

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Family Division

2022/FAM/div/00283

B E T W E E N

C.D.B

Petitioner

AND

J.D.B (Nee B)

Respondent

Before: The Honourable Madam Justice C.V. Hope Strachan

Appearances: Mrs. Donna Dorsett - Major for the Petitioner
Mrs. Ramona Farquharson with Mr. Samuel Taylor for the Respondent

Hearing date: 10th November 2023 and 12th February 2024

Family law — Divorce — Adultery — Cruelty – Petitioner claiming cruelty by Respondent — Respondent claiming adultery and cruelty by Petitioner — Whether the conduct of the Respondent amounted to cruelty — Whether the actions by the Petitioner amounted to adultery and/or cruelty – Justification for conduct - Condonation – Whether the Petitioner and/or Respondent condoned the alleged acts of cruelty and/ or adultery, - Whether there is a need for either party to seek the courts discretion – need to file discretion statement

RULING

C.V.H. STRACHAN, J

Introduction;

[1.] This case poses and answers the interesting question as to whether a party to a marriage, displaying conduct, which might ordinarily amount to cruelty, can be found not to be culpable, because their conduct was *justified*. That was the decision arrived at in this case. I have set out the reasons hereunder.

Background Facts:

[2.] The Petitioner, C.D.B (“the husband”) and the Respondent, J.D.B (Nee B) (“the wife”) were married on 20th November 1993. There are four children of the marriage, namely P.J.B born on 2nd July 1989, D.H.D.B born on 7th September 1990, C.D.B born on 5th April 1993 and J.T.B born on 25th December 2001. All of who are now sui juris.

The Husbands Petition:

[3.] The husband stated that since the celebration of the marriage the wife has treated him with cruelty. The husband’s petition was filed on 19th May 2022 wherein he alleged the following:

Particulars of Cruelty

- (i) That P.J.B biological father was released from prison for serving a twenty (20) plus year’s sentence and since he has been released the Petitioner has noticed a drastic change in the Respondent’s behaviour towards him.
- (ii) That every time that he makes sexual advances towards the Respondent and wants to be intimate with her, the Respondent refuses and always has an excuse, like she’s tired, or don’t feel too good, which is very unusual as the Respondent and the Petitioner enjoyed previously a healthy sexual relationship.
- (iii) That only recently the Petitioner found explicit sexual text messages from a male on the Respondent’s phone requesting that the Respondent send him more pictures of her in her underwear or naked. The Respondent responded by texting “my husband always checks my phone.”
- (iv) That the Respondent is cold and uncaring towards the Petitioner, with virtually little or no communication. She goes to bed and turns her back to the Petitioner; the atmosphere is as cold as ice and the Petitioner gets the feeling of an invader.
- (v) That the Petitioner would attempt to communicate with the Respondent about her sudden change of behaviour towards him and the Respondent would ask to be left alone and refuses to communicate.
- (vi) That approximately 22 years ago, the Petitioner committed adultery and fathered a son outside of the marriage. However, the Respondent forgave, or the Petitioner was of the mistaken belief that the

Respondent had forgiven him and the marriage was reconciled between them, until their eldest son's biological father was released from prison at which time there was an immediate change in the Respondent's behaviour towards the Petitioner.

(vii) That the Respondent now constantly reminds the Petitioner that he fathered a child outside of the marriage and now says that she will never forgive him for fathering a child outside of the marriage.

(viii) That the Respondent now refuses to cook anymore and often tells the Petitioner that he has hands to cook or he can drive to go get himself some fast food.

(ix) The Petitioner has spoken with the Respondent about her behaviour toward him on several occasions, and even informed her that he had spoken with an Attorney about a divorce but however held off to give the Respondent an opportunity to reconcile the marriage, however the Respondent has refused. The Respondent continues to resist the Petitioner's sexual advances towards her. The Petitioner is now of the opinion that there's a stranger in his bed and the Respondent has fallen out of love with him as she treats him with a woman's scorn.

(x) That the Petitioner has not condoned, connived or been an accessory to the cruelty.

(xi) There is no probability of reconciliation between the Petitioner and Respondent.

THE PETITIONER THEREFORE HUMBLY PRAYS that:

- a. The said marriage be dissolved
- b. There be a declaration pursuant to Section 73(1)(a) of the Matrimonial Causes Act.
- c. Both parties bear their own costs.

THE WIFE'S ANSWER AND CROSS PETITION

[4.] The wife subsequently filed an Answer and Cross Petition on 14th November 2022 stating:

(i) Paragraph 1 of the Petition is admitted save and except where the Petitioner asserts that the Respondent committed adultery with the father of P.J.B. Therefore, we contend that the Respondent's behaviour did not alter dramatically during the period of P.J.B's biological father's release from prison and that it only did so after learning of the numerous adulterous relationship that had occurred before P.J.B's biological father's release.

