1954 *Present :* **Gratiaen J. and Gunasekara J.**

JAYASINGHE, Appellant, *and* JAYASINGHE, Respondent

S. C. 29—D. C. Gampaha, 1179/1182D

Divorce action—Requisite standard of proof—Condonation of adultery—No issue raised at trial—Circumstances when Court is put upon inquiry—Civil Procedure Code, s. 602.

In an action for divorce on the ground of adultery—

Held, (i) that the words " satisfied on the evidence " in section 602 of the Civil Procedure Code mean that in actions for divorce the Court must demand the same general standard of proof beyond reasonable doubt as is required to support a conviction in a criminal court.

(ii) that, even in the absence of an issue as to condonation of the alleged adultery, the trial judge is put upon inquiry as to whether there has been condonation or not if the evidence discloses that the parties had resumed living together under circumstances which would justify the belief that a reconciliation had taken place. " Conjugal cohabitation " within the meaning of section 602 (2) of the Civil Procedure Code can be resumed even without a renewal of sexual intercourse between the spouses after reconciliation.

APPEAL from a judgment of District Court, Gampaha.

Plaintiff sued the 1st defendant for divorce on the ground of adultery. They were married in May, 1920. It was alleged that during the period April to August, 1945, the 1st defendant committed adultery with the 2nd defendant. Although no issue as to condonation was raised at the trial, the plaintiff conceded in his plaint and evidence that he forgave his wife and lived with her in the same house until 30th May, 1946, after he became aware, in April 1946, of the alleged adultery.

H. W. Jayewardene, with *Ivor Misso* and *D. R. P. Goonetilleke,* for the 1st defendant appellant.—On the facts it is submitted that the conclusions of the trial Judge are not warranted by the evidence led in the case.

There are more fundamental misdirections on the law. In regard to the burden of proof in a divorce case, it is now settled law that the Court must demand the same strict standard of proof—proof beyond reasonable doubt—as is required to support a conviction in a criminal court—*Preston Jones v. Preston Jones* [1]. See also *Ginesi v. Ginesi* [2], *Bater v. Bater* [3] and *Davis v. Davis* [4].

The trial Judge has failed to address his mind to the plea of condonation appearing in the pleadings and evidence. It was the clear duty of the Court to have raised it as an issue even though the parties or their Counse, failed to do so—*Moosbrugger v. Moosbrugger* [5]. In Roman Dutch law condonation implies " forgiveness " and " complete reconciliation "

[1] *(1951) A. C. 391; (1951) 1 A. E. R. 124.* [3] *(1951) P. 35 ; (1950) 2 A. E. R. 458.*
[2] *(1948) P. 179 ; (1948) 1 A. E. R. 373.* [4] *(1950) P. 125 ; (1950) 1 A. E. R. 40.*
[5] *(1913) 29 T. L. R. 715.*

(*Voet 24.2.5, Young v. Young*[1], *Dias v. Mensaline Hamine*[2]) or, in the words of section 602 (2) of the Civil Procedure Code, " conjugal cohabitation ".

There is no such thing in law as conditional cohabitation—*Henderson v. Henderson*[3]. Assuming, therefore, that the 1st defendant was guilty of adultery, the plaintiff has completely condoned it.

There is the further point that the Court has no power to award the plaintiff Rs. 150 a month out of 1st defendant's property as permanent alimony—*De Silva v. De Silva*[4], *Lorriman v. Lorriman*[5]. The circumstances under which such permanent alimony should be granted to the husband are discussed in *Rayden on Law of Divorce, p. 441 (4th ed.)*.

Issadeen Mohamed, with *M. L. de Silva*, for the plaintiff respondent.—It may be admitted that the first part of the judgment of the trial Judge on the question of the burden of proof does not contain a correct statement of the law. But the Judge in effect tries to reconcile conflicting English decisions which were placed before him at the trial. Taking the totality of his ruling on the question of the burden of proof it appears to be clear that he was applying the same standard of proof as that necessary to support a conviction in a criminal trial.

Condonation in itself has a special significance of (*a*) Forgiveness, (*b*) Complete reconciliation, which are two distinct and separate things. In the present case there is only forgiveness but no complete reconciliation. For complete reconciliation there must be subsequent marital intercourse—*Keats v. Keats.*[6] Mere shelter given by wife to husband does not amount to a complete reinstatement—there must be a manifest consent. See *Niemand v. Niemand*[7], *Dias v. Mensaline Hamine*[8], *De Hoedt v. De Hoedt*[9], *Henderson v. Henderson*[10]. In this case, therefore, there was only a promise of forgiveness, nothing more.

