CASE NOTES

ADULTERY WITH OWN SPOUSE
Abdoulie Drammeh v. *Joyce Drammeh*[1]

The word adultery may well bring to mind the picture of an illicit relationship, be it a momentary infatuation or a long-standing affair with a mistress. In short, adultery is usually associated with extra-marital sexual relationships. Adultery as a ground for divorce has been defined as "voluntary sexual intercourse between a married person and a person of the opposite sex, *the two persons not being married to each other.*" (*Tolstoy on Divorce*, (7th Edition) [1971], p. 54; See also, *Rayden on Divorce*, (11th. Edition) [1971], p. 178; emphasis supplied). From this definition it is apparent that sexual intercourse between a man and a woman who is his wife, cannot be termed 'adultery'. The Judicial Committee of the Privy Council however, does not seem to think so. Indeed its decision in *Abdoulie Drammeh* v. *Joyce Drammeh* has the somewhat startling effect of rendering a man an adulterer even though he may be lawfully married to the woman with whom he is having sexual relations.

The relevant facts of the case date back to 1956 when Abdoulie Drammeh, a law-student from the Gambia married a Jamaican lady domiciled in England (hereinafter referred to as 'the wife') at a Methodist Church in Liverpool. The parties lived together in various places in England until 1963 when Drammeh returned to his native Gambia after finally becoming a member of the English Bar and, incidentally, fathering six children. His wife, who had been ill when he left England joined him shortly thereafter. Drammeh began practice as a Barrister and Solicitor and all seemed well until April 1966 when he went through a Muslim form of marriage with one Mariama Jallow (hereinafter referred to as "the co-respondent"). The wife, unwilling to share her husband, petitioned for divorce on the ground of his adultery.

Drammeh's evidence was that in 1957 he had reverted to his original Muslim faith and that by his personal law he was permitted to marry and did in fact marry the co-respondent. However, he denied having sexual intercourse with her. The Chief Justice of the Gambia who heard the petition found as a fact that Drammeh had had sexual intercourse with the co-respondent basing his finding on an admission to that effect by

[1] (1970) LXXVIII C.L.W. 55.

the co-respondent herself. Though this was not made explicit, his Lordship may have felt that her admission was sufficiently corroborated by her rather pregnant condition. Consequently, he held that the wife was entitled to the divorce she sought and pronounced a decree nisi. In his judgement the learned Chief Justice said "(t)he respondent may contend that this second marriage is lawful in Islamic law, but it is still adultery within the meaning of a Christian monogamous marriage – one man, one wife – to the exclusion of all others." (*Ibid.*, p. 58).

The disgruntled Drammeh appealed to the Court of Appeal. His appeal was mainly on two grounds:

(i) that as the co-respondent was in the position of an accomplice, corroboration of her evidence was needed; the learned judge had failed to direct his mind to this need for corroboration.

(ii) that he was entitled to and did contract a valid second marriage with the co-respondent and therefore sexual intercourse between him and the co-respondent could not be adultery.

The first contention was dismissed by the Court of Appeal which held that the learned judge had not overlooked the question of corroboration. The second and far more important ground was, unfortunately, not given the consideration it deserved. The Court of Appeal, after stating the issue, perfunctorily dismissed it by asking rhetorically "(c)an this be the law of the Gambia?" The report does not disclose their reasons, if any, for the Court's conclusion that there was adultery and one is left to speculate as to why the argument put forward by Drammeh could not, in the opinion of the Court of Appeal, "be the law of the Gambia."

Drammeh, undaunted by failure, proceeded to appeal to the Judicial Committee of the Privy Council on the same two grounds. With regard to the first ground, the requirement of corroboration, their Lordships agreed with the Gambian Court of Appeal. With regard to the second ground, the question was framed clearly but answered ambiguously. After a somewhat irrelevant discussion relating to jurisdiction, their Lordships proceeded to extricate themselves from a "sticky situation" by concluding as follows:

> "Upon proof therefore that the husband had had intercourse with someone other than his wife without her connivance or condonation what reason, it may be asked, could there be for denying to the wife the dissolution of her marriage for which she prayed? No question could arise as to the jurisdiction of the Court in the Gambia to entertain the suit." (p. 58)

This conclusion it is submitted, did not really resolve the problem, which is, has a man committed adultery when the woman involved is his lawful wife? At this stage, it should be noted that the Privy Council considered it unnecessary to determine whether or not Drammeh's second marriage was valid. The Board expressly stated it was concerned only with

the Christian marriage. Presumably their Lordships agreed with the reasoning of the Chief Justice of the Gambia, for they said that they saw no reason for holding that the courts of the Gambia were wrong in holding that "the wife could assert that the relationship between her husband and the co-respondent was, so far as she was concerned an adulterous one." (p. 59)

