ANTIGUA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 12 of 1975

BETWEEN: BERTRAND DE FREITAS - Appellant

Vs.

LORNA DE FREITAS - Respondent

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: J.E. Fuller for appellant

Justin Simon for respondent.

1976, July 23, Oct. 29

J U D G M E N T

ST. BERNARD, J.A.

This appeal arises out of an order for maintenance for $175.00 per month with effect from the 1st November, 1975, against the appellant in favour of the respondent.

The main ground of appeal is that the trial judge excluded evidence of the conduct of the respondent which is relevant having regard to the provisions of section 22(1) of the Matrimonial Causes Act, Cap.52 of the Laws of Antigua.

At the hearing of the application for maintenance counsel for the appellant sought leave to call evidence of the adultery of the respondent but this leave was refused on the ground that such conduct could not be introduced at that stage for the purpose of affecting the maintenance order.

/The.....

The respondent filed a petition for divorce against the appellant which was undefended. At the trial no question as to the respondent's adultery was raised and the petition was granted. Counsel for the appellant submitted that there was no rule of public policy whereby a husband who knew, or but for his carelessness should have known, of adultery on the part of his wife committed before the decree nisi and did not pursue that matter at the hearing of the suit is precluded from raising against her in subsequent maintenance proceedings a charge of that adultery. In support of this submission he cited the case of Tumath v. Tumath (1970) 1 A.E.R 111. He then further submitted that even if the adultery of the respondent could have been an effective bar to the granting of the petition there was no evidence before the judge that the appellant knew of the respondent's adultery before or at the time of the trial of the petition and that no discretionary statement had been filed to place the appellant on notice.

In reply Counsel for the respondent conceded that the conduct of the parties must be taken into account but the question was whether all conduct could be introduced at the maintenance stage. He contended that the rationale of the decision in Tumath v. Tumath was that where a marriage had irretrievably broken down and would be dissolved there was no principle of public policy which inhibited the right of the parties to bring to light in maintenance proceedings all matters relevant to the conduct of the parties whether or not they had been raised at the trial. He further contended that in the State of Antigua the grounds on which marriages may be dissolved were not the same as in England.

/In.....

In Tumath v. Tumath all the cases dealing with the question of public policy were reviewed by the court of appeal. Most of them were decisions of courts of first instance, and although in the appeal court the judges used the expression "irretrievably broken down" they expressed the view that the earlier decisions in this respect were erroneous. Sir Gordon Willmer at page 120 states:-

> "I have come to the clear conclusion that in cases, such as the present, where there is no ground for holding that there is an estoppel per rem judicatam, there is no principle of public policy which inhibits the right of the parties to bring to light in maintenance proceedings all matters relevant to the conduct of the parties, whether or not they have been raised at the trial of the suit. As long ago as 1930, Lord Hanworth MR in Restall v. Restall in a judgment with which the other members of the court expressed their concurrence, stated the principle in the following terms:
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> '.....I think it is most important that the Court should have before it the relevant evidence to enable it to investigate thoroughly the conduct of the parties.'
>
> Since that date this principle has been regularly applied, and I think it is most important to preserve it.
>
> If there is any room for doubt, I think that doubt is removed by the recent decision of this court in Porter v. Porter. It is true that in that case the alleged principle of public policy propounded by Henn Collins J in Robinson v. Robinson was not specifically considered. But it seems to me that the whole rationale of the decision is against the existence of any such principle of public policy."

Later in his judgment the learned judge continued:

> "As early as 1950 Denning, L.J., in Trestain v. Trestain said: 'I desire to say emphatically that the fact that the husband has obtained this decree does not give a true picture of the conduct of the parties. I agree that the marriage has irretrievably broken down and that it is better dissolved. So let it be dissolved.

/But.....

> But when it comes to maintenance, or any of the other ancillary questions which follow on divorce, then let the truth be seen'."

Despite the difference between the grounds for the dissolution of marriage in Antigua and those in England, I think it is true to say that in 1930 and 1950 adultery was a ground for dissolution common to both territories. It was Henn-Collins J, that decided in Robinson v. Robinson (1943) 1 A.E.R. 251 that it was contrary to public policy to raise in maintenance proceedings matters which would have been an effective answer to the petition and which the party raising such matter knew before or ought to have known at the time of trial. All the judges in Tumath v. Tumath doubted the correctness of this decision and thought that Restall v. Restall and Trestain v. Trestain were correctly decided. In my view the difference between the grounds for dissolution here and those in England did not alter the meaning of public policy. I think what matters is the change in the attitude of the public towards divorce during the last 20 or 30 years. Although the grounds for dissolution may be different the practice and procedure for the granting of divorce petitions is as far as possible the practice and procedure of the High Court of Justice in England. I would allow the appeal and order that the matter be remitted for trial and that evidence of the conduct of the respondent, unless there is an estoppel per rem judicatam, be allowed before a proper maintenance order is made.

(E.L. St. Bernard)
JUSTICE OF APPEAL

/N.A. Peterkin.....

I agree

(N.A. Peterkin)
JUSTICE OF APPEAL

DAVIS C.J.:

I am of the same opinion and will add only a few words. I sympathise with the learned judge in the ruling he made refusing to permit the introduction of any evidence of adultery on the part of the respondent in the ancillary proceedings for maintenance. The case of Tumath vs. Tumath was not cited before him, and until I read the judgments in that case I was of the view that it would be contrary to public policy to permit a party to refrain from using at the hearing of a suit for divorce, information which he had or ought to have had, and then, when his pocket begins to be affected he proposes to prove that information. However, unless and until Tumath vs. Tumath is over-ruled, it must be regarded as the law that the conduct of the parties may be canvassed in ancillary proceedings for maintenance unless such conduct can be said to be res judicata.

(Sir Maurice Davis)
CHIEF JUSTICE