IN THE HIGH COURT OF AUSTRALIA

SHELDON

V.

SHELDON

REASONS FOR JUDGMENT

Judgment delivered at Sydney

on Thursday, 13th December 1951.

H. E. Daw, Gov. Print., Melb.

C.12280/45

SHELDON v. SHELDON

ORDER

Appeal allowed with costs. Order of the Full Court of the Supreme Court discharged. In lieu thereof order that the appeal of the petitioner (the respondent in this Court) from the order of Tooe J. to the Full Court of the Supreme Court be dismissed with costs.

SHELDON V. SHELDON

JUDGMENT

DIXON J.
WILLIAMS J.
WEBB J.
FULLAGAR J.
KITTO J.

SHELDON V. SHELDON

DIXON J.
WILLIAMS J.
WEBB J.
FULLAGAR J.
KITTO J.

JUDGMENT

This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales allowing an appeal from a judgment of Toose A.-J. Reginald Cecil Sheldon petitioned for a dissolution of his marriage with Lillian Sheldon on the ground of her adultery with George Gough. The suit was defended and came on for hearing before Toose A.-J., who dismissed the petition. On appeal a majority of the Full Court were of opinion that from certain evidence, given by a witness who had been regarded by Toose A.-J. as a truthful witness, an inference ought to be drawn which his Honour had declined to draw. The decision of Toose A.-J. was accordingly reversed, and a decree nisi for dissolution of marriage was pronounced in favour of the husband. The wife now appeals to this Court.

The parties were married on the 19th March 1930. There are two children of the marriage, both daughters, who were born respectively on the 29th July 1937 and the 12th January 1946. The home was at Coonamble where the husband carries on the business of a chemist. The co-respondent, Gough, also lived at Coonamble. No serious trouble between husband and wife appears to have occurred until 1948. In that year the wife commenced drinking to excess. In October 1948 she committed adultery with Gough in Sydney. This adultery was admitted by her, and it is this adultery, which is the foundation of the suit. This adultery, however, was, as the husband for his part admitted, condoned by him. After he had discovered it, and after his wife had confessed her guilt to him in Sydney, he took her back to Coonamble, where matrimonial relations were resumed, the wife promising that she would not drink to excess and that she would for the future have

nothing to do with Gough. The petition alleged that, after condonation, the adultery committed in October 1948 had been "revived" by "matrimonial misconduct" on the part of the wife. It is this allegation that has provided the practical issue in the case throughout. Particulars of the allegation were given in a letter dated 2nd May 1950 from the husband's solicitors to the wife's solicitors. These particulars contain three classes of specific allegations. They are (1) that the wife committed adultery during the year 1949, (2) that she had during the year 1949 drunk excessively and neglected and failed to perform her domestic and parental duties, and (3) that on eleven specified dates a man other than her husband had been in her bedroom with her, or near her bedroom, late at night or in the very early hours of the morning. It should be explained that from March 1949 onwards the wife slept in a bedroom in the front of the house and the husband on a verandah at the back of the house. The dates specified in the third set of allegations did not include the date of an alleged episode which formed the main subject of controversy in the Full Court of New South Wales and in this Court.

The hearing of the case before Toose A.-J. lasted several days. The whole of the evidence was closely examined by the learned trial judge and by the learned judges who composed the Full Court, and it has been carefully considered by us. We find it unnecessary, however, to set it out here in any detail. It will suffice to state shortly the view taken by the trial judge of the evidence given in support of each of the three classes of matrimonial misconduct alleged.

With regard to the allegation of adultery subsequent to the condoned adultery with Gough, the evidence tendered was a written confession signed by the wife in January 1950 in the presence of her husband and a private inquiry agent named Maynard. The wife swore that she had not in fact committed adultery after the condonation, and that the confession, though signed by her, was

untrue. She said, in effect, that she was induced to sign it by a promise of her husband that, if she did sign it and thus enabled a divorce to be obtained "quietly" and without undue publicity, he would permit her to retain the custody of the younger child (then about four years old). The husband in fact took the child away from her shortly afterwards. She also said that she did not know that what she was signing was a confession of adultery. It is possible that by this she meant merely that she did not realise that she was signing a confession of adultery other than the original adultery with Gough, but this possibility is of no importance. The learned judge found that she knew that she was signing a confession of adultery subsequent to condonation, but he was not satisfied that it was a true confession. Indeed, he seems to have been prepared to go further, for in one place he says:- "I have come to the conclusion that the confession is not a true confession of adultery". Both the husband and Maynard, in giving evidence, said that, at the time when she signed the document, she maintained that its contents were not true. The finding of the learned judge was clearly open on the evidence of the husband, the wife, and Maynard, and this finding has not been seriously challenged upon either appeal.

If, of course, there had been clear and cogent evidence of the allegations contained under the third head of the particulars, this evidence, even though by itself falling short of establishing adultery, might have been used to support the view that the confession was true. As will be seen, however, the character of the evidence actually given was such that it could not fairly be used in this way. There was no <u>direct</u> evidence that any "man other than the petitioner" was ever in the wife's bedroom.

Nothing need be said about the second class of matrimonial misconduct alleged against the wife except that, whatever may be the degree of "seriousness" required to constitute

misconduct which will revive a condoned offence, the evidence against the wife could not be regarded as sufficient to establish a revival. Nor was the contrary view really suggested.

