HOWARD v HOWARD (1967) ZR 47 (HC)

HIGH COURT

BLAGDEN CJ 5

23rd JANUARY 1967

Flynote and Headnote

[1] **Family law - Divorce - Cruelty - Essential elements.**

A petitioner to succeed on grounds of cruelty must prove cruel 10 conduct (1) was grave and weighty and (2) caused some injury or danger to health or reasonable apprehension thereof.

[2] **Family law - Divorce - Cruelty - Quantum of proof.**

For cruel conduct complained of as grave and weighty to constitute a matrimonial offence, proof required to establish will be high. 15

[3] **Evidence - Divorce - Cruelty - Quantum of proof.**

See [2] above.

[4] **Family law - Divorce - Cruelty - Refusal of sexual intercourse - Proof.**

Persistent refusal of sexual intercourse usually needs medical corroboration to show injury to petitioner's health. 20

[5] **Evidence - Divorce - Cruelty - Refusal of sexual intercourse - Proof.**

See [4] above.

Cases cited:

(1) *Noble v Noble* [1964] P. 250; [1964] 2 WLR 734; [1964] 1 All ER 577. 25

(2) *Mulhouse v Mulhouse* [1966] P. 39; [1964] 2 WLR 808;[1964] 2 All ER 50.

(3) *Blyth v Blyth* [1966] AC 643; [1966] 2 WLR 634; [1966] 1 All ER 524.

(4) *P v P* [1964] 3 All ER 919. 30

(5) *Evans v Evans* (1965) 115 LJ 450; [1965] 2 All ER 789.

(6) *P (D) v P (J)* [1965] 1 WLR 963; [1965] 2 All ER 456.

(7) *A (L) v B (R)* [1965] 1 WLR 1413; 109 S.J. 831;[1965] 3 All ER 263.

(8) *Sheldon v Sheldon* [1966] P. 62; [1966] 2 WLR 993; [1966] 2 All ER 257. 35

(9) *Hughes v Hughes* 1966 *Times,* 29th April.

Statute construed:

Matrimonial Causes Act, 1965, s. 5 (3).

Wasserberger, for the petitioner

No appearance, for the respondent 40

1967 ZR p48

BLAGDEN CJ

Judgment

Blagden CJ: This is a husband's petition for divorce on the grounds of cruelty. The parties were married in England in 1946 and there is one child of the marriage, a son now aged nearly 19.

This is a case in which, if I could grant a divorce I certainly would 5 because I can see very little purpose in keeping a marriage in being from which unhappily all semblance of affection and regard have long since disappeared. But I have to administer the law as I find it, and on the evidence before me I cannot in all honesty say that the petitioner has made out his case of cruelty against the respondent to that standard of 10 certainty which the law requires before the relief claimed can be granted.

The husband's main complaint against the wife was that from an early stage of their marriage she unreasonably and persistently refused him sexual intercourse and that this affected his health. Further, that she was selfish, nagging and abusive and that she habitually humiliated him, 15 made scenes, and ultimately adopted an attitude of complete indifference to him.

The parties had apparently discussed emigrating to New Zealand. According to the husband, however, there was no definite arrangement. It was therefore a shock to him on returning home one day from an 20 inspection tour to find that the wife had booked passages to New Zealand for herself and her son but not for him. The husband said that he adopted a passive attitude about this project to avoid being nagged. The wife and son left for New Zealand in 1963 and have never returned.

Letters from the wife to the husband from New Zealand in 1965 and 25 1966, which, it is only fair to point out, were made available by the husband upon the court's request, suggest that the wife left with the husband's approval and, furthermore, that the husband had promised to join her in about three months' time.

These letters show bitterness, disappointment and criticism of the 30 husband of a nagging character, but they also show a desire and, I would think, a capacity for affection.

Nothing is said in any of them about the husband's real complaint - persistent refusal to have sexual intercourse - until the latest of these letters. This was written on the 15th May, 1966, when the wife had been 35 served with her divorce papers and therefore knew of the allegations the husband was making against her. This letter contains a vigorous denial of these allegations and in one passage in particular the wife refutes the charge that she denied the husband sexual intercourse and asserts, in effect, that it was the other way round.

[1] 40 It is well established that for a petition for divorce to succeed on the grounds of cruelty the positioner must prove that the conduct complained of as being cruel (1) was grave and weighty; and (2) caused some injury or danger to health or a reasonable apprehension thereof (*see Noble v Noble* [1] per Scarman, J, at page 579 D & E.

