

Castello Ana Paula Costa Fusillier v Lobo Carlos Manuel Rosado
[2003] SGHC 219

Case Number : DA 46/2002
Decision Date : 24 September 2003
Tribunal/Court : High Court
Coram : Lai Siu Chiu J
Counsel Name(s) : Luna Yap (Luna Yap & Co) for the Appellant; Chandra Mohan (Tan Rajah Cheah) for the Respondent
Parties : Castello Ana Paula Costa Fusillier — Lobo Carlos Manuel Rosado

Family Law – Grounds for divorce – Behaviour – Test to determine whether petitioner can reasonably be expected to live with spouse – Test to determine whether petitioner finds it intolerable to live with spouse – Whether behaviour towards other family members and outsiders relevant

The background

1 Ana Paula Costa Fusillier Castello (the wife) the appellant, was married to Carlos Manuel Rosado Lobo (the husband) the respondent, on 4 April 1978 at the Singapore Marriage Registry; subsequently their marriage was registered in Portugal. Both are Portuguese nationals but have resided continuously in Singapore, the husband since October 1977 and the wife since February 1978. The wife is a housewife while the husband is a pilot with Singapore Airlines. They have two sons aged 20 and 18; the older son has been studying in Australia since 2001 while the younger boy is schooling in Singapore.

2 On 19 April 2002 the wife filed Divorce Petition No. 601422 (the Petition) in the Family Court praying for a divorce on the ground of the husband's unreasonable behaviour, which she particularised. On 13 May 2002 the husband filed an Answer and Cross-Petition to the Petition. He denied the wife's allegations set out in the Petition in particular that he had assaulted her or had mentally and physically abused her. He alleged that it was the wife whose behaviour/conduct was unreasonable, who did not discharge her wifely duties and showed no affection for him, who had refused to have conjugal relationship with him since 1993, and who failed to appreciate what he had done for her and the sons, especially his generosity with money. The husband cross-petitioned for a divorce and prayed inter alia for joint custody, care and control of the children.

3 I should add that after she had filed the Petition, the wife applied to court and obtained, an Expedited Order as well as a Personal Protection Order against the husband. She further applied and obtained a maintenance order against him, on 14 June 2002.

4 On 14 November 2002, the Family Court granted the wife and husband decrees nisi on their Petition and Cross-Petition respectively. The district judge ordered that the ancillary matters be dealt with in chambers at a later stage.

5 The wife was unhappy with the court's granting a decree nisi on the husband's Cross-Petition on the ground of her unreasonable behaviour and appealed to the High Court.

6 The wife's appeal came up for hearing before me on 12 May 2003; I dismissed the appeal and the wife being dissatisfied, has now filed a notice of appeal (in Civil Appeal no. 58 of 2003) against my decision.

The Cross-Petition

7 I can do no better than refer to the grounds of decision (paras 4 to 20) for the facts as

found by the learned district judge, which prompted her to grant the husband's Cross-Petition.

8 The husband's main grievance against the wife was her refusal to have conjugal relationship with or show any affection or intimate closeness towards, him since 1995 to-date. For five (5) years prior thereto, the wife seldom had sex with the husband. He testified he found it extremely humiliating for her to deny him a normal married life, thereby causing him a great deal of emotional and mental trauma. Cross-examined, the husband testified he had tried (hundreds of times) since 1994, to have sex with the wife but she used all sorts of excuses to turn him down. As the marriage was the second for the husband, he did not want to go through another (unpleasant) divorce. He therefore decided he would sacrifice himself for the sake of the two (2) sons (over whom the couple had frequent quarrels/disagreements) until they were older and had left home. Although he did not press the issue of the lack of sexual relationship because of the children, the husband felt over time that the parties could no longer reconcile.

9 The wife did not deny the husband's allegation. Indeed, in her Answer to his Cross-Petition she admitted she had refused to have sex with him even though she knew he felt deprived. In her Answer and in her affidavit of evidence-in-chief, she gave various reasons for such refusal:-

- (i) she alleged that the husband had assaulted her on or about 12 February 1994 (at Shaw Centre carpark) causing her to leave the matrimonial home with the sons and to stay away for 3 days. After that assault, she lost all respect and affection for the husband and could not bring herself to have sex with him. Although she returned to the matrimonial home, it was for the sake of the sons so as not to disrupt their lifestyle and studies, not because of the husband;
- (ii) after the husband cut her personal allowance to \$1,500/- (one of her complaints was that he was tight-fisted), she stopped conjugal relationships with him, as she realised he would not change. She could not bear to have him touch her; she had to have feelings for a person before she engaged in sex and had none for someone she felt had treated her badly.

