

1921.

Present : Schneider A.J.

EBERT *v.* EBERT.

84—*P. C. Kalutara*, 57,114.

Maintenance—Application by wife—Refusal of wife to live with husband on ground of his adultery—Proof of adultery.

To establish adultery it is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place. The fact may be inferred from circumstances which lead to it by fair inference as a necessary conclusion.

THE facts are fully set out in the judgment.

H. J. C. Pereira, K.C., for defendant, appellant.

Allan Drieberg, K.C., for complainant, respondent.

Cur. adv. vult.

February 14, 1921. SCHNEIDER A.J.—

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This is an appeal by the husband (defendant), who has been condemned to pay a monthly allowance of Rs. 50 for the maintenance of his wife (the complainant), and another sum of Rs. 50 for the maintenance of the child of their union, which is about six months of age. The wife refuses to live with the husband on the ground of his adultery with a Mrs. Daniel, and also on the ground of cruelty. The latter ground, the Magistrate has held, has not been proved, and rightly so on the evidence. The order is resisted on the ground that there is no proof of adultery subsequent to the marriage. The appeal, therefore, turns on this one point. At one stage of the argument I was inclined to think that, as contended for on behalf of the appellant, there was no proof of adultery. But further consideration has made me think otherwise. I accept, as proved by the evidence adduced, that the defendant was, prior to his marriage to the complainant, guilty of adultery with a Mrs. Daniel, who was a Miss White. Her father regarded the intimacy between her and the defendant with such grave disapproval that he asked her and her husband to leave his house. His evidence in this case is that he thought the defendant and his daughter guilty of a criminal intimacy for about two and a half years, and that he had reported the matter to the General Manager of the Railway. The defendant and himself are guards employed in the Ceylon Government Railway. He produced P 16, a letter written by the defendant to Mrs. Daniel. Defendant admits he wrote this letter, but endeavours to explain away its contents. But that explanation will not bear examination. The Magistrate has rightly rejected it. From its contents, from the evidence of Mr. White, and from the evidence of the complainant that the defendant admitted to her his misconduct with Mrs. Daniel, I am satisfied that there is evidence to prove that the defendant prior to his marriage to the complainant had committed adultery with Mrs. Daniel. The question, therefore, is whether, taking that to be a fact proved, adultery subsequent to marriage may be inferred from the conduct of the defendant. I think it may. The complainant and defendant were married in April, 1919. In February, 1920, the complainant came to her mother in Kalutara, leaving the defendant in Matara. The correspondence proves clearly that he promised to allow her Rs. 200 per mensem, and to come to Kalutara himself when he retired in June, 1920. The correspondence also proves that she came to Kalutara with only a sum of Rs. 50 in her hands (P 2). The evidence is that she received another sum of Rs. 60 after she came to Kalutara. In anticipation of her confinement and for her maintenance she was compelled to make purchases from a shop in Colombo and one in Kalutara. The defendant repudiated his liability for these purchases and published a notice in the newspapers. In May, 1920, the complainant wrote to him

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(P 4) about this advertisement. She received no reply. She wrote to him subsequently; her letters remained unanswered. In November she instituted the present proceedings. The defendant admits that since November, 1920; he has been living with Mr. and Mrs. Daniel in Colombo. The letter P 16 proves the guilty affection between the defendant and Mrs. Daniel before the defendant's present marriage. There is some evidence that in March, after his wife left for Kalutara, he took Mr. and Mrs. Daniel to live in Colombo, but this is not the best possible evidence. The defendant, however, admits that since November he has been living with Mr. and Mrs. Daniel in their house. He says a son of his of 24 years of age by a former marriage has also been living there. The presence of his son or of Mr. Daniel in the house is of little value in the light of the relationship which had existed between the defendant and Mrs. Daniel before this event. This living in the same house is the opportunity which has to be taken into consideration. The numerous letters produced by the complainant prove that the defendant had deserted her since February, 1920; that he left her destitute, and took no notice whatever of the birth of the child in June. There, therefore, are three facts which should be taken into consideration: guilty affection, opportunity, desertion of the lawful wife. Considering that defendant was under no manner of compulsion to live with Mr. and Mrs. Daniel, the inference is not only fair, but irresistible, that he has been guilty of adultery with Mrs. Daniel since his marriage. I would quote with approval the following from the judgment of Lopes L.J. in the case of *Allen v. Allen and Bell*¹: "It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because, to use the words of Sir William Scott in *Loveden v. Loveden*,² 'if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights.' To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery is impossible. Each case must depend on its own particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any

¹ (1894) J. R. (C. A.) Pro. 248, at pages 251-252. ² Hagg. Cons. 1, at page 2.

other reasonable solution than that of the guilt of the party sought to be implicated."

"I should, therefore, hold it proved that the defendant has been guilty of adultery with Mrs. Daniel, and that the complainant has sufficient reason for refusing to live with the defendant.

I dismiss the defendant's appeal, with costs.

Appeal dismissed.

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