Calcutta High Court
Adelaide Mande Tobias vs William Albert Tobias on 8 March, 1967
Equivalent citations: AIR 1968 Cal 133, 71 CWN 605
Author: P Mukharji
Bench: P Mukharji
ORDER P.B. Mukharji, J.

1. This is a wife's petition for divorce on the ground of "adultery coupled with desertion without reasonable excuse for 2 years or upwards".

2. The wife Adelaide Mande Tobias states in the petition the following facts. She was married on May 15. 1935 to the Respondent William Albert Tobias at the Church of the Secred Heart of No. 3 Dha-ramtala Street, Calcutta within the jurisdiction of this Court. The Marriage Certificate has been proved and marked as Ext. A in this suit. Both the wife and the husband are domiciled In India and are Roman Catholic Christians.

3. After marriage they lived and cohabited at 25 Dharamtalla Street and also at 9 Crooked Lane, Calcutta, both within the jurisdiction of this Court. There are three issues of the marriage now living: one is John Andrey Tobias, daughter born on March 20, 1936; Daphne Tobias, daughter born on August 26, 1938; and Harold Tobias, son born on April 26, 1940. It was immediately after the birth of the son that the respondent-husband is alleged to have deserted the petitioner. The matrimonial home was of a very short duration, lasting barely five years.

4. The petitioner's case is that the husband's desertion commenced in 1940. Therefore, this desertion has continued for about 26 years before the presentation of his petition. It is said in the petition for divorce that in June 1940, the husband left her and packed his bags and baggages and for ever left the matrimonial home, then at 9 Crooker Lane, Calcutta, with the intention of never again coming back to the petitioner for the purpose of cohabitation with her. It is alleged in the petition that he was ever since remained separate and that the husband has refused all the requests of the petitioner to return to her. She has supported this case by her evidence given in this Court.

5. Apart from desertion, the other allegation of the wife made in paragraph 6 oi her petition is that the respondent ever since the desertion in 1940, frequently committed adultery with various women of the town, whose names and identity were unknown to the petitioner. This allegation makes it difficult for the Court to find out why in such circumstances, where the husband not only deserted the wife but also committed adultery for so many years with the women of the town, that the wife was patient enough to take 26 long years to bring the present proceedings for divorce. The question is: why did not she come much earlier? This Court had throughout these proceedings a very anxious time to find out a plausible answer to this question.

6. The other allegation of adultery it made in para 7 of the petition which states that on January 6, 1966 at 90-A, Dilkhusa Street, Calcutta the respondent committed adultery with a woman of the town whose name and identity are unknown to the petitioner. It is this incident of January 6, 1968 that the petitioner has tried to prove by calling a private detective by the name of Joseph Okeeffe.

whom she had employed. I shall presently discuss that evidence along with the evidence of the petitioner given In these proceedings.

7. The necessary averment is made that she has not been accessory to or connived at or condoned the said adultery alleged in the petition.

8. Continuing with the account of facts in the petition for divorce it is alleged that the respondent was employed by Jessop and Co. Ltd., at 63, Netaji Subhash Road, Calcutta and to the best of the petitioner's belief was in receipt of a monthly pension of Rs. 350 and is also possessed of other assets and other properties assessed by the petitioner to be of the value of Rs. 8000. On that basis and on that allegation there is also a claim for maintenance. Mr. Dutt, learned counsel for the wife, has given up the claim for maintenance. The wife in her evidence before the Court in answer to question 51 has also said that she is not pressing her claim for maintenance. Therefore, it will not be necessary to pursue this point of maintenance.

9. In my long experience on the Bench I have never come across in this Court nor do I remember to have read of any case or authority of other Courts of other lands where a wife moved the Court after 26 years of desertion by her husband where the allegation was as. It is in the present case, that the husband committed adultery with women of the town ever since he deserted the wife 26 years ago.

10. It is sometimes said that the devil knoweth not the mind of man. Equally it should follow that the devil does not know the mind of a woman. Perhaps the cynic of this age will say that even God does not know it either. What is perhaps truer is that no man knows the mind of a woman. I am not thinking of rare exceptions but most of the men who proudly proclaim to know the feminine mind are either romantic or foolish. Besides, this court must necessarily suffer from the handicap of the situation of a man having to judge a woman. It is all the more difficult, specially in this case, because the wife gave evidence before me in a manner which, I hold, was honest, frank, candid and impressive. In coming to this conclusion, I hope T am not duped by am charm. She and her demeanour in the witness box had little to recommend by looks and charms but candour and long suffering were writ large on a very thin weather worn face. She is now about 55 years of age with all her children grown up and settled. She did not seek the divorce when perhaps she needed most, when she had youth and passion to built another home She did not give me the impression that she was seeking this divorce in the evening of her life at the age of 55 years for any delayed fancy for remarriage. She did not give me the impression that she was of that type. In fact, she did not say so in answer to the very pointed questions from Court After a series of questions from this Court on this subject this is what she finally answered in Qs. 33 and 34:

"Q. 33. When you needed most you never sought for a divorce or maintenance? That is so.

