child she retorted that she did not consider it safe when he was wobbly. He got angry as a result and slapped her. When it was put to her that she did not incur any injuries, she agreed, but pointed out that it was painful. She also pointed out that there was no family dispute that she was aware of but when the respondent gets drunk, he gets upset. When he is normal (not drunk) he bottles up his anger.

For the 13 years of their marriage life, she says she saw a priest, who counselled them. But there was no change. Their rows had gone on and off for the last 13 years. Finally she left him.

When it was put to her that she tolerated the respondent's behaviour, she replied: "*I gave him opportunity to change but there was none and so I walked out*".

The difficulty I have in this case is that I have the words of two persons who have sworn on oath before almighty God to speak the truth and yet contradicting each other. I can only judge according to the evidence as adduced before me and my observations as to the demeanour of both witness (though I must say that both witness did portray themselves confidently on the witness box as they sought to assert the truth of their statements). It is possible that I could be making a mistake in my judgement, if that is so then may the Judge of all hearts judge the person who has spoken deceit and falsehood in this court. The courts not only seek justice but also the truth, for justice is founded in truth. One of the means which courts seek to ascertain the truth is to get the witness to swear an oath on the Bible. The reasoning behind this is that such a person is not only making himself or herself accountable to this court but also to God so that when a person deliberately lies in court, then he or she will incur a curse. And for fear of that people will more likely speak the truth.

Having heard the evidence and observed the witnesses, it is more probable than not that the petitioner would be speaking the truth in court. She recalled the details quite vividly. Her explanations were reasonable and understandable. In comparison, there were denials made by the respondent but with unsatisfactory explanations, and in a way quite evasive or defensive.

The second allegation by the petitioner is that sometime in 1990 when she was about five months pregnant, the respondent when drunk, chased her from the house at night. She stated in evidence under oath that she hid herself at the kitchen of a wantok and slept over night on top of coconut husks.

The respondent under cross-examination on this point did acknowledge that the petitioner left the house but did not know where she went or why she went away. It is only reasonable to conclude that the petitioner did run away due to fright, though the respondent denies assaulting her. What is significant is that the respondent does not deny that he was drunk nor that there was a row. What he denies is that he assaulted her or chased her. However, I am satisfied on the balance of probability that the petitioner did flee from fear and misapprehension.

The third allegation related to an incident again when the respondent was drunk and attempted to stab her with a knife when she was in bed. There are two completely different versions put before this court. The petitioner says that she saw the respondent come into their room with a glass of whisky in his right hand and a knife in his left hand. He came in very quietly, put the glass down and held the knife at his right hand

and started to stab her or lifted his hand in a stabbing motion. She then shouted. This startled the respondent. Under cross-examination she stated that she did not know why he held that knife. It was however, never put to her that the respondent had a reason for holding the knife and thus giving her an opportunity to deny or explain what was said by the respondent in his evidence in chief.

She did explain that when the respondent was angry he would shout for his knife but many times she would hide the knife. She did not deny that the defendant had not held any knife before and threatened her physically with it.

In his evidence on Oath the respondent explained why he had the knife with him that evening and why he took it into the bedroom. He stated that he wasn't drunk that night. He admitted that the petitioner shouted when she saw him bringing in the knife. But there was no stabbing motion or any attempt to stab his wife with it. He explained to her what the knife was for and then they all went to bed peacefully. In cross-examination it was put to the respondent that the petitioner must have been frightened of him and so shouted. In his response he stated that there was no reason for the petitioner to be frightened. However he did say that she may have suspected something when she saw him with the knife, though in his opinion there was no basis for that. When it was further put to him that she was frightened because he had attacked her and wanted to chase her out on previous occasions, there was no reply.

On further cross-examination he stated "*I don't accept it. I held knife normally. She did shout but only she would know why she was frightened.*"

One thing is clear to me. This is that this respondent entered their bedroom that night with a knife. If what he says is true, that there was no reason for the petitioner to fear anything, that there had been no argument or row that day, that everything was normal, then it is most unlikely that the petitioner would have shouted. I would have considered it more reasonable for the petitioner to say something like - 'what's the knife for?' or ask for an explanation, rather than shouting straightaway. Even if the version given by the respondent is correct, it is clear to me that the petitioner was under some sort of apprehension for her to shout out at her husband that night. The explanation given by the petitioner seems more probable.

The fourth allegation related to an incident in which the respondent held the ears of their eldest child, lifted him up and dropped him. This was not denied by the respondent but he explained that this was done to discipline their child. I do note that acceptable methods of disciplining a child would vary from place to place, culture to culture, parent to parent and may even vary between husband and wife. The respondent in his explanation did point out that he felt it was justifiable and necessary

in view of the fact that his child was quite naughty. The petitioner however does not agree, pointing out that as a result of that she believed or thought that their first child must have incurred some injury which has affected their childs schooling.

One needs to tread cautiously when talking about discipline. But perhaps one of the guiding factors should be that it should at all times as far as is possible be done in love and not in anger or hatred, and care should be taken again as far as is possible not to inflict punishment more than what the child deserves. There are medical opinions which do point out certain parts of the human body which should not be touched when inflicting punishment, and one of them I do note is the ears.

I accept the petitioner may have been distressed about the actions of the respondent and thereby affected her feelings, however, it would not be sufficient unless it can be shown that it has injured her health as well. ***(see Birch -v- Birch (1873)42 L.J par. 89, p.122.)*** There is no evidence of that here.

The fifth allegation is that this was the reason (ie. cruelty) why the petitioner left the respondent. This is quite clear in the evidence of the petitioner. In the picture painted before this court, the images portrayed a struggling marriage for about 13 years. Most of the allegations of cruelty were committed when the respondent was under the influence of alcohol.

I do note that the respondent did bring out in cross-examination that the petitioner was involved in an extra-marital relationship. However, this aspect was never put to the petitioner under cross-examination to give her an opportunity to deny or admit the claim. It therefore does not help the respondent to try and bring this point out in his examination in chief and expect that equal weight can be placed on it when the petitioner was never asked about it.

It is possible that that may have been a contributing factor. I am satisfied however that the petitioner left the respondent as a result of much fear and apprehension, which when taken as a whole, was too much for the petitioner to handle. If there was indeed as claimed by the respondent no physical violence, I am still satisfied that the threat of it or the belief by the petitioner of its likelihood, was sufficiently real to cause distraughtness, fear and apprehension to her.

Am I satisfied beyond reasonable doubt that the allegation of cruelty has been made out?

When assessing the totality of the evidence before me, I am satisfied that the petitioner did have reasonable cause to apprehend danger in her marriage life with the

respondent, and that the only way out for her was to get out of the marriage. This is eventually what it drove her or led her to.

As I did point out there may have indeed been other contributing factors but the evidence on which the allegation of cruelty has been based in my view has been sufficiently made out so that I am satisfied the petition for a decree nisi of dissolution of the petitioner's marriage to the respondent can be dissolved forthwith.

I note that the marriage appears to have broken down irretrievably. If not, no evidence has been led or put before me that it could be saved.

That is not a ground for granting the petition but it is also a factor which I have considered.

The marriage solemnised on the 24th of April 1978 is dissolved with effect from today to be made absolute 3 months from today.

(A.R. Palmer)
JUDGE