Though the Privy Council failed to consider whether or not the co-respondent was a lawful wife of Drammeh, it did indicate that the result would have been the same in either event, by commenting:

> "Even if the second marriage was not void there can be no reason for denying to the wife the rights that are hers if she finds that her husband who has all the obligations to her which result from a validly subsisting monogamous marriage, has had intercourse with some other woman." (p. 59)

Their Lordships sought to buttress their opinion by reference to their celebrated decision in *Attorney-General of Ceylon* v. *Reid* ([2965] A.C. 720). They said:

> "The importance of the case for present purposes is that in their judgement the Board noted that it was not in controversy between the parties that the first marriage remained valid and subsisting notwithstanding the second marriage (for there had been no divorce under the Marriage Registration Ordinance) and that the first wife could if she so desired, treat the second marriage as an adulterous association by her husband on which she could found a petition for divorce."

Though there is a somewhat superficial similarity in the facts of both cases, the matters in dispute were quite different. Reid was prosecuted for bigamy under section 362B of the Penal Code of Ceylon. The crux of the matter therefore was whether his second marriage was void by reason of his first subsisting marriage. The first wife's rights and remedies were not in issue. On the other hand, in *Drammeh's* case the sole matter for consideration was the first wife's right to have her marriage dissolved. The views expressed in *Reid's* case on this issue, did not form part of the *ratio decidendi* of that case.

Furthermore, the *dictum* was made at the very beginning of the judgement in reference to a matter not in dispute between the parties. This point was mentioned undoubtedly, only because it had been part of counsel's submission. In trying to establish that Reid was not guilty of bigamy, counsel argued that he had a right to change his personal law and thereby acquire the capacity to re-marry but that the first wife would not be left without a remedy. In this context, it is submitted that their Lordships' pronouncement has little value as precedent.

It is interesting to note that in *Reid's* case their Lordships quoted with approval a portion of the judgement of Beaman J. in the Indian

case of *Attorney-General of Bombay* v. *Jimababai* ([1915] 1 L.R. 41. Bom. 181), the relevant portion of which reads:

> "After his conversion Dukhiram was governed by the Mohammedan law. There can be no question that under that law he was entitled to contract a valid marriage with Alfatanessa. It would, therefore, be a serious thing to say that such a union was a mere adulterous connection." (p. 196)

Jimababai's case was on all fours with *Reid's* and the decision there was that if the second marriage was valid according to the man's personal law then it could not be regarded as a mere adulterous connection and must be considered valid for all purposes. Their Lordships purported to follow this authority when they acquitted Reid but on that rationale, the result would not only have been that Reid's second marriage was valid but also that it was not an adulterous connection, in which case Reid's first wife would not have been able to allege his adultery. As *Drammeh's* case was considered in the light of both those cases, it seems obvious that the wife should have failed in her petition. It appears however, that their Lordships considered the matter only from the point of view of the first wife. They appear to have felt that as she had entered into a Christian monogamous marriage with no intention of being one of two or more wives, she could not be compelled to accept a relationship wholly different from that which she had contracted for. It is possible therefore, that the Privy Council came to its decision only because of the desire to help the wife who would not otherwise have been able to get a divorce. It should be noted that today a remedy is available under the Gambian Dissolution of Marriage (Special Circumstances) Act, 1967 (Act No. 18 of 1967), s. 2 of which reads as follows:

> "— (1) Notwithstanding the provisions of any other enactment having the force of law in the Gambia, the Supreme Court shall have jurisdiction to dissolve by decree any marriage at the instance of either party thereto in the following circumstances:-
>
> (a) The marriage was in monogamous form recognised by the law of the Gambia; and (b) since the celebration of the marriage one of the spouses has in good faith and to the satisfaction of the court became converted to a religion which recognises polygamous marriages and the other spouse has not become so converted."

This additional ground for divorce was enacted after the lower courts decision in *Drammeh's* case but before it was heard by the Privy Council. Though clearly not applicable to *Drammeh's* case, it is submitted that it should have been brought to the attention of the Privy Council who would have realised that as the law in the Gambia now stands, a wife in the position of the petitioner would be able to obtain a divorce without having to rely on adultery. Then perhaps the Privy Council would have felt free to take into consideration the definition of adultery when making its decision.