Q. 34. Now that you do not need to bring up your children any more after 28

years, they are all grown up and settled, what is the point of seeking a divorce?--
Just I do not know."

11. The answers impressed me as coming from a person who was not hiding anything from C

12. I put this very same question to Mr. Dutt, the learned counsel for the petitioner and he said that the reason perhaps of seeking this divorce after so many years was that she did not want to have any more the stigma of being known as "Mrs. so and so" when the husband was charged with adultery. But that submission of Mr. Dutt did not impress me. First, because that was not the case made by the petitioner herself in her evidence. If she thought that there was a stigma attaching to the name of Mrs. Tobias and it was to get rid of that name that she wanted the divorce now after 26 years, then she could have said so in evidence. But this is exactly what she did not say; and secondly, because if the stigma was there then why carry the stigma for 26 years and not make an end of it much earlier. I have come to the conclusion that this is not the reason for this delay.

13. In this situation the Court wanted to consider very carefully the factual and the legal position; the fact how far adultery is proved and to test the evidence of the petitioner by some' cross-examination; and secondly, to examine arguments on the question of the long delay after desertion in presenting the petition and how far such delay affects in law the present claim for divorce. But the difficulty was that the suit was undefended and the Respondent husband did not enter appearance.

14. In the circumstances, the Court, therefore, requested Mrs. Monjula Bose to act an Amicus Curiae to help the Court: first by cross-examining the evidence given by the petitioner and the private detective Mr. Okeefee and secondly, by arguing the points of law about desertion and delay, their effects on divorce proceedings and on the standard of proof required for establishing adultery, for they all involve significant and important points of law.

15. Mrs. Bose accepted the Court's request to act as Amicus Curiae. She has heen commendably thorough in analysing and cross-examining the evidence and placing all the relevant law and authorities before the Court. Her cross-examination has been brief, to the point and relevant. As Amicus Curiae she has not taken any partisan attitude and has throughout acted according to the highest traditions of the Bar of this Court. She Pointed out that the evidence given by the petitioner was impressive and in particular the answer to q. no. 34 which I have quoted above. This is greatly obliged and deeply Indebted to Mrs. Bose for the help given. The Court records its high appreciation of an admirable tradition admirably discharged with great ability by Mrs. Bose.

16. On the point of desertion the evidence is that of the wife petitioner. In answer to question 18 asking her why the husband left her, she said "he just went out and did not come. We had a misunderstanding and he packed his bag and baggage and just left the house". In further answer to question 19 she said that she did not do anything to cause him leave the home. It is also her evidence in answer to question 18 that he did not at any time thereafter come back and live with her. She has also said that she asked him to come back and live with her but he did not do so. It is her evidence that he left very soon after the birth of his son on the 26th April 1940. As the husband has not come to defend this evidence therefore goes uncontradicted and unchallenged.

17. On adultery there is the evidence of the wife as well as the evidence of Mr. Joseph Okeeffe. Petitioner's evidence is that she employed this private detective. In answer to questions 38 and 39 to the Court she said that she heard something against her husband round about Christmas time in 1965. It is her evidence that after her husband left her in 1940 the first time that she complained against him and his character was in 1965, that is 25 years after desertion. See her answers to questions 40 and 41. She relied on the report of the detective who was supposed to have informed her that the husband was going about with a woman. She gave the detective a photograph of her husband. This photograph was secured by her daughter. It was distinctly put to her in cross-examination by the counsel appearing as amicus curiae that since the husband's desertion in 1940 and until the 6th January 1966 she did not know that the husband committed adultery with a woman of the town. Her answer to question 67 is that before the 6th January 1966 she had no idea what the husband was doing and what kind of life he was leading. She thus contradicted her allegations in paragraph 6 of her petition that he had committed adultery since the desertion. See also her specific answer to question 72. What she ultimately said in question 74 is that "I would be hearing from different people -- I could not believe it until I found out." She practically admits that the statement in paragraph 6 of her petition is not correct and for this purpose see her answer to questions 75 and 76. The evidence is that it was really the 6th January 1966 which is the crucial date on which she came to know that the husband committed adultery with a woman of the town.

18. On this solitary incident of the 6th January 1966 hangs the whole charge of adultery in this case. The only evidence on this point is that of Joseph Okeeffe, the private detective. He produced no diary of his detective work although he has one. See his answers to questions 16-17. The gist of his evidence is that in January 1966, presumably on the 6th day of January at about 7.30 in the evening, he followed in a taxi the respondent husband from his flat, who in another taxi drove up to Park Street in Calcutta, right on to Chowringhee and near Lloyds Branch of the National and Grindleys Bank. There he is supposed to have seen the husband talking with some common women of the town (Q. 20). His further evidence is that one of these women got into the cab and then the husband and the woman drove back to the husband's flat. The detective followed them up in a taxi and is supposed to have found out that they entered the husband's flat. The detective loitered near about for 45 minutes to one hour when the woman came out. The woman went to the tram depot and boarded a tram and left. According to his evidence he immediately came and informed the petitioner wife (Q 22). In cross-examination to Mrs. Bose, amicus curiae, this detective witness said that his evidence that there was nobody in the flat of the husband at the time when he entered there with the woman of the town and really based on hearsay from people in the lorality or neighbours. But it is difficult to make out what exactly this detective was trying to say on this point Mrs. Bose brought the defect in cross-examination in answer to question 36 which is as follows. "It may be there were other people as well? -- Could be possible -- he went with this lady in the flat himselt" Then again in answer to question 38 in cross-examination he says: "You have no personal knowledge whether she was alone in that flat? -- No personal knowledge." On the point whether this detective witness knew this woman to be a woman of the town, naturally the witness said that he had no personal knowledge on that point but he saw that she was an Indian lady. His evidence is that he used his plain eyes to judge that she was a common woman of the town. It if the evidence of this detective witness that he saw the husband only that day and there was no other occasion. He has also admitted in answer to question 71 as follows: "You could not possibly say as to whether who else was

