

[HIGH COURT OF AUSTRALIA.]

MANN APPELLANT ;
PLAINTIFF,

AND

MANN AND ANOTHER RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF THE
NORTHERN TERRITORY.

Matrimonial Causes (N.T.)—Dissolution of marriage—Adultery—Evidence—Standard of proof—Inferences—Matrimonial Causes Ordinance 1932-1949 (N.T.), ss. 8, 15, 17.

H. C. OF A.
1957.
SYDNEY,
Sept. 25;
MELBOURNE,
Oct. 30.
Dixon C.J.,
McTiernan,
and
Williams JJ.

Held following *Watts v. Watts* (1953) 89 C.L.R. 200 that the standard required to prove a charge of adultery is that laid down in *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336 and that this standard will be applied unless and until that decision is clearly overruled by the House of Lords or Privy Council. *Galler v. Galler* (1954) P. 252, where it was held that a charge of adultery has to be proved beyond reasonable doubt, not followed.

Where the question is not what are the facts but what is the proper inference to be drawn from the facts proved, the appellate tribunal is no less competent to decide what these inferences should be than the judge who actually hears the case.

Paterson v. Paterson (1953) 89 C.L.R. 212, at p. 222, and *Benmax v. Austin Motor Co. Ltd.* (1955) A.C. 370, referred to.

In an action brought under s. 8 of the *Matrimonial Causes Ordinance 1932-1949* (N.T.) by a wife, B. against her husband, J., and a married woman, L., for an order for the dissolution of her marriage on the ground of J.'s habitual adultery with L. between August 1955 and May 1956, the judge accepted evidence which established: (1) habitual neglect by J. of B.'s company for that of L.; (2) frequent kissing and embracing between J. and L. in her bedroom in the daytime and at night; (3) the frequent presence of J. and L. in her bedroom during the daytime and at night; and (4) frequent absences from home by L.'s husband during the daytime and at night, thus providing opportunities to J. and L. for acts of affection and visits to the bedroom to

H. C. OF A.

1957.

MANN

v.

MANN.

take place. There was evidence by a half-caste youth of low character that on one occasion he peeped into L.'s house and saw J. and L. in the act of adultery. J. and L. denied that adultery or any lesser acts of familiarity or any kissing or embracing had ever occurred between them. The trial judge believed it was quite possible that J. and L. had committed adultery but he was not satisfied that that was the case. He decided to follow *Briginshaw v. Briginshaw* (1938) 60 C.L.R. 336, but relying on (i) the fact that B. did not leave immediately after some incident pointing to some undue familiarity between J. and L.; and (ii) the obvious belief of L.'s husband that there had not been anything improper between J. and L., the judge was not satisfied that adultery had occurred between J. and L. and dismissed the action. Upon appeal to the High Court,

Held that the only fair and natural conclusion that could be placed upon the evidence was that J. and L. availed themselves of the many opportunities that existed for the consummation of the guilty passion they had for each other and that adultery had been committed.

Decision of the Supreme Court of the Northern Territory (*Kriewaldt J.*), reversed.

APPEAL from the Supreme Court of the Northern Territory.

An action was brought by way of statement of claim in the Supreme Court of the Northern Territory under the provisions of s. 8 of the *Matrimonial Causes Ordinance* 1932-1949 (N.T.) by Betty Lorraine Mann, formerly of Winnellie, near Darwin, Northern Territory of Australia, for a divorce from her husband, John McGrath Mann, on the ground of his habitual adultery between August 1955 and May 1956 with Lydia Allmich, of Winnellie, married woman, and she claimed custody of the two children of the marriage, boys born 24th March 1951 and 25th April 1953 respectively.

After a hearing extending over four days the trial judge, *Kriewaldt J.*, referred to s. 15 of the *Matrimonial Causes Ordinance* 1932-1949 (N.T.) and said he was unable to make a finding of adultery because he was not "satisfied" that the finding would be true, and dismissed the action.

From that decision the plaintiff appealed, by leave, to the High Court.

Further facts and relevant statutory provisions appear in the judgments hereunder.

