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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

DIVORCE

SUIT NO. C.L.D.N. 001/1981

BETWEEN	LEOPOLD A. NOOKS	PETITIONER
AND	JEMIMA E. NOOKS	RESPONDENT

Mr. M. Hylton for Petitioner instructed by Myers, Fletcher & Gordon, Manton & Hart.

Mrs Gloria Hendricks - Legal Clerk for Respondent.

HEARD ON: 16th & 17th September, 1982

DELIVERED:

23rd Feb. 1983

ELLIS, J. (Actg.)

In these proceedings the Petitioner seeks the dissolution of his marriage on the ground that he and the respondent are living separately and apart from each other and have been living separately and apart for at least five years immediately prior to the presentation of his Petition. He sought and was granted leave to amend the petition to date the period of separation from the year 1970. In seeking dissolution, petitioner prays for the exercise of the Court's discretion in his favour notwithstanding his adultery committed during the marriage.

To the petition the respondent has answered and cross-petitioned. She denies the allegation that the parties have been living separately and apart for at least five years immediately preceding the presentation of the petition and prays that the Court rejects the petitioner's prayer and for costs and any further relief.

Her cross-petition was amended to delete paragraph 2 which alleged adultery by the petitioner and to delete her prayer for dissolution of the marriage.

The parties were married in 1944 and lived in rural St. Andrew until 1956. In 1956 the petitioner with the respondent's consent went to England with the expectation that she would join him later. He said he secured living accommodation in England and wrote inviting her to join him. She wrote him to say that she had some unfinished business but as soon as that was cleared she would join him. She did not do so and he returned to Jamaica in 1959. On his return he saw changes in the house - the door between their bedroom and their daughter's room was blocked off. In 1960 he went back to England and returned in 1969 and on that visit he said he told his wife that he would no longer have sexual intercourse with her. Although he returned to Jamaica again in 1977 and 1979 no intercourse took place between himself and the respondent. He had in 1963 become friendly with a lady by whom he had a child.

In answer to questions put by Mrs Hendricks the petitioner said his wife and himself separated in 1970 but it was not until in 1980 the 17th of November that he placed a notice in the newspaper to the effect that he had separated from his wife since 4th November, 1980. He said that he continued to correspond with his wife in endearing terms from 1970 until 1980 but all he was doing/^{then}was his duty. He also admitted that when he came to Jamaica in 1980 the woman with whom he had formed an attachment accompanied him.

He called one Wilton Chung to support his allegation that since 1970 he had not cohabitted with the respondent as man and wife.

The respondent stated that when the petitioner left for England in 1956 their relationship was excellent and on his return in 1959 it continued to be excellent. She said that in that year her mother was ill and the petitioner

suggested that her mother should go and stay at the matrimonial house which she did. Petitioner and herself decided to post a letter to each other every Monday. That continued for sometime and the letters were always in endearing terms. During the period he maintained her. She said that on the occasions on which the petitioner returned to Jamaica he always cohabitted with her at the matrimonial home. In 1980 when he returned she sensed a strangeness in his behaviour towards her and she felt a difference in his attitude. She did not however think that he wanted to end the marriage until she got a letter from ^{him} which said in part, that he had no intention of returning to Jamaica. From that letter (exhibit 2), she concluded that he was ceasing marital relationship. In answer to Mr. Hylton she said that in 1959 the understanding between petitioner and herself was that she should remain in Jamaica to take care of her ailing mother. It was not the understanding that she should go to England in either 1956 or 1959. She denied that the petitioner told her in 1970 that he would not have sexual intercourse with her again.

She said that although she became aware of the petitioner's relationship with another woman and which relationship produced a child, she forgave him. She denied that the marital relationship deteriorated prior to 1980. The respondent called her adopted daughter and another witness in support of her contention that the marital relationship had not broken down until 1980. She also put in evidence fourteen pages of letters (exhibit 3).

THE LAW:

Section 19 sub-section (2) of the Divorce Act provides a ground for divorce in the following terms -

"(2) A petition for divorce may also be presented to the Court either by the husband or the wife on the ground that the Petitioner and the Respondent are

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"living separately and apart and have been living separately and apart for a continuous period of at least five years immediately preceding the presentation of the petition."

