

APPELLATE CIVIL.

Before Mr. Justice Baguley.

MAUNG KYWE

v.

MA THEIN TIN. *

1929

Aug. 19.

Buddhist Law—Divorce on the ground of Cruelty—Cruelty, what it consists of—Single assault or act of violence not necessarily an act of cruelty.

Held, that a single assault by a husband, which was provoked by the wife, is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband are not of a nature to suggest any likelihood of a repetition of the offence.

Cruelty consists in indifference to, or delight in, another's pain. Hence a single act of violence is not necessarily an act of cruelty in every case, justifying a divorce.

Ma Ein v. Te Naung, 5 L.B.R. 87 ; *Ma Gyan v. Maung Su Wa*, U.B.R. (1897-01), 28 ; *Ma Hla Me v. Maung Po Gyi*, c. II. A.110 of 1928 ; *Ma Sat v. Maung Nyi Bu*, 4 U.B.R. 68 ; *Maung Hme v. Ma Sein*, 9, L.B.R. 191 ; *Po Han v. Ma Talok*, 7 L.B.R. 29—*referred to*.

Day for the appellant.

Mitter for the respondent.

BAGULEY, J.—The appellant was the defendant in the trial Court. In that Court the plaintiff, Ma Thein Tin, sued him for a divorce alleging that he had abused her, had threatened to throw a stone at her, had threatened to kill her, had kept from her a large part of the joint property of the marriage and spent it, and had assaulted her on more than one occasion. The defendant denied the allegations and the trial Court found that the quarrels that there had been between them were not sufficient to justify a divorce even as by mutual consent. The trial Judge says that the plaintiff gives three instances of assault, but

* Special Civil Second Appeal No. 86 of 1929 (at Mandalay) from the judgment of the District Court of Sagaing in Civil Appeal No. 16 of 1929.

that only one is really supported by evidence and that this happened at a time when there was a dispute with regard to the sale of some onions: the defendant was going to sell them and the plaintiff objected to their being sold saying that they were wanted for seed; defendant said that they had enough onions for seed, and after that the plaintiff seized hold of the bag of onions, there was a struggle for possession of the bag, and apparently in the end the defendant knocked the plaintiff down. As regards the making away with the joint property, the trial Judge found it not proved. The trial Court dismissed the suit.

On appeal to the District Court, the learned Judge found that there had been several quarrels between the parties which culminated in an assault or assaults. The judgment goes on to say: "From the testimony of her witnesses there was a recent instance in which the plaintiff was fisted and had a bag of onions thrown at her by the defendant." This is the only act of ill-treatment which has been definitely found as proved by the lower appellate Court. With this finding I am in agreement.

I think that this dispute over the sale of the onions did culminate in a struggle of some kind; but that struggle began because the plaintiff seized the bag of onions and tried to wrench it away from her husband. As was only natural, the fight having been started in this way, the husband overpowered his wife, and it is most probable that he struck her at the end of it.

The judgment of the lower appellate Court goes on to say: "At Burmese Buddhist Law physical assault by the husband on his wife is now considered a matrimonial fault, and a divorce on the terms of a mutual consent is now allowed to a wife on proof of a single act of cruelty on the part of the husband,"

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and the learned Judge refers to Lahiri's "Principles of Modern Burmese Buddhist Law." It is always dangerous to refer to a text book and not look up the rulings upon which the text book is based. The quotation from the text book is actually correct, but the statement quoted refers to two officially reported cases. One of these is *Ma Sat v. Maung Nyi Bu* (1) and in the whole of this ruling I cannot find the word "cruelty": the learned Judicial Commissioner throughout refers to "misconduct", and the particular misconduct is referred to by the lower Courts as "ill-treatment". The actual act complained of consisted in the husband having assaulted the wife and caused her to drop her *htamein* in public. The facts in this case did not make it necessary to decide whether a single act of misconduct or cruelty would justify a divorce. In this case the defendant admitted that he had ill-treated his wife as he had been drinking, and that he drank toddy 20 days of every month; and it is clear from the judgment as a whole that it was a case in which there had been more than one instance of physical ill-treatment. The other case referred to is *Po Han v. Ma Talok* (2). In this it is laid down by a single Judge that a divorce could be granted to the wife on the terms of a divorce by mutual consent for a single act of cruelty, but it is worthy of note that in this case the learned Judge disapproved of a previous ruling, *Ma Ein v. Te Naung* (3), in which Parlett, J., stated that "adultery on the part of a husband does not alone, or even accompanied by a single act of cruelty, entitle the wife to a divorce," and that statement was concurred in by Fox, C.J. It is true that this ruling so far as it refers to adultery has been overruled by the case of

(1) (1921-22) 4 U.B.R. 68.

(2) (1913-14) 7 L.B.R. 79.

(3) (1909-10) 5 L.B.R. 87.

Maung Hme v. Ma Sein (1); but with regard to the question of a divorce being allowed for a single act of adultery it does not appear to have been overruled, and it is a Bench case, not a single Judge case like *Po Han v. Ma Talok* (2).