D. G. McGregor, for the appellant. On the evidence the judge should have made a finding of adultery on the part of the male defendant. It is a matter of inference that there were many opportunities for the defendant and the co-defendant to commit adultery. If, as here, there is a guilty relationship or a guilty

passion, and one of the parties makes the opportunities to see the object of his or her passion, then the chances of inferring adultery are increased. This is not a case where an appeal court is asked to disregard the findings of the trial judge on matters of fact. The question of how a court can deal with circumstantial evidence was dealt with in *Paterson v. Paterson* (1). [He referred to *Cooper v. General Accident Fire & Life Assurance Corporation Ltd.* (2); *Paterson v. Paterson* (3); and *Benmax v. Austin Motor Co. Ltd.* (4).] The judge made an incorrect deduction when he deduced that the petitioner had no real belief that adultery had taken place. The petitioner's belief is irrelevant, and it should not have influenced his Honour in any way. Furthermore, the fact that the petitioner did not leave immediately she knew of familiarity ought not to have been given the weight attributed to it by the trial judge. There is a strong case of circumstantial evidence. His Honour should not have been influenced by the two matters mentioned: see *Watts v. Watts* (5); *Galler v. Galler* (6); *Brudenell-Woods v. Brudenell-Woods* (7); *Briginshaw v. Briginshaw* (8); *Wright v. Wright* (9) and *Gower v. Gower* (10).

There was not any appearance by or on behalf of the respondents.

Cur. adv. vult.

The following written judgments were delivered:—

DIXON C.J. AND WILLIAMS J. This is an appeal by leave brought by the plaintiff Betty Lorraine Mann from a judgment of the Supreme Court of the Northern Territory dismissing an action brought by her against her husband John McGrath Mann and Lydia Allmich as defendants for an order for the dissolution of her marriage on the ground of her husband's habitual adultery with Lydia Allmich between August 1955 and May 1956. The action is brought under the provisions of the *Matrimonial Causes Ordinance* 1932-1949, s. 8 of which provides that any married person domiciled in the Northern Territory may claim an order for divorce on any of the grounds therein mentioned existing or occurring after the marriage of which the first is: (a) Adultery. Section 15 provides that, subject to the last two preceding sections (which are immaterial on this appeal), the court, upon being satisfied as to the existence of any ground, shall make the order or the order

H. C. OF A.

1957.

MANN

v.

MANN.

Oct. 30.

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| (1) (1953) 89 C.L.R. 212. | (7) (1957) S.C. of N.S.W. 12th March |
| (2) (1922) 128 L.T. 481, at p. 483. | 1957. Unreported. |
| (3) (1953) 89 C.L.R., at p. 222. | (8) (1938) 60 C.L.R. 336. |
| (4) (1955) A.C. 370. | (9) (1948) 77 C.L.R. 191. |
| (5) (1953) 89 C.L.R. 200. | (10) (1950) 1 All E.R. 804. |
| (6) (1954) P. 252. | |

H. C. OF A.

1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

nisi claimed, as the case may be. Section 17 provides that every order for divorce or nullity of marriage shall in the first instance be an order nisi not to be made absolute until the expiration of six months or such shorter time as the order nisi directs.

The evidence in the case revolves around three rectangular "Sydney Williams" huts erected in a parallel row each about sixty feet long by twenty feet wide and about thirty feet apart situated facing the Stuart Highway at Winnellie near Darwin in the Northern Territory. Mr. and Mrs. Allmich at all material times lived in the middle hut. The huts which are on approximately the same level have floors of concrete with iron walls and roofs, a space of about six inches being left for ventilation between the concrete floors and the bottom of the walls. The iron walls of the huts contain many holes, one hole in the wall of the middle hut providing a means of peeping into the Allmichs' bedroom which was situated towards the centre of their hut, the kitchen being at one end and a workshop for Mr. Allmich who is an auto-electrician at the other end. The Manns were married at Darwin on 10th June 1950, when he was twenty-two and she was eighteen. He was then in the Royal Australian Navy. In June 1953 Mrs. Mann commenced to live in the hut nearest to Darwin. She was joined by her husband in September or October 1953. While living there they became friendly with the Allmichs who lived next door. The Allmichs are apparently German immigrants. In November 1953 the plaintiff and her husband went to live at a place known as the Eight Mile not far from Winnellie in a hut built behind that in which her parents were then living.

