

Ualesi v Tukutoa and Ngalu

Supreme Court

Hill J

Div 85/1979

20 December 1979

Divorce - proof of adultery - must be proved beyond reasonable doubt

Divorce - division of property - principles to be applied

Divorce - damages for adultery - principles to be applied

- 10 The husband, Ualesi, petitioned for divorce on the grounds of the adultery of the wife, Tukutoa, with the co-respondent, Ngalu. The wife denied adultery and cross petitioned on the ground of the adultery of the husband.

HELD:

Granting the petition of the husband, and dismissing the wife's cross-petition.

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- (1) Adultery must be proved beyond reasonable doubt, and, adopting that standard, adultery had been proved against the wife, but not against the husband;
 - (2) Damages for adultery should be moderate unless there has been an abuse of position or active enticement by money; and the sum of \$100 was appropriate to award against the co-respondent;
 - (3) Each spouse could retain his or her own property by virtue of s14 Divorce Act,
 - (4) Joint property should be divided equally, but a spouse who leaves the other spouse to go and live with another may have to accept less than an equal share of the joint property;
 - 30 (5) Where a spouse puts jointly owned matrimonial property into a bank account jointly operated by that spouse and the co-respondent, both are equally liable to repay the amount to the other spouse;
 - (6) Custody of the young son should remain with the father, and custody of the young daughter should remain with the mother.

Statutes considered

- 40 Divorce Act s4(3) (b), 14

Hill J

Judgment

Now in this case the Petitioner petitions on the grounds of his wife's adultery. She cross petitions on the grounds of his adultery. After some evasive tactics she does not in fact dispute that she has been committing adultery with the co-Respondent since May. The adultery alleged by her against her husband the Petitioner in the original case is not alleged to have taken place until November. Therefore even if I was satisfied which I am not, that the Petitioner, the husband, committed adultery, it would have had nothing to do with the break up of the marriage. I am not satisfied that he committed adultery because adultery must be proved, like a crime, beyond all reasonable doubt. The only evidence against him is given by a young girl who says she committed adultery with him under a house. She is to some extent corroborated by a friend of hers, the last witness; called Matelita, but I am not satisfied beyond reasonable doubt that if they went under the house she and the Petitioner committed adultery. Now it is also said by the Respondent that a decree against her ought to be refused on the grounds that her husband treated her in such a way that he induced her to commit adultery. And Section 4(3)(b) is cited in her support.

Now it is necessary to consider the reliability of these two witnesses the Petitioner and the Respondent. And I say without hesitation that I prefer the evidence of the Petitioner to that of the Respondent. The Respondent has been untruthful about her relationship with the co-Respondent on a previous occasion in chambers. She was evasive about it in Court yesterday through her advocate when he declined to say whether she committed adultery or not, and she told contradictory stories about the main assault she relies, on that with a pair of scissors. On the first occasion she said he thrust at her with his hands behind his back and it was not until she looked under the bed, that she discovered it had been a pair of scissors. The second occasion she said he thrust at her holding a pair of scissors up in the air. I form the impression that she is not to be relied upon as a witness. And I think that there is no doubt the reason why she left her husband is that she wanted to go off with the co-Respondent.

Therefore on those facts it is quite clear that there has got to be a decree nisi in favour of the Petitioner against the Respondent and the co-Respondent.

We now come down to what in fact is the main issue in this case I think, and that is the division of the property. And the reason why I am giving a record of judgment in this case, is it is, as far as I know, the first time I've decided how property should be divided in a case like this. And in this connection I've been referred by counsel or by advocate for the Respondent (wife) to Section 14 chapter 18. Now that section says that when a decree of divorce is pronounced each of the parties to the marriage so dissolved shall retain his own property. But the problem here is to determine which property belongs to whom, because, apart from these statements by the wife that she received some sums, from her mother in New Zealand, it is common ground that these two worked throughout their married life, and built up the not inconsiderable property which belonged, if I may so put it to the marriage and family before she went away. Particulars have been given by both sides of the property in the possession of the other. And it is said for the Respondent (wife) that the Petitioner has in fact got more property than she has. And that is true. However most of the value of the property consists of the house, agricultural

instruments, agricultural plantations and so on. And it is not my view of the Law of Tonga that if a wife leaves her husband in circumstances like this that she can come along and say I want a large piece of your property as well. And it works the same the other way round, if a man cares to run off with another woman, he can't come along and say to the wife I want the matrimonial home where we've lived because I want to live there with my girlfriend. Each case to some extent depends on its fact, and I am satisfied that in this case the wife was a useful member of the family in that she handled all the financial side and sold the produce in the market. And that is why I do not make her handback such property if she's got she can keep that, and the husband can keep what he's got which as I say is more and I think that's reasonably fair between the parties in the circumstances. Now there was a banking account with over \$3,000 in it. The Petitioner says that represented their joint savings arising from his work in the plantations and the wife selling the produce of the farm in the market and that they deducted the expenses and then paid it into this joint account. The Respondent (wife) says that the money in the account belongs only to her and it represents her part of the profits from working the farm and that the petitioning husband has already had his share. I prefer the evidence of the husband and I think this fund in the joint account represented the savings of the Petitioner and the Respondent when they were living and working together. Now what did the Respondent (wife) do? Some three months after she started having an affair with the co-Respondent she drew out the money from the joint account and she paid it into an account in the names of herself and the co-Respondent. Well if it is a joint account the presumption is that the money belongs to the parties equally. And therefore \$1,500 must be repaid to the Petitioner. And as this money was paid into an account in the names of both the Respondent and the co-Respondent they're both responsible for repaying it and if they don't their goods must be sold until that sum is satisfied.

And as far as the damages go it is my policy everybody knows only to award moderate damages in cases where there has been no abusive position or an attempt to use money to get the wife away from the husband. There is no evidence of that in this case and therefore I think that the modest sum of \$100 is sufficient to compensate the Petitioner.

Therefore there will be a judgment against the Respondent for \$1,500 and judgment against the co-Respondent for \$1,600 that is \$1,500 plus the \$100 damages. It of course being understood that the Petitioner can't get back more than a total of \$1,600 but he can go against them both and their property until that amount is satisfied.

Now the remaining question is the custody of the two children, the boy at present being with the father and the little girl with the mother. Now it is said with a good deal of force on behalf of the petitioning husband that it is quite wrong to leave the little girl in an irregular household that is where her mother is living with a man to whom she is not married. On the other hand there is evidence that Respondent (wife) is going to marry the co-Respondent when she's free to do so, and it is of course desirable that a young girl should be brought up by her mother if it is reasonably sensible for this to be done. It is undesirable for a child to be moved around from one household to another. And therefore the order I proposed to make at the present moment is that the little girl should stay with

her mother and that the husband should have a liberty to apply after 7 weeks when the decree in this case would have been made absolute provided he applies and we can see whether the Respondent is really going to marry the co-Respondent or not. The little boy I think it is agreed should stay with the petitioning husband and he will be given custody of him. Costs to be paid by the co-Respondent to the Petitioner to be taxed if not agreed.