Section 25(3)(iii) of the Divorce Act is as follows:-

- (3) "If the Court is satisfied on the evidence that -
- (i) the case for the petitioner has been proved; and
 - (iii) where the ground of the petition is that mentioned in Section 19(2) and the respondent opposes the pronouncement of a decree that the petitioner has proved that the separation was wholly or substantially due to the wrongful act or conduct of the respondent, the court shall pronounce a decree of divorce, but if the court is not so satisfied with respect to any of the aforesaid matters, it shall dismiss the Petition."

My understanding of the subsection is that where a decree is sought on the ground of living separately and apart for five years and the grant of such a decree is contested, the petitioner must satisfy the court that the separation was wholly or substantially due to the wrongful act or conduct of the respondent. It is clear that the subsection demands the existence of fault or guilt on the part of a respondent who opposes and requires the petitioner to satisfy by evidence the existence of such fault or guilt.

In some Commonwealth jurisdictions, fault or guilt with respect to a contesting respondent seems to be irrelevant when the courts in those jurisdictions are considering decrees on the ground of "five years living separate and apart."

This is borne out when section 2(1)(e) of the English Divorce Reform Act of 1969 and the interpretation thereto in Rayden on Divorce Eleventh Edition, paragraph 115 at page 273 are read. The paragraph after defining "living apart" goes on to say -

"This is not to say that a Court must have regard to any question of fault or guilt, it matters not that the petitioner is responsible for the separation and is a deserting party."

The New Zealand law is also to that effect. The position under the Jamaica Statute is clearly to the contrary.

ISSUES

The issues to be considered in this case are two;

- a) When did the separation, if any, begin so as to found a ground for divorce? and
- b) The applicability of section 25(3)(i) and (iii) of the Divorce Act to the case.

The petitioner contends that the period of separation started in 1970 and thus on presentation of his petition the statutory period was satisfied. There was in fact a physical separation from 1970, in fact, prior to 1970. But mere physical separation can never constitute a living apart even if for a long period. There must also be in addition to the separation, a demonstration on the part of one or both spouses to a marriage, a mental attitude contrary to the preservation of that marriage in its entirety.

Did the petitioner evince any such attitude in 1970?

His physical separation from his wife was by mutual agreement from 1956. He said that the relevant period of separation began from 1970. But does his behaviour during the period up to 1980 confirms that? Between 1970 to 1980 the petitioner returned to Jamaica four times and on every occasion, but one, he stayed at the matrimonial home. In 1980 he did not stay at the matrimonial home perhaps because a lady friend accompanied him to Jamaica on that occasion. In addition to his staying at the matrimonial home on his visits to Jamaica, the petitioner wrote several letters to his wife (exhibit 3). The endearing terms of

the letters are certainly not suggestive of any attitude of separation. Then again his newspaper notice of the 17th November, 1980 mentions the separation date to have commenced on the 4th of November, 1980.

On a consideration of all the evidence and circumstances of the case I adopt the dictum of Mr. Justice Darling in the case of R.V. Creamer /1924/ ALL E.R. p. 760.;

"In determining whether a husband and wife are living together the law has regard to what is called the consortium of husband and wife. A husband and wife are living together not only when they are residing together in the same household but also when they are living in different places, even if they are separated by the high seas provided the consortium has not been determined."

I find that the petitioner's behaviour has not from 1970 taken him out of the situation referred to in the cited dictum.

I therefore hold that the earliest period when he indicated an attitude as to a separation or living apart was in November, 1980. In the circumstances, the petitioner has not satisfied me as to the statutory period of living apart requisite for founding a ground for divorce.

If I am wrong in so holding, section 25(3)(i) and (iii) of the Divorce Act has to be considered. That section as I have stated before, requires the petitioner to prove, where a petition vide S.19(2) is contested, a fault or guilt on the part of a respondent and that such fault or guilt wholly or substantially caused the separation. The petitioner attempted to prove such a fault by alleging that he contracted a venereal disease from the respondent in 1970.

I rejected that as being no evidence in the absence of any medical certification. He said that the respondent did not prevent a girl who lived with her from locking him out of a bedroom, obviously treating that as a fault on the respondent's part. Even if that were a fault, and I do not so hold, I

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find that it did not wholly or substantially cause the separation. Moreover, that incident was in 1980 and not 1970 the date on which he alleges that the separation commenced.

The Petitioner has not satisfactorily discharged the onus of proof as to the existence of fault on the part of the respondent which in any way caused the separation.

The petitioner's prayer for dissolution of the marriage is rejected and the respondent is to have her costs to be agreed or taxed.

JUDGE.