in the flat of Mr. Tobias? Yes." That is all the evidence on adultery.

19. Having analysed the evidence on desertion and adultery, it will now be appropriate to examine first the arguments for and against desertion in this case. Desertion is defined under Section 3(6) of the Indian Divorce Act as implying "an abandonment against the wish of the person charging it." Leaving the matrimonial home by consent or separate living by mutual consent, express or tacit la not "desertion" within the meaning of this law. Any and every departure from matrimonial home is not "desertion". It has to be an abandonment against the wish of the person making the charge of desertion. Again desertion in order to be a ground for divorce under the last clause of Section 10 of the Indian Divorce Act must be desertion "without reasonable excuse". In other words, if desertion is with a "reasonable excuse" it cannot be a ground of divorce under that section.

20. Mrs. Bose on the basis of the evidence above makes this criticism that this desertion has not been proved in fact and law on the ground that the whole case of the wife is that he left due to mere misunderstanding. That in her submission is not enough to establish desertion in law and within the meaning of Section 3(9) of the Indian Divorce Act read with the last clause of Section 10 thereof. While appreciating the force of her submission it is difficult for this Court to accent it because the wife has definitely pledged her oath to say that the husband not only left but when she had asked him to come back, he did not. Reading the evidence as a whole on this point I have no doubt that the husband left against the wish of the wife. That is abandonment against the wish of the wife who is making the charge of desertion and therefore within the statutory meaning and definition of desertion. The evidence also establishes in my view there was no reasonable excuse for this desertion by the husband. I come to that conclusion all the more readily because this evidence of desertion has not been contradicted or challenged by the husband. I therefore hold that the wife has proved desertion in fact and law in these proceedings.

21. The next important point of law is what is the effect of delayed presentation of this petition on the charge of desertion. The contention is that delay does not defeat the charge of desertion. In Perry v. Perry, 1952 P. 203 the English Court of Appeal had occasion in recent times to discuss this law It is said there that desertion as a ground for divorce differs from the other statutory grounds of adultery and cruelty, in that the offence founding the cause of action is not complete until the action is constituted. i.e. the petition for divorce is presented. Indeed it is said there that the conception of condonation either in strictness or by analogy has no application to the continuing matrimonial offence of desertion as defined in Section 1(1)(b) of the Matrimonial Causes Act, 1950. Desertion as a ground for divorce was not a part of the traditional law of England appearing in its ecclesiastical and common law as providing a foundation for a decree of separation. The reason for looking into the English Law, which I would have liked to avoid is that Section 7 of the Indian Divorce Act makes it necessary by expressly providing that subject to the provisions con-

tained in the Indian Divorce Act, the High Court shall in all suits and proceedings here-under act and give relief on "principles and rules" which in the opinion of the said Courts are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Reference to the English law, and the principles and rules thereunder, therefore, to some extent is unavoidable in the present context.

22. The only remedy for desertion in old English Law was a suit for restitution of conjugal life. It is in that context that Evershed M R. expressed the view in 1952 P. 203 at p. 211. that desertion as a ground of divorce differed from the statutory grounds of adultery and cruelty in one important respect under the Matrimonial Causes Act 1937. The learned M. R. observes at that page:

"The offence founding the cause of action is not complete, is, (as if it were) inchoate, until the action is constituted. If one spouse has committed adultery or has treated the other with cruelty, the latter has an accrued right to petition for divorce. He or she may at once repudiate the marriage and is no longer bound to affirm it and reinstate the offending spouse. The deserted spouse has no such right, no such election. If the deserting spouse genuinely desires to return, his or her partner cannot refuse reinstatement. It is moreover as Denning L. J. observed in Bartram v. Bartram, 1950 P 1 contrary to public policy that the deserted spouse desiring a resumption of cohabitation and bound to affirm the marriage should be embarrassed in efforts for reconciliation. '

23. It was therefore suggested in English law that that contention could not properly be applicable to the offence of desertion prior to the presentation of petition.