She had however acknowledged (at N/E 2) that the husband maintained the family throughout the years. Other than refusing to have sex with the husband, the wife claimed she still cooked and washed for the husband (this was disputed by the husband).

10 The court below found the wife gave contradictory testimony in her re-examination when she said (at N/E 27):-

Q: What are your terms for going back?

A: Try to be husband and wife again, respectful.

while her counsel submitted that she returned to the matrimonial home to give the marriage another chance.

11 The district judge found (in para 13 of her grounds of decision):-

It would appear from the evidence that the wife wanted to keep the marriage but did not want to have sexual relationship with the husband. She perceived that she is not at fault and that she is justified in not having sexual relationship with him. The husband however was unhappy with not having sexual relationship and sought now to terminate the marriage. I am of the opinion that the behaviour of the wife was such that the husband cannot reasonably be expected to live with her.

12 The husband's other grounds in his Cross-Petition were, that the wife was violent, hot-tempered, extravagant, very cold and unfriendly towards him; she went to the extent of removing all or most of his photographs from the house. The marriage had become an empty shell. Often, he

came home tired due to jet lag but the wife paid little attention to him. The husband also claimed that the wife disliked many of his friends, giving them the cold shoulder when they came to the house so much so that they did not bother to come again. The wife also disliked his father and his daughter from his first marriage; her behaviour towards them upset him. She was extravagant and obsessed with buying things which included having 200 pairs of shoes. He denied her allegations of violence on his part.

13 The wife denied she was hot tempered or violent and, that she had removed most of his photographs. If she was uncaring or showed him no affection, she was only doing to him what he did to her. She said she disliked only a couple of his friends in Portugal but had never turned away any of his friends in Singapore. She had nothing against her husband's daughter but she disliked his father as much as the father disliked her. She admitted having 100 pair of shoes in Singapore and 4 pairs in Portugal.

14 The court below looked at and applied the principles in, *Wong Siew Boey v Lee Boon Fatt* [1994] 2 SLR 115 (and the English cases cited therein) and concluded that the husband had proved, on a balance of probabilities, that the marriage had broken down irretrievably in that the wife had behaved in a such way that he cannot reasonably be expected to live with her. Consequently, the district judge granted the husband a decree nisi to be made absolute in three (3) months.

The Appeal

15 In her submissions, counsel for the wife pointed out that although the husband alleged that he could not reasonably be expected to live with the wife, he continued to live with the wife up to the date of the hearing of the Appeal. Hence, nothing had changed over the years. Counsel contended that the husband filed his Cross-Petition only because her client had filed the Petition. Counsel argued that the husband had failed to satisfy the requirements of s 95(3)(b) of the Women's Charter Cap 353 (the Act) and his decree nisi ought to be rescinded. The case of *Pheasant v Pheasant* [1972] 1 All ER 587 was cited for the proposition (per Ormrod J) that the irretrievable breakdown of the marriage must essentially be as at the date of the hearing of the petition, not when the petition was filed.

16 Counsel for the respondent pointed out that the court below found as a fact, that the wife knew the husband felt deprived by her refusal to have sexual relations with him since in or about 1993; yet she behaved in a manner she knew would adversely affect the husband.

17 Another finding of fact by the district judge was that the wife gave contradictory evidence which cast doubt on her veracity as a witness. Since the court below had the advantage of seeing the wife and the husband in the witness box, an appellate court should respect the findings made on their testimony.

18 Counsel pointed out that the wife obtained an Expedited Order on an ex-parte basis, without the husband giving his version of the facts. As for her Personal Protection Order (PPO), he had disputed her application. At the hearing, it was agreed between the parties that the PPO would be granted without prejudice to the husband's right to contest the allegations of violence which he had denied. Consequently, the PPO cannot be construed as proof the husband had been violent against the wife. In fact the wife filed several applications at about the same time, as a tactical move to put pressure on the husband to make compromises on the Petition.

19 As for the argument that the husband had been tolerating the wife's conduct since 1993 to-date and therefore it cannot be said he finds it intolerable to live with her, his counsel pointed out that the husband is scheduled to retire from Singapore Airlines' services in December this year. He was/is unable to afford reasonable alternative accommodation for the limited number of days he

spends in Singapore in-between his flight schedules, given his heavy financial contributions towards the sons' education, the wife's maintenance (\$7,000/- per month), household and other expenses. He was also anxious to save money in view of his pending retirement.