(ii) The Respondent admits to paragraph 2 of the Petition that she has had sexual relations with the Petitioner on numerous occasions, but while doing so, she felt violated and dirty knowing that the Petitioner was engaging in adultery.

(iii) Paragraph 3 of the Petition is denied. The Respondent's sim card was removed from her cell phone at the time of the occurrence and placed in the Petitioner's phone, where he messaged every male on the Respondent's contact list. At the time of this incident the Respondent experienced a great deal of embarrassment as a result of the Petitioner's acts.

(iv) Paragraph 4 of the Petition is denied. The Respondent has treated the Petitioner with much adoration despite his cruel and aggressive nature towards her.

(v) Paragraph 5 of the Petition is denied. The only nude photo that was disseminated was to Spectrum Cosmetic Surgery located in Miami, Florida. There was nothing in the Respondent's phone that suggested or even stated that "my husband always checks my phone" as the Petitioner avers.

(vi) Paragraphs 6 and 7 of the Petition are denied and the Respondent puts the Petitioner to strict proof thereof. Notably, the Respondent has forgiven the Petitioner for having a child outside of the marriage and has also forgiven the Petitioner on numerous occasions for his adulterous relations, which was the reason for their marriage's continuation prior to as she hoped the adultery would cease.

(vii) Paragraphs 8 and 10 of the Petition are admitted. In an attempt to falsify the truth of what actually happened between the Respondent and himself, the Petitioner is making an effort to present himself in a favorable light. The Respondent has refused to have sexual relations with the Petitioner because he has a history of having adulterous relationships with multiple women. This has caused the Respondent a great deal of pain and heartache especially in light of the fact that he is the reason she has contracted a sexual bacteria disease.

(viii) Paragraph 9 of the Petition is partially admitted. The Respondent's behaviour changed over time as a result of the Petitioner's physical, mental and emotional abuse of the Respondent.

(ix) That since the celebration of the marriage the Petitioner has committed adultery.

PARTICULARS OF THE ADULTERY

(x) The Petitioner has been disloyal, deceptive and untruthful to the Respondent throughout their marriage. As a result, the marriage in question was irretrievably destroyed, especially in light of the Petitioner's extramarital relationships.

(xi) An example of one of his adulterous relationships that has completely obliterated her emotionally was when she learned that the Petitioner had a son outside of the marriage with L. W., this is just one example of his many adulterous affairs.

(xii) Given that she has never had an extramarital relationship and has been faithful to the Petitioner from the outset, this astonished the Respondent quite a bit.

(xiii) In or around 2005, the Petitioner once more persisted in being dishonest and unfaithful to the union that God had blessed. The Petitioner left the marital home and moved in with O. M., a teacher at Gerald Cash Primary School for six (6) months.

(xiv) Regarding his numerous adulterous relationships, the Respondent and the Petitioner have never reconciled. The Petitioner has not only been an adulterer, but he has also fathered children outside of the marriage. The Petitioner's actions are extremely insulting and demeaning to the marriage they worked so hard to create.

(xv) There have also been instances where the Respondent overheard the Petitioner and other women on the phone having lewd and offensive conversations. During this time, he used phrases like "honey", "baby", and "my love" when addressing them. Due to the Petitioner's cunning and dishonest behaviour, the Petitioner would utilize the telephone to talk to his numerous women when he believed the Respondent was not around.

(xvi) The Respondent's marriage, which she believed would endure forever, eventually fell apart, and what she had imagined would be a happily ever after turned out to be a nightmare. Due to the Petitioner's actions, the Respondent felt a multitude of emotions but most of all she felt betrayed, disrespected, and unwanted.

(xvii) The Respondent had high hopes that her marriage with the Petitioner would succeed, but she was again disappointed when in or around March 2022, she overheard the Petitioner on the phone and discovered that he was still engaging in adulterous relationships. Such conduct caused the Respondent much hurt and anguish.

(xviii) As a result Petitioner cheats and lies, the Respondent sees no future with the Petitioner and her love for the Petitioner has diminished. The Respondent has ceased her wifely obligations as a result of the Petitioner's acts. Given that the

(xix) The Respondent firmly feels that there is no chance for the marriage to be saved because of the Petitioner's ongoing adultery, dishonesty and undesirous attitude to save the union.

(xx) As a result, the Respondent feels that the marriage she ultimately accepted has radically changed in front of her eyes and that the love the Petitioner formerly professed for her has vanished.