24. Evershed M. R. points out in 1952 P. 203 at p. 212, that desertion postulates both: (i) the factum of separation and (ii) the animus deserendi on the part of the deserting spouse There can be no difficulty in accepting these two basic postulates. What becomes difficult on the basis of this decision in 1952 P 203 is the proposition that seems to emerge, that sexual intercourse between a deserted and a deserting spouse unaccompanied by the setting up of any matrimonial home or by any intention to do so cannot end or interrupt the state of desertion whether the deserter is the husband or the wife and whether or not the intercourse leads to the birth of a child.

25. It may be difficult in India to accept the full implication of that proposition both in law and fact. Sexual intercourse between a husband and a wife is one very cogent act to overcome those two very postulates viz. (a) the factum of separation and

(b) the animus deserendi. The view that such sexual intercourse between the husband and wife can continue without the intention to set up what is called the "matrimonial home" appears to be a refinement more suited to legal dialecties than to common sense and domestic life, as usually understood It is possible for a husband and wife to remain husband and wife, happy and contented, without sexual intercourse. I do not say that such instances are frequent but they are not rare on grounds of health, self-restraint and particular notions and brands of morality and companionship. It is equally possible for a de facto and de jure husband and wife to have sexual intercourse and not to have a happy home, or the "matrimonial home", as the English Court of Appeal would like to describe. I shall not enter into the discussion of what is a "home". In a very old accepted Sanskrit tradition in India the very modern idea is epitomised by a very famous and celebrated saying: "Grihini Grihamuchayate" -- the wife is the home, --wherever the wife is, the home is. There is no other matrimonial home in that sense of the term according to the Indian law. It is not the building of bricks and mortars or the apartment or the flat which is the "home".

25a. This brings me to certain notions of a fastly changing human society in the modern age, where the whole expression and notions of married life, matrimonial home and matrimonial behaviour are acquiring new and strange proportions and dimensions. Qualitatively and quantitatively matrimonial ideas, like other ideas are changing. Being in a field of intimate conduct, these ideas change slowly but change they do. Any one familiar with the Kinsey Report or Judge Lindsay's report would see some of the symptoms of these changes in the modern age. The English Court of Appeal also discusses some Australian cases and the ratio of those cases quoted at p. 219 in 1952 Probate appears to indicate that the desertion was not stopped or condoned by what is called "casual acts of intercourse" on the ground that the matrimonial relationship has not thereby been re-established. This meant a definite departure from some of the older authorities. Evershed M. R. in 1952 P. 203 disapproved of the observation of Lord Merriman P. in Viney v Viney, 1951 P 457 where the very definite opinion and conclusion were expressed that an act of sexual intercourse by a husband with his wife was absolutely conclusive (in the absence of fraud on her part') of the fact that he had thereby reinstated her as his wife and that was so although the express object of the husband's actions was to effect a reconciliation. The significant observations of Lord Merriman P. were made at p. 465 of 1951 Probate, where the learned President of the Court stated them in the following terms:

"I venture to say that the judge misdirected himself because he ignored the vital fact that in 1950 P. 1 there was lacking the essential element, which is present in this case we are now deciding, that the husband petitioner had voluntarily had sexual intercourse with his wife, and that Henderson v. Henderson and Crellin, (1944) AC 49 decides that it is absolutely conclusive of the fact that he has thereby reinstated her as his wife."

26. The view of Lord Merriman P., which was disapproved in 1952 P. 203 appears in my judgment to be more consistent with the view that the Indian courts would like to accept. I for one sitting here in this Court, in deciding this case would prefer the view expressed by the English Courts in 1951 P 457 and 1944 AC 49 to the one suggested in 1952 P 203 on this particular point.

27. No one for a moment can dispute the basic principle which was voiced in the decision in 1950 P. 1 that is mere resumption of cohabitation perhaps casual in nature, after desertion by one spouse, must necessarily and always mean resuming a state where a matrimonial home is again set up and that invariably involves a bilateral intention on the part of both spouses so to set up that home. But the question is that this intention has got to be gathered by conduct. The point is, if sexual intercourse is a conclusive conduct. It was said in 1951 P 457 that an act of sexual intercourse by husband with his wife was absolutely conclusive, except of course in the case of fraud, of the fact that he has thereby reinstated her as his wife and that was so although the express object of the husband's action was to effect a reconciliation The question thereafter is not one of principle any more, but whether the Court should accept the test of sexual intercourse as a sufficient indication of the intention to resume matrimonial status? To accept the view expressed in 1950 P 1 means that the Court really will have no obvious guide to find out such an Intention. Intention naturally is basically subjective, mental and phy-chological, but a Court of Law has got to go by certain objective standard to find out that state of mind. I should have thought that the sexual-intercourse was an act of such Intimacy and objective standard that it should normally be conclusive proof of such Intention unless

there are other obvious facts which contradict it. Any other view would really mean that the Court is taking up the position that a wife could be used only as a mistress for the purpose of sexual Intercourse and that is to be iustlfied at the altar of the problematic process of reconciliation which appeared to be the main reason with Denning L. J. in 1950 P 1 at pp 6-7. As at present advised I am unable to commit the Indian Courts to the view that Denning L. J. expressed there. I do not regret my inability to treat sexual intercourse in such circumstances as mere Inconclusive experiments at reconciliation. I am all for reconciliation but not to the extent of considering the act of sexual intercourse as an overture in the process of reconciliation. I would, therefore, draw the curtain when the sexual intercourse is voluntary, even though it is casual and hold it to be conclusive.

