[HIGH COURT OF AUSTRALIA.]

LOCKE AND ANOTHER . . . . . APPELLANTS;
RESPONDENT AND INTERVENER,

AND

LOCKE . . . . . RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1956.

SYDNEY, *April* 24, 26, 27.

Dixon C.J., Williams and Fullagar JJ.

Matrimonial Causes (N.S.W.)—Dissolution of marriage—Adultery—Standard of proof—Decree nisi—Woman charged virgo intacta—Necessity of proof of some penetration—Adultery to be found after consideration of all evidence.

To constitute adultery as a ground of divorce some penetration of the woman by the man must be found to have taken place, although such penetration need not constitute a complete act of intercourse. The actual commission of adultery must be proved affirmatively to the reasonable satisfaction of the court, but reasonable satisfaction is not a state of mind that is attained or established independently of the nature of the fact or facts to be proved, nor should such reasonable satisfaction be produced by inexact proofs, indefinite testimony or indirect inferences.

Where an intervener is found to be *virgo intacta* the court in determining the issue of adultery should weigh the whole of the evidence on both sides with that cardinal fact and, having done so, should consider whether there is sufficient proof of such issue to its reasonable satisfaction. The court should not, having first considered all other circumstances of the case, find in them a presumption of adultery and then consider whether such presumption is rebutted by the appearance of virginity presented by the intervener.

Chalmers v. *Chalmers* (1930) 142 L.T. 654, at p. 654; *Thompson* v. *Thompson* (1938) P. 162, at pp. 169, 170, approved.

Decision of the Supreme Court of New South Wales (*Richardson* J.), reversed.

H. C. OF A. 1956.

LOCKE v. LOCKE

APPEAL from the Supreme Court of New South Wales.

Thelma Phyllis Lorraine Locke presented a petition to the Supreme Court of New South Wales in its Matrimonial Causes Jurisdiction praying dissolution of her marriage with Terry James Locke upon the ground of his alleged adultery with Gloria Armstrong on 22nd May 1953. The adultery relied upon was a single act alleged to have taken place in a sedan motor-car on the night of the date mentioned. The husband and Gloria Armstrong, who intervened in the suit, both denied the adultery.

At the trial before *Richardson* J. medical evidence was given that the intervener Gloria Armstrong had twice submitted herself for medical examination and that upon such examinations it was found that her hymen was unruptured and that she presented all the *indicia* of a *virgo intacta.*

The trial judge found that some degree of penetration had occurred between the husband and the intervener, and, accordingly, pronounced a decree nisi for dissolution of the marriage.

From this decision the respondent husband and the intervener appealed to the High Court.

Further facts and the manner in which the trial judge arrived at his decision appear in the judgment of the Court hereunder.

J. A. M. Pritchard, for the appellants.

S. Ross, for the respondent.

April 27.

THE COURT delivered the following oral judgment:—

We have given anxious consideration to this case and we have arrived at the conclusion that the decree nisi for dissolution cannot be supported. The decree was obtained on the wife's petition on the ground of adultery. A single act of adultery by her husband with the intervener was charged. It was alleged to have taken place in a sedan car on the night of 22nd May 1953.

Evidence for the petitioner was given of facts from which, if they stood alone, an immediate inference of adultery would arise. The husband and the woman denied not only the commission of adultery but also the more important of the incriminating circumstances. But a fact of the greatest significance was proved by medical evidence which could not be questioned and that fact was that the intervener had twice submitted herself for medical examination and that the hymen was unruptured and that she presented all the *indicia* of a *virgo intacta.*

The law is that to constitute adultery as a ground of divorce, some penetration of the woman by the man, must be found to have

taken place. It is not necessary that such penetration should constitute a complete act of intercourse. The act need not be complete but a mere attempt, without penetration, is insufficient.

The learned judge who heard the suit inferred that some degree of penetration had occurred. The questions upon which the appeal depends are first whether the manner in which his Honour arrived at that conclusion can be defended in point of law, and second whether in any event on all of the facts of the case such a conclusion is sufficiently safe.

In *Chalmers* v. *Chalmers* (1) *Hill* J. had a case before him where there was medical evidence of the same kind and he had to deal with the situation which it created in considering evidence which tended to prove adultery. His Lordship said this: " The King's Proctor's intervention (in the case) had been most abundantly justified. Medical evidence had now been given which proved that the intervener had the ordinary condition of a virgin, with the hymen intact. That was not absolutely conclusive. It was just possible that there could have been some limited intercourse which would amount to adultery in law and yet cause no rupture of the hymen . . . that condition put a very heavy burden on the person asserting that the woman had committed adultery " (2).

