IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE No. 722 of 1979

B E T W E E N:

FELLIDA MACLUNE .... PETITIONER

versus

LUCKWELL MACLUNE .... RESPONDENT

Coram: TOPPING, Ag.J.
Mbalame: Principal Legal Aid for the Petitioner
Respondent: not present; unrepresented
Sonani: Official Interpreter
Kelly: Court Reporter

J U D G M E N T

In this matter the petitioner, Fellida Maclune, petitions for the dissolution of her marriage to the respondent, Luckwell Maclune. The ground alleged in the petition is adultery. The particulars of the adultery allege that about November/December 1977 the respondent committed adultery with a woman unknown, as a result of which he contracted a venereal disease.

The parties were married at the Registrar General's Office in Blantyre on the 24th November 1973. Both were Malawians and I am in no doubt that they are domiciled in Malawi.

There are three children of the marriage, Rees, Roy and Grace. The petitioner seeks their custody and she also seeks an order that the respondent do maintain them.

The petitioner gave evidence on oath in which she dealt with her marriage to the respondent from which I find that the parties were married as alleged in the petition on the 24th November 1973. Things began to go wrong in about October 1976 when the respondent, who was working outside Blantyre, began to stay away from home for longer and longer periods. He blamed his absence from the matrimonial home on his work, saying that he was working overtime and that his bosses were difficult.

In addition to his absence the petitioner noticed that even when the respondent was at home he seemed unwilling to have sexual intercourse with her and he complained that he was too tired. Respondent said in reply to her queries on this point "Sometimes I just regard you as a sister". This did not satisfy the petitioner, who clearly became suspicious. In December 1977 the respondent was working at Salima. He came home on leave. His wife noticed that he had a certain wetness on the front of his trousers She asked him about it and he said that he was washing in the kitchen and had wet the trousers while doing so. However as the same wetness was there on the following day the petitioner was not convinced and again asked him about it. The respondent confessed that he had a venereal disease and that he was being treated at a mission hospital.

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The petitioner's father gave evidence that he discussed the respondent's failure to have sexual intercourse with the petitioner with the respondent and that he arranged for him to see an herbalist. the respondent did not keep the appointment.

There was no evidence to corroborate that of the petitioner. I found the petitioner to be an impressive witness and I believed her. It is not necessary to prove adultery by direct evidence and it is indeed rare that such evidence is available. However, the court usually looks for some corroboration. It would appear from the dictum of Cockburn, C.J. in Robinson v. Robinson and Lane (1858) 1 S. & T. 362, that this is a matter of practice only for in that case he observed:

> "The Court is bound to act on any evidence legally admissible by which the fact of adultery is established and if therefore there is evidence not open to exception, of admission of adultery by the principal respondent, it would be the duty of the court to act on such admissions even though there might be a total absence of all other evidence to support them."

This is such a case. The evidence consists solely of the petitioner's evidence of the respondent's admission. But such admission appears to be valid evidence that he had committed adultery and the fact that he admitted he was suffering from a venereal disease is prima facie evidence that he was guilty of adultery, see Stead v. Stead (1927) S.J. page 391.

In LATEY ON DIVORCE (14th edn) at paragraph 872 on page 412 it is suggested that the fact of service of the petition on the respondent and his failure to enter a defence might be a slight measure of corroboration.

As to the standard of proof required of a petitioner, section 7 (2)(a) of the Divorce Act requires the court to be satisfied that the case for the petitioner has been proved and sub-section (b) requires the court to be satisfied that there has not been connivance or condonation and by sub-section (c) there must be no collusion.

I am satisfied that the petitioner has not connived at or condoned the alleged adultery nor has the petition been presented collusively. Discretion is not sought.

Adultery was previously known as criminal conversation and the standard of proof to be applied was quasi criminal. In Bater v. Bater (1951) Probate Reports at page 35, which was a cruelty case, the Commissioner who heard the case directed that the standard of proof of the cruelty was proof beyond a reasonable doubt. Such direction was upheld. However, it is clear that as adultery is not a criminal offence the analogies and precedents of the criminal law do not apply. Mordaunt v. Moncreiffe (1874) 2 LR 2 HL, 474. The standard of proof appears to be that laid down in Bastable v. Bastable (1968) 1 WLR at p.1684. In that judgment Willmer, L.J. reviewed the authorities on the question of the standard of proof with particular attention to Preston Jones v. Preston Jones (1951) A.C. p.391 and Blyth v. Blyth (1966) A.C. He observed at page 1686:

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"When Blyth v. Blyth and Pugh was before this court I ventured to say that I agreed with the view expressed by Denning, L.J. in Bater v. Bater and adopted by this Court in Hornal v. Neuberger Products Ltd. In that oft quoted passage Denning, L.J. said -

'The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. As Best, C.J. and many other great judges have said 'In proportion as the crime is enormous, so ought the proof to be clear.' So also on civil cases the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court... even when it is considering a charge of a criminal nature: but still it does require a degree of probability which is commensurate with the occasion. Likewise a divorce court should require a degree of probability which is proportionate to the subject matter.' "

Willmer, L.J. went on -

"Until the matter has been further considered by the House of Lords and further guidance has been received I propose to direct myself in accordance with that statement of principle. In the present case what is charged is an offence. True it is not a criminal offence: it is a matrimonial offence. It is for the husband to satisfy the court that the offence has been committed. Whatever the popular view may be it remains true in the eyes of the law the commission of adultery is a serious matrimonial offence. It follows in my view that a high standard of proof is required in order to satisfy the court that the offence has been committed. "

In the same court Edmund Davies, L.J. also applied the "preponderance of probability" test as the standard of proof with reference to an adultery charge. He said, considering Blyth's case:

"Be that as it may, Blyth's case dealt solely with a matter of condonation, and in relation to that it decisively and authoritatively laid down that the petitioner need show, only on a balance of probability, that he did not connive or condone, as the case may be. Lord Denning's observations in relation to the standard of proof appropriate to the

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"establishment of a matrimonial offence, on the other hand, must ex necessitatis be regarded as obiter. As to this Professor Cross in CROSS ON EVIDENCE at pp. 96-97 has observed that:

> 'All that can be said with certainty on the present law is that it is only necessary to negative the bars to matrimonial relief on a preponderance of probability. So far as the grounds for such relief are concerned there is, it is submitted, every reason why the views of Lord Denning in Blyth v. Blyth should be adopted and, at the level of the House of Lords, no authority precludes their adoption. Whether lower courts will treat Blyth v. Blyth as an authority for the proposition that proof on a preponderance of probability is all that is required throughout every matrimonial cause remains to be seen.' "

Lord Justice Edmund Davies thereupon applied the test of the preponderance of probabilities as the standard of proof in the adultery charged.

I have given considerable thought to this matter and I find that I am satisfied that the totality of the evidence of the petitioner, while in general uncorroborated, is sufficient to prove the contents of her petition. On the preponderance of probabilities, I so hold, accepting the evidence of the petitioner and viewing it over the whole course of the respondent's conduct over the years, including the petitioner's account of his increasing sexual neglect of her, culminating in his confession of adultery. I grant a decree nisi of divorce. I grant custody of the children as prayed and condemn the respondent in costs. The question of maintenance is adjourned into chambers to a date to be fixed.

Pronounced in open court this 26th day of July 1980 at Blantyre.

R.G. TOPPING
Ag. JUDGE