

1967 Present : H. N. G. Fernando, C.J., and Siva Supramaniam, J.

A. DHARMASENA, Appellant, and B. K. NAVARATNE,
Respondent

S. C. 574/65 (F)—D. C. Colombo, 6399/D.

Divorce action—Evidence—Wife's confession, outside Court, of adultery—Inadmissibility against co-respondent—Standard of proof for proving adultery.

In a divorce action instituted by a husband, statements made outside Court by the defendant (the wife) admitting adultery cannot be used against the co-respondent in proof against him of an act of adultery.

Proof beyond reasonable doubt is necessary for proof of adultery.

APPEAL from a judgment of the District Court, Colombo.

E. R. S. R. Coomaraswamy, with *E. C. Chakradaran*, for the 2nd defendant-appellant.

D. R. P. Goonetilleke, with *M. D. K. Kulatunga*, for the plaintiff-respondent.

Cur. adv. vult.

May 20, 1967. H. N. G. FERNANDO, C.J.—

The plaintiff brought this action for divorce from his wife on the ground of her adultery with the 2nd defendant. The plaintiff and the 2nd defendant are both Police Constables who at the relevant time lived with their wives in the married quarters at the Cinnamon Gardens Police Station ; the quarters of the two families adjoined each other.

At about 5.30 in the morning of 7th February, 1964, the plaintiff left his quarters in order to report at the Station; his wife remained in the quarters with her young child and the plaintiff's brother. When the plaintiff returned about a half-hour later, his wife was not in the quarters and on inquiry from his brother, he was told that she had gone towards the kitchen at the rear of the premises. The plaintiff stated that a while later he saw his wife "being pushed out" by the 2nd defendant from a doorway in the latter's quarters. The plaintiff immediately assaulted his wife, and she then confessed that she had been called by the 2nd defendant into the latter's quarters and there had intercourse with the 2nd defendant. (The latter's wife, a hospital attendant, had been away from home on night duty.) Thereafter, according to the plaintiff, his wife was "dragged" by the 2nd defendant into the latter's quarters and only emerged from there after the lapse of some minutes. The plaintiff immediately informed an Inspector of the incident, and of his wife's admission, but the Inspector was unable to record statements until after 10 o'clock. At that stage, the plaintiff's wife admitted in a statement to the Inspector an act of intercourse with the 2nd defendant. The latter, however, denied any intimacy and further denied that he had ever spoken to the 1st defendant.

The evidence for the plaintiff at the trial was that which I have summarised above. The wife retracted her confession, stating that she had been forced to make it because of threats by the plaintiff. Both she and the 2nd defendant, however, did admit that she had been called by the 2nd defendant towards the entrance to the latter's room, and had there some conversation about an incident which had occurred in the quarters a few days earlier. The learned trial Judge was satisfied that the confession of adultery had been made voluntarily by the wife, who has not appealed against the finding that she had committed adultery and the decree for divorce.

But in holding against the 2nd defendant that he was guilty of adultery, the trial Judge nowhere refers to the long-established principle that statements made outside Court by the defendant (the wife) in a divorce action are not admissible as evidence against the co-respondent (*Eliatamby v. Eliatamby*¹). The Judge failed to direct himself that the wife's alleged confession to the Inspector in this case could not be used against the 2nd defendant in proof against him of an act of adultery.

When the confession is excluded from consideration in the case against the 2nd defendant, the only circumstances which remain are:—

- (1) that the 1st defendant had apparently entered the neighbouring quarters early in the morning, and that a while later the 2nd defendant pushed her out of those quarters;

¹ (1925) 27 N. L. R. 396.

- (2) that after the plaintiff had assaulted his wife, the 2nd defendant dragged her into his quarters, where she remained for some little time;
- (3) that the 2nd defendant falsely denied to the Inspector that he had ever spoken to the woman, whereas he later admitted in evidence that he did call to her and speak to her on this particular morning.

The plaintiff admitted at the trial that the 1st defendant and the wife of the 2nd defendant used to visit each other. Despite this admission, the learned trial Judge refused to believe that the two women had been on friendly terms, and had gone out together to witness the Independence Day celebrations. The reason stated for this disbelief arose from a misdirection on the facts. It would appear that the plaintiff and his wife had only occupied the quarters a few weeks before this incident. There was evidence that the 2nd defendant's wife had been on night duty at the hospital during the preceding two weeks. The Judge thought that there was little chance for the women to meet, because one of them had been on duty at the hospital. It was a misdirection to think so, because the duty was night duty, which did not by any means exclude the possibility of meetings during the day. But for the statements in the confession, the visit to the 2nd defendant's quarters on this particular morning was in the circumstances open to an "innocent" explanation.

So far as the 2nd defendant was concerned, there was nothing in the evidence to contradict his version of an innocent conversation with the plaintiff's wife. Even if she did enter his quarters, the plaintiff's own evidence is that the 2nd defendant *pushed* her out, a circumstance which at the least casts doubt on the theory that an act of intimacy had taken place. Counsel for the plaintiff in appeal could point only to the fact which I have mentioned at (3) above: but a false denial by a man that he has ever spoken to a woman does not raise any strong inference that when he did speak to her he did so to entice her to intercourse.

Had the trial Judge reminded himself of the principle that the wife's confession was not evidence against the co-respondent, and of the further principle that the general standard of proof beyond reasonable doubt applies for proof of adultery (*Jayasinghe v. Jayasinghe*¹), I do not see how he could have found the charge proved against the 2nd defendant on such tenuous material.

The decree awarding damages against the 2nd defendant and the finding that he committed adultery with the 1st defendant are set aside with costs in both Courts.

SIVA SUPRAMANIAM, J.—I agree.

Appeal allowed.

¹ (1954) 55 N. L. R. 410.