The husband was discharged from the Navy in February 1955. He and his wife were then still living at the Eight Mile. He started to work for Allmich in order to learn the trade of an auto-electrician. The plaintiff went south for a holiday of about a month in June 1955. While she was away her husband boarded with the Allmichs, sleeping in a bed in their kitchen. When she returned her husband suggested that she should live with her parents while he continued to live with the Allmichs. But she would not agree and her husband returned to the hut at the Eight Mile. It seems apparent enough from the evidence that before the plaintiff went south their marriage was drifting towards the rocks due to the fact that her husband neglected her and preferred to spend most of his time with the Allmichs. Rumours were rife and were reaching her as to his relations with Mrs. Allmich. After the plaintiff returned to Darwin her husband promised to mend his ways and spend his spare time at home. He spent the first three evenings with her but after that

resumed his old habits. In October 1955, the Manns returned to live at Winnellie, this time in a hut not forming part of the row of three huts already mentioned but situated only about one hundred and fifty yards away. In March 1956 the Valentine McGuinness incident occurred of which more will be said later. On the evening of 17th April 1956 the plaintiff, who was becoming more and more disturbed by the manner in which her husband was neglecting her and spending his time with the Allmichs, walked across to the Allmichs' hut on three occasions. On the first two occasions she heard her husband quarrelling with Mrs. Allmich in the kitchen and returned to her home. But her husband did not return and about 10.00 p.m. she went back a third time. Finding that the kitchen door was locked, she peeped through the hole in the wall into the bedroom and saw her husband embracing Mrs. Allmich. After an unpleasant scene between the three of them, in which the husband said he had only patted Mrs. Allmich on the back to stop her coughing, the plaintiff returned to her hut and her husband returned a little later. She told him that he would have to stop going over to the Allmichs' and that if he did she would try to make a go of the marriage and he promised that he would stop doing so. But he continued to go there nevertheless and she told him that if it continued she would leave him. About this time she took a job at the Star Milk Bar in Darwin. On 29th April she returned from work somewhat late, having been to a party on the way home, and there was a row in the course of which her husband, besides insulting her by accusing her "of lying in bed with the Greeks" and frightening her by what he described as a display of black magic, twisted her arm and would not let her get into their bed. As a result she started packing her things, later slept in another bed and left next morning with the children. She had at this time two children and was expecting another child in the following January.

The plaintiff and both the defendants gave evidence. The defendants denied that adultery or any lesser acts of familiarity or any kissing or embracing had ever occurred between them. His Honour said that he regarded the plaintiff as an honest and truthful witness but that neither of the defendants made a favourable impression upon him. The plaintiff's evidence does not take the case very far. It is to the effect that at least from the time of the defendant's discharge from the Navy he was neglecting her, never taking her out, spending most of his time away from home, and only returning late at night. His Honour said that the plaintiff believed, probably correctly, that most of the evenings he spent away from home were spent with the co-defendant. But the

H. C. OF A.
1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

H. C. OF A.

1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

plaintiff's case does not rest on her own evidence. It rests mainly on the evidence of neighbours of the Allmichs. His Honour thought that these witnesses, except Mrs. Vincent McGuinness (a white woman married to the brother of Valentine McGuinness who is a half-caste), were obviously biassed against the Allmichs because they were Germans. It is also clear that Valentine McGuinness is a youth of very low character and that Mrs. Saxby has not the best of reputations. But his Honour took all these matters into account before deciding, as he did, to accept the evidence of these witnesses to a very substantial extent. And, whatever their repute may be, it is difficult to understand why these witnesses should want to give false evidence just to vent their spite upon the Allmichs. Their evidence, if it can be fully accepted, is quite decisive. The witness Valentine McGuinness swore that at about 9.00 p.m. one night in March 1956 he peeped through the hole in Mrs. Allmich's bedroom and witnessed Mann and Mrs. Allmich in the very act of adultery of which he gave details. He was at the time living in the same hut as Mr. and Mrs. Vincent McGuinness and Mrs. McGuinness said that she saw him looking through the hole. His Honour must have been satisfied that he was doing so because he said, speaking of this incident, "I believe that he did see something when he looked through a hole in the wall, but I do not believe that he was witness to an act of adultery". At least McGuinness must have seen Mann and Mrs. Allmich in the bedroom together and the "something" that he saw must have been very suggestive because he promptly went to the Eight Mile to tell Mrs. Mann and he must have been confident that Mann would not be home for some time because, when he found her in bed, he tried to get into bed with her but was repulsed and was subsequently summoned for indecent assault.

