

WROE v WROE (1967) ZR 54 (HC)

HIGH COURT

BLAGDEN CJ

23rd MARCH 1967

Flynote and Headnote

[1] Family law - Divorce - Cruelty - Essential elements. 15

To constitute a matrimonial offence cruelty has to be (1) grave and weighty and (2) causative of substantial injury to health or a reasonable apprehension thereof.

[2] Family law - Divorce - Cruelty - Nature of conduct.

Conduct which constitutes the matrimonial offence of cruelty need not be aimed at innocent spouse.

Cases cited:

(1) *Noble v Noble* [1964] P. 250; [1964] 2 WLR 734; [1964] 1 All ER 577.

(2) *Saunders v Saunders* [1965] P. 499, [1965] 2 WLR 32; 108 S.J. 114; [1965] 1 All ER 838. 25

(3) *Gollins v Gollins* [1964] P. 46; [1969] 3 WLR 1344; [1962] 2 All ER 891; affirmed [1964] AC 644 (HL).

Hadden, for the petitioner

A O R Mitchley, for the respondent

Judgment

Blagden CJ: This is a husband's petition for divorce based on the 30 grounds of cruelty.

The husband's main complaint against the wife is that over the last three years or so she has displayed a complete indifference to him personally and to the marriage in general.

The parties were married on the 10th of March, 1962. In 1963 the wife 35 left the husband, but for one night only. She left him again in February, 1964, and went down to South Africa. A reconciliation took place in June, 1964, after the husband had been down to South Africa and persuaded her to return. The wife left again in August, 1964, staying away until June, 1965, when once again the husband persuaded her to return. In

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November, 1965, she left him yet again and went down to South Africa. The husband made endeavours to effect a further reconciliation: he went down to South Africa and joined his wife there in January, 1966.

At this time they had had two children born to them, namely, Karen Amanda, born 23rd September, 1962, and Gordon Wayne, born 23rd 5 March, 1965. One of the husband's complaints was that the wife refused him sexual intercourse except on very rare occasions. One of those occasions was in South Africa in January, 1966, and as a result a third child of the marriage. Debra - Anne, was born in October, 1966. But the husband's attempts at reconciliation in 1966 failed of success, and in April, 10 1966, the husband returned to this territory.

[1] To constitute a matrimonial offence cruelty has to be -

(1) grave and weighty; and

(2) causative of substantial injury or damage to health or of a reasonable apprehension thereof (*see Noble v Noble* [1], per 15 *Scarman, J*, at page 579; *Saunders v Saunders*, [2]).

The instances of cruelty relied upon by the husband here are of a slight nature but they constituted a course of conduct which, I am quite satisfied from Dr Oliver's evidence, did have a substantially adverse effect on the husband's health. 20

[2] It is no longer a necessary ingredient of the matrimonial offence of cruelty that the conduct complained of should be aimed at the innocent spouse (*see Collins v Collins* [3]). In the present case it may well be that the wife's conduct was not particularly aimed at the husband. But she must have known that her conduct was wrecking the marriage and that 25 the husband was very unhappy about it. In all the circumstances I have come to the conclusion that her conduct, although not actively cruel, was undoubtedly passively cruel, and it was cruel to the standard requisite for that conduct to constitute the matrimonial offence of cruelty.

The husband has submitted a discretion statement in which he admits 30 to committing adultery on two different occasions with two different women. Both these occasions were during periods when the wife had left him and he was obviously emotionally disturbed. I am satisfied that in those circumstances I should exercise my discretion in his favour.

His petition also contains a prayer for access to the three children of 35 the marriage, in furtherance of an arrangement between the parties, disclosed in the petition, whereby the wife will have the custody of the three children and allow the husband reasonable access to them. The children's ages are 4½ years; 2 years; and 5 months. They should be with their mother. The husband has also agreed to pay the wife maintenance for herself and 40 the three children. I am satisfied with these arrangements.

In the exercise of my discretion I grant the petitioner a *decree nisi* as prayed; I award custody of the three children of the marriage to the wife with access to the husband as may be agreed between the parties or,

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in default of agreement, as may be determined by the court upon application thereto.

The determination of the question of maintenance which the husband will pay to the wife for herself and the children will be referred to the 5 learned Deputy Registrar.

I certify that I am satisfied with the arrangements for the children and I grant the wife permission to take and have the children out of the jurisdiction, to and in South Africa, upon her undertaking to return them to the jurisdiction if called upon by the court so to do.

Liberty 10 to apply.

Petition granted