The evidence tendered in support of the third class of misconduct alleged was evidence of the petitioner as to noises which he heard during a number of nights when he was lying awake in his bed on the back verandah. The learned trial judge found himself unable to draw any adverse inference against the wife from this evidence. He very properly took into account the strong probability that the husband would be in a state of acute nervous tension, extremely unhappy, and full of a suspicion which seems not unnatural when it is remembered that his wife had not fully honoured her promise about drink and was sleeping apart from him. (She says that she left his bed because of unfounded suggestions which he made about her relations with the milkman). There was no suggestion that the wife had had anything whatever to do with Gough after condonation, and no man had been named in the particulars, but at the trial the husband said that a neighbour named McCarry was the man whom he suspected. McCarry was called by the wife as a witness. His Honour accepted McCarry's evidence that he had never been in the Sheldon home on any night, and stated his view of this aspect of the case in the following passage:- "I do not doubt that the petitioner heard noises in the front of the house at night time. It was a weatherboard house, built from the ground and no doubt he heard his wife on many occasions walking about. He became suspicious and went to his wife's bedroom, but did not find anyone there. On two occasions he watched from his garage. Having received advice from his solicitors, on various nights he did not make investigations because he had no witness, but stated he heard what appeared to be someone leaving his wife's bedroom during the night. I do not intend to go through the various incidents because I cannot find any acceptable evidence that the respondent

ever had any man in her bedroom or in the verandah at night time as alleged in the particulars".

It seems to us to be impossible to challenge this finding of his Honour's. There remains, however, the evidence of a witness named Fuller who deposed to an incident which, as he said, took place on a night which the husband identified as the night of the 26th-27th August 1949. Actually Fuller described two incidents, the other being on the night of the 24th-25th August, but the earlier incident is of small importance, and it is the later which has given rise to the difference of opinion in this case in the Court below. Fuller's evidence, and the evidence of the husband, which was complementary to it, is set out in full in the judgment of Toose A.-J., and it is not necessary to set it out again here. It is enough to say that Fuller, who was watching the front of the house at about 3 a.m. from a park on the other side of the road, described the movements of a man/whom he said he had seen entering wearing a dressing gown the garden of the house, certain coughings and other sounds which he said he had heard, and the extinguishment and re-lighting of a light in the wife's bedroom. He did not actually say that he saw the man approach the wife's bedroom. He did not recognise the man. The husband said that he heard some coughing, and "several minutes" later heard sounds as of a man going out past the back verandah (on which the husband/in bed) and through the back yard. lay

Fuller's evidence was obviously open to several comments. The incident was not included in the eleven incidents mentioned in the particulars of misconduct, and it had evidently not been intended originally to call Fuller. The incident took place twelve months before the evidence was given. Fuller was a partner of the husband, who had taken him into his business in 1944, and he was on unfriendly terms with the wife. His story involved some curious details. The learned judge, who saw and heard him, regarded him as a truthful witness, but he was not prepared to draw any inference against the wife from his evidence. His Honour said:-

"Mr. Fuller gave me the impression of a man telling the truth, and his truthfulness and repute were not in any way attacked, but, taking his evidence in conjunction with the evidence of the petitioner, I cannot find that the man in the dressing gown went into the respondent's bedroom. It would appear that this man, whoever he was, possibly some prowler, got over the gate and passed round the side of the grounds to the back gate. The only evidence connecting him with the respondent is the coughing and the light going off. Had the man been McCarry, I should think that Mr. Fuller would have recognised him, as Mr. Fuller has been a chemist in Coonamble for five or six years and would have known McCarry."

In argument before us some criticism was directed at this passage by counsel for the husband, the suggestion being that his Honour had attached too much importance to the absence of evidence that the man had entered the wife's bedroom. It was said that, even if he had not done so, the inference should have been drawn that he was there in pursuance of what was described as a "guilty assignation". But the reference to the possibility that the man was a mere "prowler" makes it clear, in our opinion, that the learned judge felt himself unable to infer that the wife was in any way responsible for, or connected with, the presence of the man described by Fuller.

The case is of great importance to the parties. The probability is that the marriage has completely broken down. But, after anxious consideration and with the greatest respect for those learned judges who formed a different opinion, we have reached the conclusion that it is not really possible to disturb the trial judge's view of the facts or to draw an inference which he felt himself unable to draw. The burden of proof of the very serious issue in question was on the husband. There was no evidence of any liaison or attraction between the wife and any particular man. The former relations between her and Gough had been broken off. Toose A.-J. had before him not only the evidence of Fuller, but the evidence of the wife denying any knowledge of what is said by Fuller to have taken place. His Honour was in the best position to say

what inferences should or should not be drawn. The evidence of Fuller is open to the comments which we have mentioned. Although he regarded Fuller as a truthful witness, it is not clear that his Honour regarded his evidence as an absolutely and literally accurate account of what occurred. It was rightly conceded that Fuller's evidence was not sufficient to establish adultery, and, the inference of adultery being excluded, it is not easy to formulate any charge which it can be regarded as satisfactorily proving against the wife. We think that an appellate Court could not safely in this case treat the evidence of Fuller as literally accurate, and then say that the trial judge was bound to draw from it an affirmative inference against the wife of conduct such as would revive condoned adultery.

The appeal must be allowed with costs. The judgment of the Full Court must be set aside, and in lieu thereof it must be ordered that the appeal to the Full Court be dismissed with costs.