28. It will be plain from the decisions already cited of the English Courts on this point that the English Law is at present somewhat confusing and appears to be in the melting pot. This perhaps is due to the fact that conception of marriage and married life, relationship between husband and wife, the nature and character of the matrimonial home are all undergoing a tremendous change, ideological, sociological, emotional, psychological and behaviouristic. The judicial opinions, therefore, are also naturally reflecting the inevitable confusion that such change brings about, of which one more illustration is found in the more recent decision of the English Court of Law in Pizey v. Pizev and Stephenson, 1961 P. 101 where on the fact it was held that the desertion had been terminated by the husband's course of conduct consisting of regular visits to and intercourse with the wife (which also con-doned adultery), and was such that the separation thereafter became consequential and it was held that the husband had failed to discharge the onus on him of showing any subsequent desertion by the wife, and therefore, his petition was dismissed.

29. I am satisfied on the evidence in this case that there has been desertion by the husband of the wife. I am also of the opinion that the unusual delay of 26 years in this case from the date of desertion in filing this petition by the wife for divorce does not defeat in the facts of this case her right to claim this relief. I hold that the reason for this delay by the wife in bringing the proceedings, although not said at all in so many words, is plainly that she had to bring up two daughters and a son during those years. As I could understand from the net effect of her answers to the various questions put to her in examination is that she did not think that until the children were brought up and educated and settled it would be wise for her to have the divorce for very often such an event affects their education and mental and moral upbringing.

A wife's reluctance to lose the status of a wife and become a divorcee during the cru cial period of the education and bringing up of her children by the unsuccessful marriage is understandably natural and explains the delay in this case. That I think is the major inarticulate premise throughout the answers given by the petitioner wife in these proceedings.

30. It is not, therefore, necessary to subscribe to the view as at present advised that no amount of delay can ever condone desertion and that the right continuous Indefinitely till divorce proceedings are brought, the view expressed in some of the cases discussed above, because I hold on the fact here that the delay is explained and by a very good reason just stated by me. The general question whether delay at all in any case can defeat the ground for desertion, therefore, I do not answer because it is not necessary for the disposal of this case. I shall only express the view that here again

the Courts will be well advised not to take any dogmatic view that no delay condones desertion for it is just possible in an appropriate case the Court might consider that passivity or long delay is proof that it was not desertion in law, but living separately by consent, express or tacit. It will depend on the facts of the case under consideration. At any rate I am unwilling to subscribe to any general proposition or a general formula on this point.

31. I come now to the petitioner's case of adultery against the husband.

32. Mere desertion, however, is not a sufficient ground for divorce by wife under Section 10 of the Indian Divorce Act. As already pointed out from the section itself it has got to be adultery coupled with desertion without reasonable excuse for two years or upwards. That is the language of the Statute. Therefore, a wife can only succeed in obtaining a dissolution of her marriage if she can prove in this case adultery coupled with desertion without reasonable excuse for two years or upwards. Desertion per se will not be a ground for dissolution under Section 10 of the Indian Divorce Act. Desertion per se, however, may be a ground for judicial separation under Sections 22/23 of the Indian Divorce Act.

33. That was the view expressed about Section 10 of the Indian Divorce Act by the Madras Full Bench in Siluvaimani Ammal v. Thangiah Nadar . Incidentally, this Madras Full Bench decided that on the mere evidence that the husband was keeping a woman it was impossible to return a finding of adultery on the part of the husband. This aspect will be relevant later on when I consider how far adultery has been proved in this case and what are the standards of proof in adultery in matrimonial proceedings. Similar view on the construction of Section 10 was expressed by the Lahore decision in Glorious Jacob v. Mrs. Rosie Jacob, AIR 1939 Lah 404. An old Calcutta decision also took the same view in Fowle v. Fowle, (1879) ILR 4 Cal 260 The well-known English decisions on this point are Wood v. Wood, (1888) 13 P D 22 and Lapington v. Lapington, (1888) 14 PD 21.

34. Mrs. Bose appearing as Amicus curiae has contended with considerable force and logic that the evidence in this case given both by the wife and the private detective Mr Okeeffe is inadequate to establish adultery. Her main criticism of this evidence is that it does not establish beyond doubt the commission of the act of adultery by the husband. She develops her argument in this way. The evidence of the wife that the husband has been going about with a woman of the town was utter hearsay and that she never saw even any single instance of such company kept by the husband although she and her husband were in Calcutta all these twenty six years. The wife relies only on one solitary instance which was reported to her by the private detective Mr. Okeeffe, whom she employed after 26 years of description by her husband and who has also given evidence in this case. Mrs. Bose submits that this evidence should be rejected by the Court on the ground that it is unreliable and insufficient. Mrs. Bose marshalls her argument on this point in different steps.