(xxi) That since the celebration of the marriage the Respondent has treated the Petitioner with cruelty.

PARTICULARS OF CRUELTY

(xxii) Along with having an affair while the couple was still married, the Petitioner also mistreated the Respondent cruelly and emotionally.

(xxiii) The Respondent was actually quite distraught when she discovered that she had a sexual bacterial disease as a result of the Petitioner's adulterous activities, which forced her to have a hysterectomy.

(xxiv) The Respondent was devastated, emotionally upset, and disturbed when this happened. She made the Petitioner aware of this, but he showed no remorse and no concern for what had happened to the Respondent.

(xxv) As a result, the Respondent stopped having sex with the Petitioner out of fear that something worse might occur given the fact that the Petitioner was obviously not using protection during sexual acts outside of the marriage. The Petitioner's carefree attitude and continued desire for sex with countless women without any form of protection astounded the Respondent.

(xxvi) The Petitioner would still coerce the Respondent into having sex with him even after all of that. In fact, if the Petitioner did not have sexual intercourse with the Respondent, he would threaten to shoot her. As a result, the Respondent reported those instances to the Police Station where the Petitioner was held in custody.

(xxvii) The Petitioner is quite aggressive; on another occasion, he physically abused the Respondent, which forced her to take time off work due to her injuries. Furthermore, she continues to have bodily problems as a result of the injuries she received from the Petitioner.

(xxviii) The Respondent felt like a prisoner in her marriage, she was not happy and suffered emotional stress due to the actions of the Petitioner.

(xxix) Despite being subjected to physical, sexual, and emotional abuse, the Respondent carried out her wifely duties because she was terrified of the Petitioner and believed he would abuse her even more if she did not.

(xxx) The Petitioner is very controlling, in addition to the previous forms of abuse the Respondent experienced, she also suffers financial abuse. The Petitioner manages the finances entirely without the Respondent being aware of their financial status raises serious concerns. A number of times, the Respondent inquired about the money and the Petitioner flat-out refused to respond. In particular, the funds raised from the apartments built on the matrimonial property.

(xxxi) The Respondent has expressed outrage over the Petitioner's behaviour towards her. He has sought to undermine her mental and emotional confidence. Because of this, the Respondent is physically, psychologically and emotionally scarred by the Petitioner and verily believes that a reconciliation is impossible.

THE RESPONDENT THEREFORE PRAYS:-

- a. That the prayer of the Petitioner may be rejected and the said Petition dismissed;
- b. That the Cross Petition be upheld and the said marriage be dissolved;
- c. That there be a Declaration pursuant to Section 73(1)(a) of the Matrimonial Causes Act, Chapter

- d. That the Petitioner do pay Alimony;
- e. That Ancillary matters be adjourned to Chamber;
- f. That there be a Property Adjustment Order; and
- g. That the Petitioner may be condemned to pay the cost of this suit.

The Issues

[5.] The issues for the court's determination are:

- (i) Whether the evidence given by the Petitioner and/or the Respondent has satisfied that court that the ground of cruelty has been established as defined in the Matrimonial Causes Act?
- (ii) Whether the Respondent has satisfied the court to the requisite standard that the husband has committed adultery?
- (iii) Whether either of the parties have condoned the behaviour of the other party?
- (iv) Is there a need to pray the court's discretion for either of the parties?

The Relevant Statute Law

[6] Issue 1 – The question to be determined as to whether the evidence given by the Petitioner and/or the Respondent satisfies the court, that the ground of cruelty has been established is tested by application of the definition of cruelty as defined in the Matrimonial Causes Act, Chapter 125 of the Statute Laws of The Commonwealth of The Bahamas (“MCA”).

Section 2 of the MCA defines cruelty as:

“Cruelty includes voluntary conduct reprehensible in nature or which is a departure from the normal standards of conjugal kindness on the part of one party to a marriage thereby occasioning injury to the health of the other spouse or a reasonable apprehension of it on the part of the other spouse and being conduct which, after taking due account of all the circumstance of the case, would be considered to be so grave and weighty a nature that should such other spouse be called upon to continue to endure it, would be detrimental to his or her health”.

[7] Issue 2 - The question to be determined as to whether the evidence given by the Respondent satisfies the court that the ground of adultery has been established is tested by application of the definition of adultery as defined in S.2 , MCA.

Adultery is defined by Section 2 MCA as:

“includes any voluntary act of an intimate sexual nature, other than that regarded as an act of mere familiarity, between one party to a marriage with another party of the

opposite sex who is not the other spouse and which act is inconsistent with that sexual fidelity that is presumed in the interest of public policy to exist between parties to a marriage, or any conduct between a party to a marriage with another person as aforementioned whereby a strong presumption arises that such sexual act occurred between them”

[8] Issue 3 – The husband’s assertion that his wife had forgiven him for adultery raises the issue of condonation. Condonation may be a bar to obtaining a Decree Nisi. This is prescribed in S. 19 MCA.