In an unreported case of this Court, *Ma Hla Me v. Maung Po Gyi* (2), Pratt, J., states that *Po Han's* case is authority for the proposition that a wife may claim a divorce as by mutual consent on proof of a single act of cruelty on the part of the husband, and that so far as he is aware this ruling has never been dissented from, and he is satisfied that it is good law. I would note, however, that in the ruling in *Po Han's* case it is stated that it is clear from the texts cited in section 303 of the Kinwun Mingyi's Digest that "even where the husband has been guilty of cruelty only once, it is open to the wife to insist on a divorce and she is entitled to get it, subject to a penalty, the penalty being that the divorce shall be effected as if both parties desired it." A reference to section 303 referred to, does not, in my opinion, altogether bear out this statement. The leading *Dhammathat* (*Manugye*) only refers to the right to divorce for a single act of ill-treatment, if at the same time the husband has taken a lesser wife, and *Manu Dhammathat* says the same. *Chittara* is also in agreement with these two *Dhammathats*, while in the same section, the *Rescript Dhammathat*, which according to the Digest, is a special amendment of the law passed in 1146 B.E., says that divorce should not be granted for the first fault; only the guilty party should be admonished.

The case of *Ma Sat v. Maung Nyi Bu* follows the case of *Ma Gyan v. Maung Su Wa* (3). The headnote of this case does not refer to this point at

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(1) (1917-18) 9 L.B.R. 191.

(2) Civil Second Appeal 110 of 1928.

(3) U.B.R. (1897-01) 28.

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all, but a perusal of the judgment shows that it was a case in which divorce was asked for on the ground that the defendant had committed more than one act of ill-treatment. There had apparently been a series of assaults which had resulted in the parties appearing before arbitrators with the result that a document was drawn up which amounted to an agreement that the wife should be entitled to a divorce and to retain all the property if the husband again misbehaved. Apparently after this document had been drawn up a quarrel took place and the husband pulled his wife's hair, boxed her ears and kicked her more than once. This single act of ill-treatment would of course revive the previous acts which had been condoned by the execution of the agreement and the divorce would naturally follow on the ground that there had been a course of ill-treatment.

Another case that has been referred to is *Maung Pye v. Ma Me* (1). Here again the husband had beaten his wife and had also falsely accused her of infidelity and there is no question of a divorce having been given for one act of physical ill-treatment.

It is unfortunate that in many of these cases the word "cruelty" has been used as though it were interchangeable with the term "physical violence." The two in my opinion appear to be quite distinct. The essence of cruelty does not consist in violence. "Cruel" is defined in Chambers' Dictionary as "Disposed to inflict pain, or pleased at suffering: void of pity, merciless, savage: severe", and in the "Concise Oxford Dictionary," the word "Cruel" is defined as "Indifferent to, delighting in, another's pain." Therefore, cruelty really depends on the state of mind of the person inflicting pain, rather than the actual infliction of the pain. Naturally, a series of

(1) U.B.R. (1902-03) "Buddhist Law" p. 6.

assaults which result in pain would warrant the deduction that the person inflicting that pain was indifferent to the pain that was being inflicted; but if an assault is regarded as a single act of cruelty, the assault must in itself be such as to warrant the assumption that the person committing it was indifferent to, or pleased with, the pain he was inflicting.

I entirely agree with the proposition laid down by May Oung in his work on Buddhist Law, namely, "there must be at least evidence of such ill-treatment as shows that the husband is a man of violent tendencies," to which I would add that the ill-treatment is likely to recur. A divorce is given, not to punish a husband for an assault, that is provided for by the criminal law, but to enable the wife to free herself from a bond which bids fair to become intolerable.

In the present case I can see no such deduction warranted. There was a rough-and-tumble fight, possibly, in which the husband struck his wife; but the fight happened on the initiative of the wife, because she started the whole trouble by trying to wrest the bag of onions out of his hand; and when an assault is committed under provocation, one cannot from the fact of that assault argue that it was an act of cruelty committed by the person assaulting. In this case, nothing whatsoever has been proved which would render it likely that the appellant would commit any further assaults on his wife; he is a man of good character, and the plaintiff's own witnesses testify to this: he does not drink and he does not gamble; and the charge that he has left his wife destitute can easily be disproved by the evidence of Ma Hnit, the 6th witness called by the plaintiff, who says that comparatively recently the plaintiff took a loan of Rs. 300 from her without any deed and without any

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security, and the money was repaid to her by the defendant.

I hold that a single assault by a husband on the wife, which was provoked by the wife, is not a sufficient ground for the granting of a divorce to a wife on any terms, when the character and habits of the husband, as in this case are not of a nature to suggest any likelihood of a repetition of the offence. I do not wish to be regarded as differing from the dictum in which the rulings in *Po Han v. Ma Talok* (1) and *Ma Sat v. Maung Nyi Bu* (2) are usually summed up, namely, that a divorce as by mutual consent may be granted for a single act of cruelty, but I am of opinion that a single act of violence is not necessarily an act of cruelty, and I hold that the assault in this case is not an act of cruelty, either actually or technically.

I would therefore allow this appeal, set aside the order of the lower appellate Court and restore that of the trial Court. As I consider that the husband is not entirely free from blame, and as the possibility of execution proceedings in the future would certainly not help towards a reconciliation between the parties, I direct that each of the parties do bear their own costs throughout.

(1) (1913-14) 7 L.B.R. 79.

(2) (1921-22) 4 U.B.R. 68