35. To discover a woman to be a woman of the town on the 6th January in the winter month of Calcutta from a distance by her dress and cosmetics is criticised as an act of imagination and, not a credible fact. Woman's dress in the modern age has become literally and metaphorically far too slippery, not merely to the touch but also as a dependable basis for judging feminine character. It is difficult to judge by dress alone a modern woman. Judicially it will be indeed riskv and too

venturesome to come to so serious a conclusion by dress alone, whether a person is a woman of the town or a woman of the home or society. The Victorian opacity of the feminine dress has yielded place to the modern pellucid transparency, whose diaphanous and scanty character, either "topless" or "topful", has come in as a screaming protest against the heavy overclothing of the previous age when the puritanic anxiety was to keep invisible the female body then regarded as an unholy instrument of sin and temptation. If wise Shakespeare was right in saying "for the apparel oft proclaims the man", then it is doubtful whether in this modern age the apparel proclaims the woman. Carlyle, if alive today, would have revised his "Sartor Resartus" to express the modern philosophy of clothes to say that the feminine dress today neither clothes nor covers, but exaggerates protuberances, accentuates angularaties and deepens the depressions to produce the new sartorial anatomy, radically different from the physiological anatomy of the orthodox medical science. The crisis of female dress does not stand alone but combines with the crisis of colours and the new cosmetics of this age. It is equally difficult to distinguish a woman of the town by cosmetics alone in this new age of science and nuclear sophistication, when the natural beauty of a female face is so universally replaced by the plastic glim-mer of modern cosmetics wearing its new message of chemistry of colours and riot of hues, on the lips, the cheeks, the eye-laahes tnd the nails and displaying a formidable combination of variety of shades of tints, taints and stains, helping to creat pneumatic blondes and parched brunettes who produce optical illusion and psychopathic hallucinations. Cosmetics therefore are not absolutely safe test to distinguish the woman of easy virtues from the woman of difficult virtues. Elusive as all external tests of modern dress and cosmetics are, yet an unerring human sight and the remnant of a basic human instinct can still, I believe, judge from a type of meretricious display of dress and cosmetics and detect the demimonde.

36. Mrs. Bose's next attack on this evidence is that this going into a flat with a woman when there is no authentic evidence, who was inside the flat, cannot establish adultery- This Court, therefore, will have to judge in this case what are the standards of proof for establishing adultery in a Court of law and whether such standards have been satisfied.

37. Mr Dutt, learned counsel for the wife-petitioner has heavily relied on the decision of the English Court of Appeal in Gower v. Gower, reported in 1950-1 All ER 804 and particularly on the observations of Denning L. J. at pp. 805-806 where the learned Lord Justice observed:

"I would issue a caveat about the standard of proof. I do not think that this Court is irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge, to be proved beyond all reasonable doubt. I can well understand the iudgp applying that standard because of what was said in Ginesi v. Ginesi, 1948 P. 179 = 1948-1 All ER 373 but I would like to point out several things in regard to that case. First, it was not fully argued, because counsel conceded that the standard of proof of adultery was the same as in a criminal case. Secondly, the decision of the House of Lords in Mordaunt v. Moncreiffe, (1874) 30 LT 649 was not cited. It was there decided that a suit for divorce for adultery is a civil and not a criminal matter and that the analogies and precedents of criminal law have no authority in the divorce courts. This strikes at the root of 1948 P. 179 which appears to have proceeded on the supported criminal or quasi-criminal character of adultery. Thirdly, no reference was made to the Supreme Court of Judicature (Consolidation) Act 1925, Section 178(2), as substituted by the Matrimonial Causes Act, 1937, Section 4, which simply requires

the court on a petition for divorce to be 'satisfied on the evidence that the case for the petition has been proved'. This itself lays down a standard and puts adultery on the same footing as cruelty, desertion or unsoundness of mind. Fourthly, the High Court of Australia in Wright v. Wright, (1948) 77 CLR 191 after full consideration, declined to follow 1948 P. 179 and held that, on a charge of adultery, the criminal standard of proof was not appropriate. Fifthly, this Court, in Davis v. Davis, 1950-1 All ER 40 held that the 'criminal' standard of proof did not apply to cruelty.

So far as the Act of 1925 is concerned, no valid distinction can be drawn between the standard of proof of cruelty and adultery, nor does public policy require any such distinction: see a valuable note in the Law Quarterly Review, Vol. 66, pp. 35-38. These matters may well be sufficient to entitle this Court to re-consider 1948 P 179 if and when the occasion arises: see Young v. Bristol Aeroplane Co., Ltd., 1944-2 All ER 293, 300."

38. These observations of Denning, L. J., for whose opinions I have the highest regard, have provoked a good deal of controversy and comment not only in the Court but also outside in the legal profession and in academic journals. These observations, however, were obiter in that case because Denning L. J. was satisfied on the evidence that there adultery had been proved. That was also the view of Bucknlll. L. J. who was the other learned member of the Court of Appeal in 1950-1 All ER 804. If the facts proved beyond reasonable doubt that there was adultery committed in that case, then these observations about the niceties of standards of proof in criminal and civil matters might have been avoided.