On the facts, there is overwhelming evidence to support the findings of the trial Judge.

Cur. adv. vult.

May 10, 1954. GRATIAEN J.—

The plaintiff (then 23 years of age) and the 1st defendant (aged 16) were married with her father's consent on 27th May, 1920.

The 1st defendant was possessed of fairly considerable means, but the plaintiff, who had no fixed employment, was impecunious and extravagant. He squandered a good portion of his wife's wealth, and the learned District Judge was satisfied that during the period 1940 to 1945 alone she had paid over Rs. 33,000 in settling his debts, and that frequent quarrels arose because he " pestered her for more and more money for his speculative ventures and betting ".

Nevertheless, the plaintiff and the 1st defendant seem to have been fond of one another after their fashion. They were both prolific letter writers, and the correspondence produced at the trial indicates that,

[1] *25 S. C. 428.*
[2] *(1945) 46 N. L. R. 193.*
[3] *(1944) A.C. 484 ; (1944) 1 A.E.R. 44.*
[4] *(1925) 27 N. L. R. 289.*
[5] *(1908) P. 282.*
[6] *48 L. J. R. 57 at 61.*
[7] *(1898) 15 S. C. 217.*
[8] *(1945) 46 N. L. R. 193 at 197.*
[9] *(1910) 4 Leader 66.*
[10] *(1944) A. C. 484 ; (1944) 1 A. E. R. 44.*

whenever they were separated by force of circumstances, they took undisguised pleasure in subjecting each other's misdemeanours and faults to minute analysis.

In 1944 the husband and wife lived together in her ancestral home at Kanampella, but when his mother fell ill early in 1945, he began to spend most of his time in the latter's house at Weboda (14 miles away). The mother's illness was eventually diagnosed as tuberculosis, and, until she died in September 1945, he more or less adopted Weboda as his permanent residence in order to attend to the patient. The 1st defendant remained at Kanampella, but it is common ground that they visited each other from time to time and that, until at least April, 1945, marital intercourse often took place on these occasions. The 1st defendant was on cordial terms with her mother-in-law.

In or about June 1945 another " misfortune " brought them specially close together. Their only child Ena (a girl of education and culture) fell in love with the young man who is now her husband. The plaintiff and the 1st defendant objected to this association, and they jointly and severally made unsuccessful (and sometimes hysterical) attempts to break it off. Ena eventually married the young man without her parents' consent on 31st January 1946. She was promptly disinherited by her mother, and on 8th February 1946 she received a letter 1D10 from the plaintiff (obviously written on his wife's behalf as well) in which it was made quite clear to her that her overtures with a view to reconciliation with her parents were resented.

There is another person to whom reference must now be made. The 2nd defendant, when he was a lad of ten, had been engaged by the plaintiff and the 1st defendant as their domestic servant in Colombo (where they then resided) in or about the year 1924. The plaintiff later arranged for him to receive a course in mechanical training at the Government Technical College, and in due course the 2nd defendant obtained employment in the Postal Department. In spite of the improvement in his status, he retained a close connection with the household. In the words of the learned judge " he used to drive a car for the plaintiff and the 1st defendant and continued to do odd jobs for them. He acted as a servant who was grateful to his master and mistress for the help they had given him to secure better employment ".

In 1929 the 2nd defendant was transferred to Avissawella, and from that time he lived at the 1st defendant's house at Kanampella (which is not far from Avissawella). The evidence shows that he continued, as before, to be of assistance to the plaintiff and the 1st defendant in various ways. To all outward appearances, his behaviour towards his former employers was beyond reproach. When the plaintiff's mother died in September 1945, the 2nd defendant was (so the plaintiff admits) of great help in attending to certain details connected with the funeral arrangements. Even in April 1946 he and the plaintiff were jointly interested in a land transaction from which the latter hoped to earn a commission.

I must next refer to an incident which ultimately led to the institution of this action for divorce. The events of 26th October 1945 have been described by the witness Cyril Ekanayake (an apothecary) whose credibility the learned judge accepted without hesitation.

Mr. Ekanayake and his wife had been on calling terms with the 1st defendant ever since the early part of 1945 when he was the Government Apothecary of Kosgama (another neighbouring village). He visited her house professionally on the morning of 26th October 1945, and found that she was suffering from a menstrual discharge which, so she told him, had been delayed by "about two months": she had "passed clots" when she "started bleeding profusely" on the previous day.