It is difficult to understand what his Honour meant by this finding because one would have thought that he would have accepted McGuinness' evidence completely or rejected it completely. Be that as it may his evidence at least proves that Mann was in the bedroom with Mrs. Allmich in compromising circumstances. McGuinness was cross-examined to show that he was a person whose evidence could only be worthless but no effort was made in cross-examination to break down the detailed evidence he gave of what he saw or to prove that he was exaggerating. Then there is the evidence of the three witnesses Mrs. McGuinness, Mrs. Saxby and Mrs. Wright. Mrs. McGuinness lived in one of the huts next door to the Allmichs from February or March 1956 onwards. She said that she saw Mann and Mrs. Allmich kissing and embracing

on many occasions, and that this often took place at night. She said that she saw them walking into the bedroom from the kitchen on many occasions. She could see this because the door of her kitchen was opposite to the door of Mrs. Allmich's kitchen. Mrs. Saxby another witness, who lived in the hut on the opposite side of the Allmichs' hut from August 1954 to November 1955, also said that she saw Mann and Mrs. Allmich kissing and embracing on many occasions. She said that she used to lie on the floor of her hut beside her baby in the afternoons whilst the baby was going to sleep and that she could see through the spaces beneath the walls of the two huts the feet of Mann and Mrs. Allmich in her bedroom and that their feet disappeared above these spaces indicating that they had got on to the bed at first with shoes and later after leaving their shoes on the floor. Of this evidence his Honour said that he doubted the correctness of the inference Mrs. Saxby drew from the disappearance of the feet because of the restricted view she had but that he did not doubt that she frequently saw male and female feet in the bedroom of the Allmich hut and that these feet were those of the defendant and co-defendant. The other witness was Mrs. Wright who lived in the hut later occupied by Mrs. McGuinness from early in 1955 or earlier until February 1956. She said that she frequently saw Mann and Mrs. Allmich kissing and embracing and that on one occasion after a passionate interlude she saw Mann carry her into the bedroom and over to the bed. Of this evidence his Honour said that he believed that Mrs. Wright saw something which might be interpreted as the defendant having picked up Mrs. Allmich but that he thought that the rest of the incident was an inference on her part and could not have been seen having regard to the position of the windows.

His Honour said that the evidence satisfied him that there was some substantial degree of affection between the defendant and the co-defendant which had reached the stage where the defendant and co-defendant kissed each other in the daytime under circumstances where they might easily be observed. His Honour also said that he was satisfied that there were many opportunities for the defendant and co-defendant to have committed adultery if they were so inclined, when the co-defendant's husband was at the pictures, as he frequently was, and the only other person in the house was a young child. His Honour also said "I believe it is quite probable that the defendant and co-defendant have committed adultery but I am not satisfied that this is the case". His Honour discussed the degree of proof required and decided that he should