39-40. I for one do not subscribe in theory or in principle that in a Court of law the standard of proof or principle of proof varies between the civil and criminal proceedings. The celebrated expression "reasonable doubt" is not used in Section 3 of the Indian Evidence Act which governs us. That doctrine was developed as a caution to guide the Courts in deciding criminal charges against the accused. But the standard of proof remains the same. The principle always is that the court must be satisfied. It is unnecessary in my view to discuss in the present case whether adultery partakes more of a crime than of a civil offence.

41. The difficulty on the point is increased by a later and more recent decision of the English Court of Appeal in Galler v. Caller, reported in 1954-1 All ER 536 decided by the Bench of Jenkins, Singleton and Hodson, L JJ. It is distinctly laid down there by the English Court of Appeal that an adulterer who gave evidence of his own adultery was in the same position as an accomplice in a criminal case. Although this case was being decided four years after 1950-1 All ER 804 it does not even mention or notice this earlier decision. 1950-1 All ER 804 discussed the cases of 1948 P. 179 as well as Preston Jones v. Preston Jones. (1951) 1 All ER 124 = 1951 AC 391.

42. This non-citation of 1950-1 All ER 804 in the subsequent decision of 1954-1 All ER 536 makes the authority of Gower v. Gower weak. I find myself in respectful agreement with Hodson, L. J. delivering one of the judgments in 1954-1 All ER 536 where the learned Lord Justice observed at page 541:

"It might appear from the passages which I have read from the judgment in Fairman v. Fairman, (1949) 1 All ER 938 that the analogy of criminal law was the ratio of that decision, but I think the result is the same by whichever road one travels. In divorce, as in crime, the court has to be satisfied beyond reasonable doubt."

Again Hodson, L. J., at pp. 540-541 laid down the law in the following terms:

"* * * I think the courts of this country may be taken to have come down on the side of the view that there was no distinction to be drawn between the word 'satisfied' standing alone and the word 'satisfied' accompanied by the words 'beyond reasonable doubt'. Lord Simonds expressly assented to and adopted the language of Lord Macder-mott (1951 AC 391) who continued:

'The jurisdiction in divorce involves the status of the parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict enquiry. The terms of the statute recognise this plainly, and I think it would be quite out of keeping with the anxious nature of its provisions to hold that the Court might be 'satisfied' in respect of a ground for dissolution. With something less than proof beyond reasonable doubt, I should, perhaps, add that I do not base my conclusions as to the appropriate standard of proof on any analogy drawn from the criminal law. I do not think it is possible to say, at any rate since the decision of this house in (1874) 30 LT 649 that the two jurisdictions are other than distinct. The true reason as it seems to me, why both accept the same general standard proof beyond reasonable doubt lies not in any analogy, but in the gravity and public importance of the issues with which each is concerned."

43. I respectfully agree with the view expressed by Hodson, L. J. and Lord Mac-dermott. quoted above.

44. At this stage it will be appropriate to refer to a decision of this Court to which I was a party Mrs. Agnes Cecillia Gome (Gannon) v. Lancelot Ashley Gome My learned brother Laik J. delivered the judgment to which my learned brother R. N. Dutta, J. and I agreed. The ratio of that decision is that it is not necessary that there should be direct evidence of adultery as it is not easily available and direct proof is rather rare. It is noticed there and circumstantial evidence must be sufficiently strong and conclusive. Association coupled with opportunity, illicit affection undue familiarity, guilty attachment are some of the instances which create an inference upon which the Court can act. In that case the old Latin maxim leavened by Scottish humour is quoted with painful repetition: "Solum cum sola in suspecto loco non presumitur dicere pater noster." Behind this Latin maxim and the cold Scottish common sense lies the home-spun truth that when a man and a woman are found together under suspicious circumstances, it is not likely that they are together for the purpose of saying the Lord's prayer or discussing Platonic love or engaged in any pedantry about Byronic discontent. In such circumstances the Court might reach the conclusion that they committed the act which the Court is trying to find out. I have some reservations on this point which I shall express after I have disposed of the relevancy of this decision in Agnes v. Lancelot on the point under discussion.

45. Mr. Dutt for the petitioner-wife relies on the following observations of Laik J. in :

"* * In my judgment the correct approach has been laid down by Denning L. J. in (1950) 1 All ER 804 that the Court should not be irrevocably committed to the view that a charge of adultery must be regarded as a criminal charge,"

46. To that, Mr. Dutt reminds me, I had agreed. Therefore. Mr. Dutt argues that 1950-1 All ER 804 should be accepted in this case.

47. I still subscribe to the proposition as quoted above. I still subscribe to the view that the Court should not be irrevocably committed to the view that the charge of adultery must be regarded as a criminal charge. But that does not mean that the standard of proof of adultery is different. Indeed, in this very decision in the decision of the House of Lords in (1951) 1 All ER 124 and the decision of the Supreme Court in the case of E. J. White v. K. O. White were cited. It must be mentioned here that the decision subsequent to 1950-1 All ER 804 namely, the decision of the English Court of Appeal in 1954-1 All ER 536 was not noticed in the case of .