Upon this scanty information, and assuming, no doubt, that the 1st defendant was on terms of normal intimacy with her husband, Mr. Ekanayake formed the opinion that the case was one of "abortion" which he defined as "a discharge of the ovum from the uterus before the formation of the placenta and before the beginning of the fourth month". He added in the course of his evidence that he "would place the probable date of conception of that foetus as two months or two and a half months prior to October 26th 1945". He prescribed certain medicines and told the patient that he would call the District Medical Officer in consultation if there was no improvement in her condition by the next day. But his treatment proved beneficial. She was advised, however, not to exert herself for a fortnight. He does not appear to have communicated his diagnosis to the 1st defendant at that time.

I would certainly hesitate to decide that there was sufficient material upon which a Court of Law, exercising jurisdiction in a matrimonial action, could confidently accept Mr. Ekanayake's theory that the 1st defendant had in fact had sexual relations with a man during the month of August or September 1945. Be that as it may, this incident is the basis of the plaintiff's allegation that his wife had committed adultery with the 2nd defendant "during the period April to August 1945" (issue 1*a*). It is important to note that no evidence was offered in support of his further allegation of adultery at Nawalapitiya "between 5th February 1946 and 10th March 1946" (issue 1*b*) or "at Embulgama between 10th March 1946 and 10th April 1946" (issue 1*c*). Nor was any issue raised as to whether, as alleged in paragraph 6 of the plaint, the defendants were "still continuing to commit adultery". The charge of adultery was therefore confined to the period specified in issue 1*a*.

The plaintiff says that on information received from Ekanayake, his suspicion of an adulterous association between the 1st defendant and the 2nd defendant was confirmed in April 1946, but that thereafter (*vide* paras 4 and 5 of the plaint) he "continued to live in the same house as the 1st defendant on her undertaking not to misconduct herself in future"; he later "failed to break off the intimacy" and therefore left her finally on 30th May 1946.

The institution of this action was delayed until 20th February 1948. On 17th February 1949 interrogatories were served on the plaintiff requiring him to furnish particulars of the acts of adultery on which he relied. On 1st March 1949, before these interrogatories were answered, his proctor made an application to Court to postpone the fixing of the date of trial "*as a reconciliation was possible*". The 1st defendant's proctor, however, objected to this proposal, and the action was therefore taken up in due course.

The learned judge granted the plaintiff a divorce on the ground that the 1st defendant had committed adultery with the 2nd defendant at Kanampella " in or about August 1945 ", but he decided that there was insufficient evidence to establish this charge *against the 2nd defendant.*

I have come to the conclusion that the decree for divorce against the 1st defendant on the ground of adultery cannot be supported, and must be set aside. The judgment under appeal is unsatisfactory in many respects, but it is unnecessary to consider those matters in detail because of a fundamental misdirection as to the standard of proof to be observed by a Court in proceedings for the dissolution of a marriage on the ground that adultery (or, for that matter, any other matrimonial offence) has been committed by one of the spouses.

In an action for divorce, the court must be " satisfied on the evidence " that the case of the plaintiff has been proved—section 602 of the Civil Procedure Code. These words have been taken over from section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925 of England, and we ought therefore to be guided by authoritative pronouncements of the English Courts as to their true meaning in the context of divorce law. Ceylon's recent attainment of Dominion status has not affected this salutary principle—*Cooray v. The Queen* [1].

In England, it has always been recognised that the same strictness of proof is required to establish a charge of adultery as in the case of a criminal charge—*Churchman v. Churchman* [2], *Ginesi v. Ginesi* [3], and *Gower v. Gower* [4]. In later judicial pronouncements, made particularly by Denning L.J. and with special reference to matrimonial offences other than adultery, it was suggested that this long-established principle ought to be relaxed. But all controversy on this subject has now been brought to an end by the ruling of the House of Lords in *Preston-Jones v. Preston-Jones* [5], and it is now settled law that the words " satisfied on the evidence " in the English Act mean that in actions for divorce the Court must demand " *the same general standard*—proof beyond reasonable doubt " *as is required to support a conviction in a criminal court.* The reason is that " the jurisdiction in divorce involves the status of parties and the public interest requires that the marriage bond shall not be set aside lightly or without strict inquiry "—*per* Lord MacDermott.