20 The fact that the arguments between them arose mainly over the husband's complaint of the wife's spoiling of the sons (and neglecting him in the process) did not detract from the fact her behaviour was unreasonable. Counsel cited instances where the wife had been found by the court below to have acted unreasonably, despite the husband's providing well for the family (which the wife admitted), including a maid, a gardener and all amenities in a large landed property. The wife's allegation that she had to furnish receipts for all her expenditure (since 1994) was not proven. Indeed, she had been found to be extravagant which was one of the husband's complaints, having 100 pairs of shoes (by her own admission). This was also substantiated by her need for monthly maintenance of \$7,000/-, excluding living expenses for the sons and household expenses. Her expenditure was in sharp contrast to the husband's of \$1,500 to \$2,000 per month; he wanted her to be less extravagant in view of his pending retirement.

The decision

21 I start by referring to the case cited and relied on by the court below, that of *Wong Siew Boey v Lee Boon Fatt* (para 13 *supra*). There, the court spelt out the following tests:-

- (i) the question whether the petitioner finds it intolerable to live with the respondent must be answered subjectively; whether his/her attitude is reasonable is irrelevant;
- (ii) in dealing with behaviour, the relevant question is whether the petitioner can reasonably be expected to live with the respondent. It is for the court to answer this, using an objective test, having regard to the personalities of the individuals before it, however far these may be removed from some theoretical norm, in the light of the whole history of the marriage and their relationship;
- (iii) the court must look at behaviour by taking into account the cumulative effect of behaviour. Any conduct, active or passive, constitutes behaviour. The behaviour is not confined to behaviour towards the respondent: the behaviour may have relevance to the marriage although it is towards other members of the family or towards outsiders. Any and all behaviour may be taken into account, including omissions, where it has reference to the marriage.

I was of the view that the district judge correctly applied the above guidelines when she granted the husband a decree nisi on the Cross-Petition; consequently I dismissed the wife's appeal.

22 The governing principle in appeals must be borne in mind — the court below had the advantage of seeing the couple's demeanour when they testified; it was in the best position to assess the veracity of the wife and husband. Having made that assessment, the court below preferred the testimony of the husband. A court sitting in an appellate capacity should be slow to go against the findings of fact made by a trial judge save in exceptional circumstances, which were not present in this case. I was therefore not prepared to depart from the findings made by the court below.

23 The impression I gained from evaluating the notes of evidence of the hearing below was, that the wife's behaviour was indeed unreasonable; the husband had thus satisfied the subjective test set out in *Wong Siew Boey's* case, under s 95(3)(b) of the Act which states:-

The court hearing a petition for divorce shall not hold the marriage to have broken down

irretrievably unless the petitioner satisfies the court of one or more of the following facts:-

- (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

24 I should make one observation at this juncture. In the Particulars of the husband's unreasonable behaviour under para 9(d) of the Petition, the wife referred to a February 1994 incident where the husband allegedly assaulted her at Shaw Centre carpark; this took place eight (8) years before she filed the Petition. If she was able to continue living with the husband thereafter (save for the 3 days she stayed away immediately after the incident and when she was on holiday), it cannot be said she found it intolerable to live with him, particularly when the next alleged incident of assault took place more than five (5) years later on 23 November 1999 (para 9(g) of the Petition).

25 From my reading of the testimony in the court below, the wife came across as an unreasonable person who, despite acknowledging that the husband's complaints were valid (see paras 9 and 13 *supra*) was not prepared to accept that such behaviour entitled him to a decree nisi on the Cross-Petition. She expected indeed demanded to be well maintained by him and yet, she was not prepared to carry out her wifely duties including having a conjugal relationship with him, even though she knew he felt deprived. It was a punishment she decided to mete out to him for his assaulting her back in 1994. Either it did not cross her mind or she would not accept that, her behaviour was equally unreasonable and intolerable to the husband.

26 My view that the wife was an unreasonable person was reinforced by her conduct subsequent to my dismissal of her appeal. Letters from counsel suggested that the wife was furious at losing her appeal. She wanted the husband to leave the master bedroom immediately even though the husband paid the rent for the house and she had maintenance of \$7,000 per month from him while continuing to reside under the same roof.

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