48. Coming back to the case of adultery made here in these proceedings on the evidence I am prepared to go a long way to accept much of the arguments advanced by Mrs. Bose, appearing as amicus curiae to say that the evidence is not sufficient on the point. I am not, however, one of those Judges in this modern age to jump at the conclusion that in the present time, whenever a man and a woman are found alone inside a room, the Court must presume or infer they must be committing an act of adultery. I am sorry that the idealist philo-, sopher Plato had such a bad time with suspicious judges and unbelieving Courts on that very delicate subjects which has come to be known as Platonic love in memory of his famous name and his celebrated views. Even holding in favour of the proverbial judicial inclination to believe, that once inside a room alone, a man and a woman have livelier things to do than philosophise on Platonic love, there are I believe a thousand and one things of mutual interest today between a man and a woman which can be discussed and are discussed without sexual intercourse, Conjugal fidelity is a virtue of the highest honour and the crowning glory and supernal power of married life but this precious virtue is not of tinsel strength to melt at the narrow suspicion either of the Scottish or Latin persuasion. Its wisdom since the days it was invented by the Scots or the Romans, has outlived its time when women are no longer regarded as chattels or slaves or inferior subhuman creatures. The devoted husband wife with ideal married life can, in my view in the modern age, have a man or a woman as a fiood friend and it will be against the social consciousness of the day and the changing social behaviour pattern and norm to think that every such association should be a ground for inference of sexual intercourse by a Court of law. That would be installing a new in the place of old Victorian prudery. Prudery is not a virtue, conjugal, matrimonial or judicial. Law and lethargy to response go proverbially together. Indeed law and lethargy have been and are closest kins. Their kinship is justified as protecting and preserving tradition. But the Courts and law will have to respond to the new sociology of the age. All associations between a man and a woman who are not husband and wife are not associations for committing acts of adultery. Were it the standard then much of the modern world would indeed be a world of adultery and adulterers, a position which I am not intellectually, morally and legally ready to accept. I shall only conclude by quoting Lord Atkin in Ross v. Ross, (1930) AC 1 at p. 23 where His Lordship said:

"That there were opportunities for committing adultery is nothing: there must be circumstances amounting to proof that the opportunities could be used. The circumstances relied on are consistent with the entirely innocent relations of friends with a common interest in sports."

49. I am not to be understood at all as saying that adultery cannot be inferred from certain acts. I am alive to the plain and obvious fact that in an offence of the nature of adultery it will be inappropriate to have or expect direct witness witnessing the act, although I know Courts and Judges act on the evidence of hired private detectives who with their proverbial rontgen eyes peep through the narrowest key-holes of closed bedrooms and giving vivid and detailed description of the whole panorama of the act of adultery, with a sang-froid that freezes the judicial mind to accept that class of testimony. Circumstantial evidence can prove and establish adultery, provided the circumstances are relevant, cogent and compelling. In the 7th Edition of Rayden's Practice and Law in Divorce Division 1958 the law is stated at page 133 in the following terms:

"It is not necessary to prove the direct fact, or even an act of adultery in time and place or even the name of the person with whom the respondent is alleged to have committed adultery. In nearly every case the fact is inferred from circumstances which lead to it, by fair inference, as a necessary conclusion The Court must be satisfied that there was something more than opportunity before it will fix the guilt; evidence of a guilty intention or passion is needed in addition."

50. The collection of cases in support of the above statement will be found at Rayden's Divorce page 134 and which I need not examine individually here. I shall be content here by saying that I agree with Rayden's statement of the Law quoted above. Lord Buckmaster in (1930) AC 1 at page 7 clearly pointed out "Adultery is essentially an act which can rarely be proved by direct evidence. It is a matter of Inference and circumstance". In the recent work of D. Tolstoy of the Law and Practice of Divorce and Matrimonial Causes, Fifth Edition, 1963 at pp 28-29 circumstantial evidence has been classified under different heads such as (1) familiarity, (2) evidence of either spouse, (3) birth of a child. (4) visiting a brothel and such other cognate or other acts from which legitimate inference could be taken. But whether such inference will be drawn or not will depend certainly on the facts in each case and upon the Court's assessing and evaluating such facts. Indeed I need hardly add. that the burden of proof is always on the person alleging adultery, not so much because there is any legal presumption in favour of morality as on the plain common sense that a person who asserts a fact must prove it.

51. I perhaps would have accepted Mrs. Bose's argument in full on this point that the husband's going to his flat with a woman by itself does not prove satisfactorily that he committed an act of adultery with her on the 6th January but for the fact that in spite of this allegation in the petition for divorce which was duly served upon the husband he has not chosen to come and defend himself against this charge of adultery or to den\ or dispute it or that the woman was a public woman. I am satisfied that this tilts the balance in favour of the petitioner wife. I hold, accordingly, that adultery has been proved in the context of the present facts and circumstances and after taking into account all these diverse considerations which I have discussed above.

52. I, therefore, grant a decree nisi for dissolution of marriage as prayed by the petitioner wife in prayer (1) of the petition and I also order that the respondent husband shall pay the costs of these proceedings to the petitioner.