The ruling in the *Preston-Jones case* (*supra*) has equally fixed the standard of proof required in this country under the provisions of section 602 of the Civil Procedure Code. There is no longer room for the earlier theory that in actions for divorce there are various gradations of the concept of " reasonable doubt " such as Denning L.J. had previously recommended in *Bater v. Bater* [6]. Since the *Preston-Jones case* (*supra*), attempts to revive the controversy have met with no success—*England v. England* [7], *Galler v. Galler* [8]. In divorce, as in crime, the standard of proof is precisely the same. There is no reason at all to assume that, when the parties are governed by the Roman-Dutch Law, the rule ought to be relaxed in the slightest degree. If adultery has been committed,

[1] *(1953) 54 N. L. R. 409 P. C.*
[2] *1945 P. 44.*
[3] *1948 P. 179.*
[4] *(1950) 1 A. E. R. 804.*
[5] *(1951) A. C. 391.*
[6] *1951 P. 35.*
[7] *1953 P. 16.*
[8] *(1954) 2 W. L. R. 395.*

" the innocent spouse is not permitted to break off the bonds of matrimony by private authority, but must enter into a civil action for the dissolution of the marriage, so that, *all requisite things having been proved* the judge himself may by his decree order the severance of the nuptial tie "—*Voet 24.2.8.*

The decision in the *Preston-Jones case* (*supra*) had unfortunately not become known in Ceylon at the time that the judgment now under appeal was pronounced. In consequence, the learned Judge's opinion as to the requisite standard of proof seems to have been largely influenced by the propositions suggested by Denning L.J. in *Bater's case* (*supra*). At the end of his judgment, he summarised the grounds on which he decided that the plaintiff's charges of adultery against the 1st defendant had been established to his satisfaction. He said :

> "*Keeping in mind that a civil court* (*even in divorce proceedings*) *does not require the same strict standard of proof as a criminal court in a charge of a similar nature*, and that divorce proceedings are of great importance to the parties (specially on charges of adultery) and to the community, and as such *a high degree of proof is required* and that this court must be satisfied *beyond reasonable doubt* in a matter of such importance, I come to the conclusion on the evidence as against the 1st defendant that the charge of adultery with the 2nd defendant in or about August and September 1945 has been proved. "

This can only mean that, if the learned Judge had adopted the strict standard of proof which is equally required in matrimonial actions and in criminal cases, he would not have been " satisfied on the evidence " that the charges of adultery had been established *against either defendant*. The words " beyond reasonable doubt " have a very clear connotation in the context of criminal law, and must receive the same meaning whenever the alleged commission of a matrimonial offence is made the ground of a prayer for divorce in matrimonial proceedings. It is quite wrong, therefore, to approach the evidence led in support of a charge of adultery on the assumption that the standard of proof, though higher than in an ordinary civil suit, falls short of what is necessary to support a conviction on indictment in criminal proceedings. The House of Lords has finally rejected the theory suggested in *Bater's case* (*supra*) that the phrase " beyond reasonable doubt " has an elastic connotation which varies with " the particular subject matter ", or that " the divorce court should not adopt the rules and standards of the criminal court ".

The case for the plaintiff was based entirely on circumstantial evidence, and the proper test to be applied was whether the totality of the evidence which the learned judge confidently accepted was " inconsistent with any other reasonable hypothesis " than that the 1st defendant had committed adultery—*Gower v. Gower* [1]. The introductory words from the extract of the learned District Judge's judgment which I have quoted indicate that, if adultery had been a criminal offence in this country, he would have acquitted the 1st defendant because the evidence fell short of

[1] *(1950) 1 A. E. R. 804.*

" the strict standard of proof " required in criminal cases. It was therefore his duty to answer issue 1*a* in favour of the 1st defendant in the present action.

The circumstantial evidence relied on by the plaintiff was not, in my opinion, of such a quality that a judge of first instance, having properly directed himself as to the standard of proof and in other respects, could confidently have excluded the hypothesis that the 1st defendant was innocent of the serious charge of adultery. According to the plaintiff :

1. the apothecary has proved that the 1st defendant did have sexual intercourse with a man about two months before 26th October 1945 ;
2. the plaintiff himself had by that time ceased to have marital relations with her ;
3. his own evidence of " non-access " during the relevant period was confirmed by her oral and written confessions made to him in April and May 1946 ;
4. certain statements which she made to the apothecary and the Village Headman when they tried to bring about a reconciliation between the parties after May 1946 were also tantamount to confessions.

I shall assume that item 1 was established beyond reasonable doubt, although the 1st defendant's admission at the trial that a so-called " abortion " had taken place might well have been induced by a temptation to fall into line conveniently with the apothecary's evidence which was based on inference.

