

IN THE HIGH COURT OF AUSTRALIA

MONAHAN

V.

MONAHAN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on FRIDAY, 11TH OCTOBER 1963

MONAHAN

v.

MONAHAN

ORDER

Appeal dismissed with costs.

MONAHAN

v.

MONAHAN

JUDGMENT

TAYLOR J.
MENZIES J.
OWEN J.

MONAHAN

v.

MONAHAN

The appellant was the petitioner in a suit for dissolution of marriage on the ground that his wife, the respondent, had committed adultery with a man named Schmidt between 11 p.m. on 8th July 1961 and 1.30 a.m. on 9th July 1961 in a room occupied by Schmidt at a hostel in Canberra. Schmidt was joined as co-respondent in the proceedings but died before the case was heard. The suit was tried by Eggleston J. in the Supreme Court of the Australian Capital Territory and, on the issue of adultery, the petitioner failed to satisfy his Honour that the charge made was established. The only matter argued on the appeal was that, on this issue of fact, the learned judge was in error and that the evidence did establish that adultery had taken place on this occasion. In his careful judgment his Honour dealt with the facts in detail and, for the purposes of this appeal, they may be briefly stated.

Over a considerable period of time there had been a close and friendly association between the respondent and Schmidt, to which both the petitioner and Schmidt's wife had objected. Nevertheless the association continued and some time in March 1961 Schmidt left his wife and apparently went to live at the hostel. It is clear too that the relationship between the petitioner and his wife was an unhappy one. On the night in question the respondent and Schmidt were being followed and watched by a private detective named Jones and Mrs. Schmidt. They were seen to visit a hotel in Canberra where they had a number of drinks and danced until about 10.30 p.m. Schmidt then drove the respondent to the hostel

where he was staying and they were followed there by Jones and Mrs. Schmidt and seen to go into Schmidt's bedroom where the light was switched on. Soon after 11 p.m. Jones knocked on the bedroom door and it was opened by Schmidt who was fully dressed. Jones asked him whether he knew that his son may have been admitted to hospital with appendicitis. In fact Jones had invented the story about the son and no doubt his purpose was to find out what was happening in the bedroom. Jones retired to the place from which he and Mrs. Schmidt had been watching and a few minutes later Schmidt left his room and went to a nearby telephone, presumably to get some information about his son. After about 10 minutes he returned to the bedroom and at about midnight the light was switched off. Soon after 1 a.m. Jones and Mrs. Schmidt went to the bedroom door and knocked. They received no reply, forced the door open, went in and turned on the light. They found Schmidt and the respondent lying on the single bed with which the room was furnished, covered by a blanket or quilt. This cover was pulled off either by Jones or Mrs. Schmidt and Schmidt was seen to be wearing only a cotton singlet and underpants. The respondent was fully dressed except for her shoes. Mrs. Schmidt lifted up the respondent's skirt and saw that she was wearing a pair of pants. The respondent then said "Have you seen enough" and tried to strike Mrs. Schmidt. This remark, his Honour thought, may well have been induced by Mrs. Schmidt's action in pulling up the respondent's skirt and accordingly he thought it wrong to treat it as being in the nature of a confession. Jones said in evidence that he had looked for indications such as smears of lipstick, disarranged clothes or hair or marks of semen pointing to the fact that intercourse had taken place but could see none. He said further that he would have noticed it if there had been any such indications.

The respondent's evidence was to the following effect. She said that when they left the dance at the hotel, Schmidt asked her to come to his room to have some coffee. They drove to the hostel and went into the bedroom where Schmidt made coffee which they drank. The room, a small one, was heated by an electric fire and was hot. Some one knocked at the door and spoke to Schmidt who left the room shortly afterwards. While he was away she kicked off her shoes, lay down on the bed and went to sleep. She woke up when Schmidt came back and he sat on the bed, seeming to be very worried. She went off to sleep again and the next thing she knew was the entry of Jones and Mrs. Schmidt into the room. They pulled away a blanket which was covering her and for the first time she realized that Schmidt was lying on the bed and wearing only his underclothes. She herself was fully dressed, except for her shoes, wearing a skirt and blouse with a brooch at the neck and two pairs of underpants. She said also that she was menstruating at the time and wearing an internal tampon. She denied that adultery had occurred.

In the course of her evidence she had sought to minimize the extent of her previous association with Schmidt by saying that many of their meetings were unpremeditated, at least on her part. Of this evidence his Honour said that "the improbabilities, and some inconsistencies, in her account of these incidents made it impossible for me to treat her sworn evidence as decisive in determining whether adultery took place on the night of 8th-9th July. But even assuming that the relationship between the respondent and Schmidt was much closer than she was willing to admit, I am still not satisfied that adultery took place on that night". His Honour went on: "I invited counsel for the petitioner to indicate the sequence of events which he suggested had taken place after the respondent

and Schmidt entered the room and which culminated in their being discovered in the condition described by Mrs. Schmidt and Jones. He, however, merely asked me to find that adultery had taken place at some stage during the period. I have considered the matter for myself, unassisted by any specific suggestion from petitioner's counsel, and have come to the conclusion that if adultery had occurred during the period it would have been most improbable that the parties would thereafter have been discovered lying on the bed in the condition described by the witnesses, and with no observable signs of intercourse having taken place. It is of course possible that intercourse occurred, and that the respondent thereafter readjusted her clothing. But if so, I must either conclude that intercourse occurred before midnight, at which time the light was switched off, or that the readjustment of respondent's clothing and the removal of signs of intercourse took place in the darkened room between midnight and about 1 a.m. There is of course nothing inherently incredible in the respondent's statement that she was menstruating at the time, and if it were so it could explain why the respondent was fully dressed while Schmidt had removed his outer clothing. It is also, I think, of great importance that the private inquiry agent, Jones, who was obviously aware of the importance of detailed observation, was unable to indicate any signs of intercourse either on Schmidt's underclothing or elsewhere. For these reasons, without relying on the respondent's evidence that she went to sleep while Schmidt was absent from the room, I am not prepared to draw the inference that adultery occurred on the night of 8th-9th July.". We read these passages as meaning that while his Honour was not prepared to accept the respondent's evidence as "decisive" of the fact that adultery had not taken place, her evidence, together with the facts to which Jones and

Mrs. Schmidt deposed, raised such a doubt in his mind as to prevent him from being reasonably satisfied that adultery had occurred. His Honour had, of course, the advantage denied to us of seeing and hearing the respondent and it is of significance that, on a number of disputed questions of fact relating to other issues, he accepted her evidence in preference to that of other witnesses. In the light of these matters and upon a careful consideration of the evidence we are not prepared to differ from his Honour's conclusion that the onus of proof of adultery was not discharged. The appeal should therefore be dismissed with costs.