H. C. OF A.

1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

H. C. OF A.

1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

follow *Briginshaw v. Briginshaw* (1), despite the statements in some of the English cases of which the most recent would appear to be that of the Court of Appeal in *Galler v. Galler* (2) (cited in *Barnett v. Barnett* (3); *Knott v. Knott* (4)), that a charge of adultery had to be proved beyond reasonable doubt. The question of proof was recently reviewed in this Court in *Watts v. Watts* (5) when it was said that there was nothing in *Preston-Jones v. Preston-Jones* (6) which required this Court to abandon the standard of proof laid down in *Briginshaw v. Briginshaw* (1). To that opinion we adhere and we propose to continue to apply the standard of proof laid down in *Briginshaw v. Briginshaw* (1) unless and until that case is clearly overruled by the House of Lords or Privy Council. But we are unable to agree with his Honour that the evidence he accepted is insufficient to satisfy the Court that adultery had been committed. Where the question is, not what are the facts but what is the proper inference to be drawn from the facts proved, the appellate tribunal is no less competent to decide what these inferences should be than the judge who actually hears the case: *Paterson v. Paterson* (7); *Benmax v. Austin Motor Co. Ltd.* (8). The evidence which his Honour accepted is clearly sufficient to establish (1) habitual neglect by Mann of his wife's company for that of Mrs. Allmich; (2) frequent kissing and embracing between Mann and Mrs. Allmich in the daytime and at night; (3) the frequent presence of Mann and Mrs. Allmich in her bedroom in the daytime and at night; (4) frequent absences from home by Allmich during the day and at night, in the course of which there was every opportunity for acts of affection and visits to the bedroom to take place. Then there is the evidence of Valentine McGuinness which it would seem impossible to accept at all without providing very strong evidence that he saw adultery being committed or acts from which it could only be inferred that it was about to be or had been committed.

His Honour, we feel sure, would have been satisfied that the charge was proved had he not relied upon two factors which he said stood largely in the way of belief of adultery. These factors were: (1) that the plaintiff did not leave her husband immediately after some incident pointing to undue familiarity between the defendant and co-defendant but only after an incident involving some element of cruelty by the defendant towards her. His Honour said "Notwithstanding the gossip she had heard, notwithstanding what she herself had seen, she remained with her husband until the night

(1) (1938) 60 C.L.R. 336.

(2) (1954) P. 252.

(3) (1955) P. 21, at p. 23.

(4) (1955) P. 249, at p. 251.

(5) (1953) 89 C.L.R. 200.

(6) (1951) A.C. 391.

(7) (1953) 89 C.L.R. 212, at p. 222.

(8) (1955) A.C. 370.

when he accused her of 'lying in bed with the Greeks' and twisted her arm." This rather suggested to him that she herself had no belief in adultery having taken place but that her chief concern until then was with his continual neglect of her. (2) The obvious belief of the co-defendant's husband that there had been nothing improper between his wife and Mann. His Honour said that it was true that Allmich did not even believe that they had reached the stage of kissing each other but that he did not regard Allmich as not normally jealous of his own and his wife's honour. The effect of Allmich's evidence on his mind was that Allmich, at least, had not seen anything to arouse his suspicions. Allmich seemed to be in love with his wife but not to the extent that he would be prepared to share her with another. His Honour said that Allmich's belief in his wife had helped to prevent him from reaching the conclusion that the plaintiff had proved her case.

With all respect to his Honour, neither of these factors should have prevented him from reaching the conclusion that the plaintiff had proved her case. So far as the first factor is concerned, there is no evidence that before 17th April the plaintiff, whatever her suspicions may have been, had seen any familiarity occurring between Mann and Mrs. Allmich. There had been the Valentine McGuinness incident but her husband had stoutly denied the truth of what she had been told and, if she did not accept his denial, she at least decided to give him the benefit of the doubt. They had only been married a short time, there were already two children and a third was expected, and there is no reason to believe that the plaintiff did not genuinely desire the marriage to continue if her husband would sever his relations with Mrs. Allmich. After the incident of 17th April, when the plaintiff for the first time saw the couple embracing, her attitude hardened. Sexual intercourse with her husband ceased and it was left to him to decide finally either to put an end to his relations with Mrs. Allmich or allow the marriage to break up. This reluctance on her part to act prematurely points not to her having no belief in adultery having taken place but to a desire to save the marriage if that was possible. There is no evidence that at that time she knew what Mrs. McGuinness, Mrs. Saxby and Mrs. Wright were prepared to say they had seen and indeed, in their respective cross-examinations, they each said that they were interviewed by the plaintiff's father and then only shortly before the hearing. As to the second factor, Allmich's belief or disbelief in his wife's fidelity should not have weighed with his Honour at all. His Honour was of course entitled to take into account, in weighing all the circumstances of the case, Allmich's evidence that

H. C. OF A.

1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

H. C. OF A.
1957.

MANN

v.

MANN.