The above criticism of the Privy Council may seem somewhat short-sighted inasmuch as it does not consider the possibility that the Board may have been applying the "functional test" in deciding both *Reid's* and *Drammeh's* case. This functional approach involves the court's considering the purpose for which the validity of the polygamous marriage is in issue and, depending on the proper law applied in each instance, the same marriage could be held valid for one purpose and invalid for another purpose. If the Privy Council did in fact proceed on this principle, then their decision in *Drammeh's* case would be correct and consistent with both their decision in *Reid's* case and the traditional definition of adultery. Drammeh's second marriage therefore would be valid in the context of a bigamy prosecution if he had been so charged, (following *Reid's* case), but invalid in an action for divorce by his first wife on the ground of adultery (the proper law applied being the "Christian" law applicable to the first marriage, on the basis that it has the closest connection with the marriage). Whatever the merits of that approach may be, it is submitted that the Privy Council did not have it in mind when deciding *Drammeh's* case. There is no indication whatsoever of such an approach anywhere in the judgement. In any case, it is submitted that the functional test could not be used in *Drammeh's* case as the kind of situation created by *Drammeh* and *Reid* is slightly different from that in *Baindail* v. *Baindail* ([1946] P. 122.) and other similar cases which gave rise to that approach. In the latter category of cases, polygamous marriages were not recognised by a "monogamous" society which, however, subsequently made concessions when the need arose. In the former category, polygamous marriages are acceptable in the countries where they are contracted and if they are declared valid for one purpose there can be no justifiable reason for finding them invalid for any other purpose. The writer finds some support for this view in the comments made by M.B. Hooker ([1967] 9 Mal. L. Rev. 383) when reviewing the eighth edition of Morris's, *Dicey and Morris on the Conflict of Laws*. Hooker appeard to be of the opinion that the book is of somewhat limited use in Malaysia and Singapore inasmuch as the traditional English conflict rules are inadequate to resolve the special problems that are peculiar to this region. In relation to the case of *A.G. of Ceylon* v. *Reid*, Hooker says: "In the context of this note the point is that English conflict rules do not have the necessary machinery for deciding as a matter of principle the position in regard to such "conversion" marriages. Further this is not just a matter of principle alone, since a decision which is valid according to English conflict rules as in *Hertogh's* case ([1951] 17 M.L.J. 12) may be followed by undesirable practical consequences. Thus the decision in *Hertogh* was followed by several days of rioting in Singapore." It is submitted therefore that the Privy Council did not apply the functional test, and that therefore their decision in *Drammeh's* case is either inconsistent with their decision in

Reid's case or alternatively, it substantially changes the definition of adultery. Though this case is not binding on Malaysian courts, it exercises persuasive authority and is especially important because so many similar cases arise here. Adultery is a ground under all the ordinances in force in Malaysia relating to divorce (see s. 7, The Divorce Ordinance, 1952; Ordinance No. 74 of 1952, States of Malaya; s. 6, The Matrimonial Causes Ordinance, 1932, Chap. 94, Laws of Sarawak; s. 7, The Divorce Ordinance, 1963, Ordinance No. 7 of 1963, North Borneo (Sabah). In Sabah adultery is the only ground available to a wife in circumstances comparable to that in *Drammeh's* case and as such *Drammeh's* case would be most significant there. In Sarawak, a wife has the alternative of proceeding under s. 6(2) of The Matrimonial Causes Ordinance which gives the court a discretion to grant a decree of dissolution of marriage where circumstances have arisen which make it reasonable and just that the marriage should be dissolved. However, it is difficult to say whether a *Drammeh*-type situation would move the court to exercise its discretion in favour of the petitioner. In the States of Malaya, it is submitted, adultery need not be relied on as a ground because s. 7(2)(a) of the Divorce Ordinance entitles a wife to petition for a divorce when her husband contracts a marriage with another during the subsistence of the prior marriage. As such the doubtful decision in *Drammeh's* case need not be resorted to

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CALLING A SPADE A PICKAXE

Government of Malaysia v. *Lionel*[1]

The respondent, Lionel, was appointed a temporary clerk interpreter in 1953 with the Police Clerical Service on a contract of employment which incorporated the right of either party to terminate the contract. In 1962 disciplinary action was instituted against him for alleged breaches of discipline. His attempt to exculpate himself made no impression on the Chief Police Officer who proceeded to terminate his services. The Privy Council set aside the order of the Federal Court and ruled that the trial judge was correct in deciding that the respondent's employment was terminated in accordance with the terms of his appointment. As such a

[1] [1974] 1 M.L.J. 3.