Proper 45 proof of these matters is not always of easy attainment. In *Mulhouse v Mulhouse* [2], Sir Jocelyn Simon, P., said, at page 56:

1967 ZR p49

BLAGDEN CJ

"Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt *(Bater v Bater*, 1950, 2 All ER 458). That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be proved of a grave and weighty nature . . . Secondly, it 5 must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury. In the absence of acts of violence . . . the law requires that there should be proved a real impairment of health or a reasonable apprehension of it. Thirdly, it must be proved beyond reasonable doubt that it 10 is the misconduct of the respondent which has caused the injury to health of the complainant. Fourthly, it must be proved beyond reasonable doubt that the whole of the conduct of the respondent, taking into account its repercussion on the health of the complainant, can properly be described as cruelty in the ordinary sense of 15 that term. (See *Collins v Collins*, 1963, 2 All ER 966)."

But *Mulhouse v Mulhouse* [2] must be considered in the light of the more recent case of *Blyth v Blyth* [3] where, amongst other things, the court was concerned with the burden of proving a matrimonial offence. The relevant statutory provision was section 4 (2) of the Matrimonial 20 Causes Act, 1950, now repealed and replaced by section 5 (3) of the Matrimonial Causes Act, 1965. The words of this subsection, as relevant to this case, are:

"If the court is satisfied on the evidence that the case for the petitioner has been proved . . . the court shall . . . grant a decree 25 of divorce;".

In *Blyth v Blyth* [3] the House of Lords considered the meaning and force of the word "satisfied".

In Mulhouse's case, Sir Jocelyn Simon, P., had equated "satisfied" with "proved beyond reasonable doubt". But in *Blyth v Blyth* [3] the 30 House of Lords held by a majority that in matrimonial cases, as in other civil cases, the proof must be by a preponderance of probability, the degree of probability depending on the subject matter, so that in proportion as the offence is grave, so the proof should be clear.

[2] [3] Adopting this approach, I would say that as the cruel conduct 35 complained of has to be grave and weighty before it can be regarded as constituting a matrimonial offence, then the proof required to establish that degree of conduct will be a correspondingly high one.

Returning now to the facts of the instant case, I have already summarised the petitioner's case of cruelty and stated that it is substantially 40 based on refusal of sexual intercourse over a long

period of time. That this sort of conduct can constitute cruelty is undoubted. There have been a number of cases on the subject (*see,* for instance, *P. v P.* [4]; *Evans v Evans* [5]; *P (D) v P (J)* [6]; *B (L) v B (R)* [7]; *Sheldon v Sheldon* [8]; *Hughes v Hughes* [9]. 45

1967 ZR p50

BLAGDEN CJ

In *Sheldon v Sheldon* [8], Lord Denning, M.R, said, at page 261:

"The real difficulty that I see is to keep the matter within bounds. It may be said that, if refusal of sexual intercourse is to be regarded as cruelty we should be opening far too wide a door to divorce; but 5 I do not think so. No spouse would have any chance of obtaining a divorce on such a ground except after persistent refusal for a long period; and it would usually need to be corroborated by the evidence of a medical man who had seen both parties and could speak to the grave injury to health consequent thereon." 10

In *Hughes v Hughes* [9] the matter was remitted for rehearing, in order that the question of injury to health caused by the refusal of sexual intercourse might be clarified, the course which, in effect, I took in this case when I adjourned the hearing to enable the petitioner to bring further evidence of injury to his health. 15

[4] [5] Despite this indulgence no further evidence was forthcoming. In all honesty I cannot say that I find myself satisfied in this case of the petitioner's allegations of cruelty against his wife. That by itself is fatal to his petition. But I think I should add that on the evidence it does not seem to me that he has established injury to health or reasonable apprehension 20 thereof. The injury sustained or apprehended must be of some substance - in both *Sheldon v Sheldon* [8] and *Hughes v Hughes* [9], Lord Denning, M.R, spoke of "grave injury" to health. According to the petitioner's own story he has suffered in his health. But there is little or no corroboration of his evidence and it seems to me that this is a case 25 where, as I have some doubts about the reliability of the petitioner's evidence, I should look for corroboration. The evidence of Dr Glynn hardly supplies it, and the evidence of Dr Acheson is completely negative.

In the circumstances I have no alternative but to dismiss this petition. 30

Petition dismissed