

IN THE HIGH COURT OF AUSTRALIA.

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HARRIS

V.

HARRIS & ANOR.

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REASONS FOR JUDGMENT.

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*Judgment delivered at* MELBOURNE

*on* MONDAY, 19TH MARCH, 1945.

HARRIS

v.

HARRIS & ANOR.

REASONS FOR JUDGMENT.

LATHAM C.J.

This is an appeal from an order of the Supreme Court of Western Australia dismissing a petition for divorce on the part of a wife. The petition as originally filed alleged adultery between the respondent husband and Ruby Joyce Francis, the intervening respondent, on 5th October 1943, and also on prior dates. An order was made for particulars of the prior dates. It was not complied with, and the petition was heard and evidence given on the basis that the only allegation of adultery was with respect to 5th October 1943. The proof of adultery on that day failed. The learned Judge, however, found that other evidence showed that there had been an adulterous association between the respondent and the intervening respondent "in October 1942 and other dates subsequent thereto and prior to 5th October 1943". After the evidence had been heard His Honour allowed the petition to be amended by including allegations of adultery in the terms which I have stated. An opportunity was given to the parties to adduce further evidence and to address His Honour. No further evidence was adduced.

It is now objected on the part of the respondent to this appeal that the amendment was wrongly made. The amendment was made in order that the cause could be decided upon the real facts as found by the learned Judge to be established. The making of an amendment was in the discretion of the learned Judge. It was in the interests of justice to determine the case, as I have said, upon the true facts, and the complaint as to the making of the amendment affords no ground for granting special leave to appeal.

His Honour, however, dismissed the petition. I read from the formal order of the Court. His Honour found "that adultery had been committed as alleged in the amendment to the said Petition and after hearing Counsel for the Respondent and Counsel for the

Petitioner dismissed the Petition on the ground that the Petitioner had been guilty of undue delay in the presentation of her said Petition". The petition was presented on 8th October 1943. There had been quarrels and disputes between the parties from about October 1942 in relation to the association of the respondent with Ruby Joyce Francis. There was a bad quarrel in January 1943 and no further marital intercourse took place between husband and wife after that time. In March 1943 she left the conjugal home. The husband paid her a sum of £3 per week until she obtained a position. When she obtained a position he ceased to pay her this amount. On 5th October the wife, a private detective, and another witness made a descent upon the home and, they alleged, found Miss Francis in the bedroom of the respondent. The learned Judge did not accept their evidence - at least he did not find that adultery was proved on that evening. The evidence upon which adulterous association was ultimately based depended upon, first, a letter which was written after the proceedings had started. It was a letter in warmly affectionate terms from the intervening respondent to the respondent. It came into the possession of the petitioner only in December 1943.

The other evidence which was critical in the case was the evidence of a daughter of the petitioner by a previous marriage, Lesley. She gave evidence of association between the respondent and Miss Francis which was, if believed, very plain evidence indeed of adultery. That evidence was accepted by the learned Judge. The events to which she deposed took place some months before October 1943.

The evidence is not clear as to whether the wife was really aware of the facts as to which Lesley deposed. It is rather confused. But it appears to me that, either Lesley told the wife about everything, or Lesley did not. If Lesley did not tell her about these facts before the presentation of the petition, then that evidence has no bearing on the question of the delay. If she did, it was by no means certain that Lesley's evidence of conversations

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and of events would be accepted if not supported by other evidence.

The important evidence of the letter was only obtained after the petition was filed. It is not unreasonable for a woman to hope that things may improve and to abstain for a period from taking divorce proceedings - which are so final and so fatal, hoping that matters may be satisfactorily adjusted. In this case, in my opinion, there was no evidence of unreasonable delay. It was reasonable for the wife to endeavour to obtain better evidence of adultery before actually instituting proceedings. When she thought she had that evidence she immediately instituted proceedings - within three days thereafter. For these reasons there is, in my opinion, no evidence to support the finding of unreasonable delay.

Reference has been made to the evidence given by the wife to the effect that she took proceedings because she heard that her husband was proposing to take proceedings against her (when a sufficient period had expired) based on desertion, and that she desired to obtain maintenance from him. In my opinion that evidence has no bearing whatever on the propriety of the wife's proceedings or upon her sincerity in bringing proceedings. It is, I think, consistent with entirely proper behaviour on the part of the wife.

For these reasons, in my opinion, the appeal should be allowed. A decree nisi for dissolution of marriage should be pronounced as of this date, and the case, including the question of the custody of the child, should be remitted to the Supreme Court of Western Australia. The order for costs in the Supreme Court, which provided for payment of 50 guineas costs to the wife, should remain as it stands, and the wife should have the costs of the appeal to this Court.

JUDGMENT.

STARKE J.

I agree. The only date from which delay could begin in this case strikes me as March 1943, when the wife finally left the matrimonial home. But the delay from March 1943 to October 1943, when the petition was lodged, is not so unreasonable in the

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of this case that the petition should be dismissed. I agree with the order proposed.

WILLIAMS J: I agree.