Dixon C.J.
Williams J.

he had not seen any familiarity between his wife and Mann. But this evidence was at most of a very negative character. Having decided, despite this evidence and the positive evidence of Mrs. Allmich and Mann to the contrary, that these familiarities were close and frequent, the fact that they were carefully hidden from Allmich tended if anything to prove that they were of a nature to which he would have strongly objected if he had known of them. The real crux of the case is to determine the degree of persuasion which should be induced by the evidence that his Honour accepted. This evidence is of a very compelling character. It is quite unequivocal. The difficulties in the way of watering down this evidence, particularly the evidence by Valentine McGuinness, have been mentioned. But even in its watered-down condition, one complexion and one complexion only can reasonably be placed upon this evidence, and that is that the defendants had a guilty passion for each other and that every opportunity existed for that passion's being consummated. The only fair and natural conclusion is that those opportunities were availed of and that adultery was committed. This conclusion derives some assistance from the rejection by his Honour of the evidence of Mrs. Allmich and Mann that they never kissed or embraced, that they were never in her bedroom together except on the one occasion when Mrs. Mann caught them there, and from Mann's hypocritical evidence that when he was boarding with the Allmichs he was always careful to go out if Allmich was not at home so that he and Mrs. Allmich would not be left alone in the hut with only the baby for a chaperon.

For these reasons the appeal should be allowed.

McTIERNAN J. I agree that this appeal be allowed.

The learned trial judge, *Kriewaldt J.*, has stated the evidence which he accepted in proof of the allegation of adultery; it is unnecessary for me to state it again. That evidence affords clear proof of the adultery alleged. There is nothing in the case to diminish its probative force. The judgment appealed from is, in my opinion, clearly against the evidence and the weight of evidence. In a proceeding under the ordinance of the Northern Territory relating to divorce and matrimonial causes, it is the duty of the court (where, as here, there is no absolute or discretionary bar), "upon being satisfied as to the existence of any ground" on which divorce is claimed, to grant the order. In respect of the standard of proof, the ordinance does not differentiate between adultery and any other ground. The proofs of the adultery alleged in this case, rested on a solid setting of circumstantial evidence, reinforced

with direct evidence of habitual guilty association between the defendant and co-defendant. Besides, the learned judge did not believe their denials of adultery. He said in the course of the reasons for judgment that "it is quite probable they committed adultery", but that, having regard to "the gravity of the issues involved" in the allegation, he was unable to say that he was satisfied that adultery was committed. He added that with evidence of equal probative strength on an issue such as whether a small sum of money was not paid he would be satisfied that it was not. His Honour was, of course, right in making this distinction. However, the learned judge said that under the ordinance, the strict criminal standard of proof is not applicable to an allegation of adultery. I agree in that view. His Honour's ultimate conclusion is that he was not satisfied that a finding of adultery would be "true"; and for that reason he refused to make an order for divorce. With respect, I am of opinion that the satisfaction which the learned judge felt that he should have, is a higher state of certitude than being satisfied, upon the evidence, as to the existence of the ground on which divorce is claimed. It is the latter degree of certitude which s. 12 of the ordinance requires. What led the learned judge to decline to act upon the proofs of adultery which were adduced was the apparent disbelief of the present appellant and the co-defendant's husband that adultery was being committed. Such a consideration, if admissible, should not countervail to rebut the strong inferences of guilt to be drawn from the circumstantial and even more direct evidence that it had been in fact committed.

H. C. OF A.

1957.

MANN

v.

MANN.

McTiernan J.

Appeal allowed. Order of the Supreme Court of the Northern Territory set aside. In lieu thereof let there be an order nisi for the dissolution of marriage on the ground of adultery, not to be made absolute in the Supreme Court until the expiration of six months.

Order that the defendant-respondent, John McGrath Mann, pay the plaintiff-appellant the costs of the appeal. Order that the plaintiff's costs of the action be taxed in the Supreme Court and paid by the defendant to the plaintiff or her solicitor.

Order that an office copy of this order be filed in the Supreme Court by the plaintiff-appellant.

Solicitors for the appellant, *Newell & Ward*, Darwin, N.T., by *Molloy & Schrader*.

Solicitor for the respondents, *John W. Lyons*, Darwin, N.T.

J. B.