That passage was quoted with approval by *Langton* J. in *Thompson* v. *Thompson* (3). *Langton* J. expressed again the view that the circumstance put a very heavy burden upon the party claiming that such a woman has committed adultery, but he added: " It is accordingly my duty to be specially careful in making inferences against them, (that is both the respondent and co-respondent). On the other hand no one nowadays contends that the fact that a woman accused of adultery is found to be *virgo intacta* is inconsistent with partial intercourse sufficient to sustain the charge of adultery " (4).

And then he refers to another case in which *Hill* J. presided, *Jolly* v. *Jolly and Fryer* (5). He says: " (That) is an instance in point, and shows that this most careful and discriminating judge was ready to find what he so properly described as a ' very heavy burden ' discharged, where the circumstances disclosed by the evidence warranted such a conclusion " (6).

In *Briginshaw* v. *Briginshaw* (7), and in *Watts* v. *Watts* (8), this Court has explained the burden of proof which is applicable in all cases of adultery.

(1) (1930) 142 L.T. 654.
(2) (1930) 142 L.T., at p. 655.
(3) (1938) P. 162.
(4) (1938) P., at pp. 169, 170.
(5) (1919) 63 Sol. Jo. 777.
(6) (1938) P., at p. 170.
(7) (1938) 60 C.L.R. 336.
(8) (1953) 89 C.L.R. 200.

H. C. OF A. 1956. LOCKE v. LOCKE Dixon C.J. Williams J. Fullagar J.

The actual commission of adultery must be proved affirmatively to the reasonable satisfaction of the court but reasonable satisfaction is not a state of mind that is attained or established independently of the nature of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, a thing which applies in this particular case, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question, whether the issue has been proved to the reasonable satisfaction of the tribunal.

In such matters reasonable satisfaction should not be produced by inexact proofs, indefinite testimony or indirect inferences.

In the present case it was essential that the court determining the issue of fact should weigh the whole of the testimony on both sides with the cardinal fact of the appearance of virginity presented by the intervener, and should consider whether, when all was weighed together, there was sufficient proof to the comfortable satisfaction (if we may use that expression) of the tribunal of facts.

The question would be, was it possible to arrive at that comfortable satisfaction as to the not very probable conclusion that partial penetration had occurred before the man and woman in the car were disturbed.

Unfortunately the learned judge did not take this course. He first formed his conclusion as to the credibility of the witnesses and as to the detailed circumstances. He treated his conclusion as to these matters as raising a presumption of adultery and then turned to the appearance of virginity presented by the intervener for the purpose of considering whether that fact sufficed to rebut the presumption of guilt which he had thus set up.

There are some expressions used by *Singleton* L.J. in *Dennis* v. *Dennis* (1) which his Honour may have regarded as warranting such an approach, but clearly they ought not to be so understood. *Hill* J. and *Langton* J., in the passages already cited, expressed with great clearness what is the true position. There is a single issue governed by a burden of proof and a measure of certainty that remains constant throughout. The crucial consideration supplied in this case by the condition of the intervener, as disclosed by the medical evidence, could not be placed in an independent or separate compartment or category. It necessarily possessed an importance bearing on every part of the proof in support of the issue. The learned judge's finding must therefore be put aside.

(1) (1955) P. 153.

This makes it necessary for us to consider for ourselves whether on the whole case an affirmative finding that some degree of penetration, or partial penetration, occurred before the parties in the car were disturbed, is an inference that could safely be made.

We took the opportunity overnight of considering the evidence more closely than we could in court. No purpose can be served in this case by discussing it in detail. But perhaps it should be said that the medical evidence makes it highly improbable that any but the smallest degree of penetration could have occurred consistently with the physical facts.

On the whole evidence we have no doubt that an affirmative inference that such a thing took place could not be reached with the requisite degree of judicial satisfaction. It is an unsafe conclusion. We think the petition should have been dismissed.

The appeal must therefore be allowed. The order will be :— Appeal allowed. Discharge so much of the decree or order of the Supreme Court of New South Wales dated 29th December 1955 as relates to the petition of Thelma Phyllis Lorraine Locke, No. 2142 of 1953. In lieu thereof, order and decree the said petition be dismissed and that the costs of the petitioner of the suit be taxed and paid by the respondent in the suit, namely Terry James Locke. Order that the costs of this appeal of the respondent to this appeal, Thelma Phyllis Lorraine Locke, be paid by the appellant, Terry James Locke.

Appeal allowed. Discharge so much of the decree or order of the Supreme Court of New South Wales dated 29th December 1955 *as relates to the petition of Thelma Phyllis Lorraine Locke, No.* 2142 *of* 1953. *In lieu thereof order and decree that the said petition be dismissed and that the costs of the petitioner of the suit be taxed and paid by the respondent in the suit Terry James Locke.*

Order that the costs of this appeal of the respondent to this appeal Thelma Phyllis Lorraine Locke be paid by the appellant Terry James Locke.

Solicitors for the appellants, *Lynne Rolin, Nix & Co.*
Solicitors for the respondent, *Teakle, Ormsby & Francis.*

R. A. H.