Items 2 and 3 must necessarily be assessed together. The learned judge did not expressly accept the plaintiff's evidence concerning an oral confession of adultery, presumably because it was not found possible to reject the suggestion that the subsequent written " confession " (P4) was a fabricated document. In that view of the matter, the plaintiff's evidence of " non-access " could not but be regarded as extremely unreliable. Finally, I take the view that the statements made by the 1st defendant in 1946 to Ekanayake and the Village Headman were at best equivocal and did not constitute conduct or behaviour inconsistent with her innocence. As against this, the court was confronted with the important circumstance that the 1st defendant had led a chaste life for 25 years and there was no evidence against her of any acts of undue familiarity with the 2nd defendant.

The judgment under appeal is also vitiated for another reason. The 1st defendant's lawyers (no doubt for tactical reasons) did not specifically raise an issue at the trial as to condonation. But having regard to the plaintiff's own pleadings and to certain portions of his evidence, the learned trial judge was himself put upon inquiry as to whether the alleged adultery, even if established beyond reasonable doubt, had been condoned by the plaintiff after (as he says) he became aware of it in April 1946.

Section 602 (1) of the Civil Procedure Code does not entitle an innocent spouse to obtain a decree for divorce on the ground of adultery which has subsequently been " condoned ", provided of course that the

" condonation " has been accompanied by a resumption of " conjugal cohabitation "—*section 602 (2)*—that is to say, if a reconciliation has taken place " by the full restoration of the offending spouse to his or her former position "—*Bell v. Bell* [1], *Elliot v. Elliot* [2]. " Conjugal cohabitation " can be resumed even without a renewal of sexual intercourse between the spouses after reconciliation

" It is of great importance that the question of condonation should be gone into . . . . and the fact that it is not pleaded must not shut the judge's eyes to the necessity of a full investigation " —*per* Du Parcq L.J. in *Bertram v. Bertram* [3]. A decree for divorce is a judgment *in rem*, and is not merely concerned with the rights and obligations of the parties *inter se*. The gravity of the issues involved therefore imposes a special obligation on the trial judge whenever there is material " of sufficient cogency to raise a provisional presumption of condonation " which the innocent spouse must displace before he can be granted a divorce on the ground of adultery. If, therefore, the evidence discloses that " the parties had been living together or were re-instated in one household, the judge is put upon inquiry as to whether there has been condonation or not "—*Tilley v. Tilley* [4]. Similarly, under the Roman-Dutch law, " a decree for divorce should not be granted at the suit of a husband who, knowing of his wife's adultery, continued to live under the same roof with her . . . . . *under circumstances which would justify the belief that a reconciliation has taken place* ".— *Niemand v. Niemand* [5].

In this case the plaintiff concedes that he forgave his wife and lived with her in the same house until 30th May 1946 after he had " discovered " in April that she had been guilty of infidelity. He no doubt pleaded that this temporary reconciliation had been influenced by her " undertaking not to misconduct herself in future ", but he withdrew at the trial his allegation that she had broken her pledge by committing further acts of infidelity. In these circumstances, it would perhaps be understating the position to say that the facts admitted by the plaintiff merely raised a " provisional presumption " that he had condoned the only matrimonial offence which ultimately formed the basis of his action for divorce. The learned judge has not directed his mind at all to this aspect of the case and the judgment under appeal cannot be allowed to stand for this additional reason.

In my opinion, the decree (and the consequential order for maintenance in favour of the plaintiff) must be set aside because (1) the evidence relied on in support of the allegations of adultery was found by the learned judge to have fallen short of the strict standard of proof which (in the correct view of the law) ought to be required in proceedings for divorce, and (2) the learned judge has not found as a fact that " the provisional presumption of condonation " raised by the evidence has been displaced. The trial was incomplete because no inquiry was held as to whether or not, according to the plaintiff's own version, " forgiveness was confirmed or made effective by re-instatement " in the months of April and May 1946—vide *Henderson v. Henderson* [6].

[1] *(1909) T. S. 500.*
[2] *(1925) C. P. D. 286.*
[3] *(1944) P. 59.*
[4] *(1949) P. 240.*
[5] *(1898) 15 S. C. 217.*
[6] *(1944) A. C. 484.*

Learned Counsel for the appellant made no submissions to us with regard to the first defendant's counter-claim for a divorce on the ground of malicious desertion. I would therefore set aside the judgment of the learned judge and dismiss the plaintiff's action with costs in favour of the 1st defendant in both courts. In so far, however, as the 1st defendant's claim in reconvention has been refused, the judgment will stand, but there will be no further order as to costs in favour of either party as to that part of the case.

GUNASEKARA J.—I agree.

Appeal allowed.