S. 19 (1) (a) Where the ground of the petition is adultery, that the petitioner has not in any manner been accessory to or connived at or condoned the adultery; Court may order respondent or correspondent to be dismissed from suit.

S. 19 (1) (b) Where the ground of the petition is cruelty that the petitioner, has not in any manner condoned the cruelty,

the court shall, subject to section 18 grant a decree declaring the marriage to be dissolved; and if the court is not satisfied with respect to any of the matters aforesaid; it shall dismiss the petition;

[9] Issue 4 – Notwithstanding that a Petitioner may have sufficient cogent evidence to prove the case, his Petition may be subject to dismissal. This issue came to light in this case. S. 18 MCA provides:

S. 18 (1) Where the court:

- (a) is not satisfied on the evidence that the case for the petitioner has been proved; or**
- (b) it finds that the petition is presented or prosecuted in collusion with the respondent or either of the respondents; or**
- (c) it finds that the petitioner has during the marriage been guilty of adultery; or**
- (d) in its opinion the petitioner has been guilty —**
- (e) of unreasonable delay in presenting or prosecuting the petition; or**
- (f) of cruelty towards the other party to the marriage; or**
- (g) where the ground of the petition is adultery or cruelty, of having without reasonable excuse either deserted or willfully separated himself or herself from the other party before the adultery or cruelty; or**

(h) where the ground of the petition is adultery or desertion, of such willful neglect or misconduct as has conducted to the adultery or desertion.

[Emphasis mine]

[10.] Issue 5 – The failure to pray for the courts discretion when it becomes obviously necessary or to file a discretion statement in the form prescribed in S. 28 (1) of the Matrimonial Causes Rule (MCR), S.28;

28. (1) Every party to a matrimonial cause praying that the court shall exercise its discretion to grant a decree nisi notwithstanding his adultery shall lodge in the Registry a statement (in this rule called “a discretion statement”) signed by him or his attorney, stating that the court will be asked to exercise its discretion in his favour notwithstanding his adultery, and setting forth particulars of the acts of adultery committed and of the fact which it is material for the court to know for the purpose of the exercise of its discretion.

Preliminary Commentary - The Demeanor of the Parties:

[11.] Both the husband and the wife have accused each other of cruelty. Additionally the wife has accused the husband of adultery. No witnesses were called by either of them to corroborate their evidence. Therefore, the court had to determine the issues before it based on the sole testimony of the parties and from their respective demeanor in the witness box. In these circumstances it often comes down to the issue of credibility.

[12.] It is fair to say that most of the husband’s testimony comported with the Petition except for an instance or Two (2) when he introduced certain accusations which were not pleaded in his Petition. This did not go unnoticed by the wife’s counsel nor did it go unnoticed by the court. The husband appeared to be extremely emotional while testifying and at one point there was a loud outburst from him. There are a myriad of reasons as to why this occurred. It might have been a display which could be attributed to anguish or despair that the divorce hearing was actually taking place or anguish in having to recount what took place during the marriage. It might also have been guilt or regret over the wife’s retelling of the events in the marriage or regret about those events and or his behaviour towards the wife during the marriage. The Respondent’s attorney challenged him that this was a fake reaction, and he was simulating tears that did not exist.

[13.] In giving her evidence the wife was less emotional, more controlled than the husband and tended only to display anger and annoyance at certain times while under cross-examination.

[14.] This court accepts that emotions run high in these situations and while not particularly influenced one way or the other by the husband’s outburst finds that the behaviour displayed in the witness box by the parties goes to their credibility and has helped to influence the final

determination of this matter. Those observations have helped, when taken in context with, the statute, and case law, and accounts for the ultimate decision of the court as will become clear as the case is analyzed and assessed.

The Husband's case analyzed and assessed:

[15.] Addressing the allegation made that the change in the wife's loving attitude to one of coldness and rejection of advances: The husband attributes a drastic change in his wife's behaviour towards him to the release of her son's father, one Phillip White from prison in July, 1989 after serving a Twenty (20) year sentence. The wife has denied that Mr. White's release from prison was the cause for any of her conduct in the marriage. In responding to this allegation by the Husband the wife says that she herself told her husband of Mr. White's release from prison, because she was afraid of Mr. White and felt that her husband could protect her.

[16.] In my assessment the relevance of Mr. White's release from prison has not been clearly explained by the husband. The inference which the Petitioner desires this court to make is that the wife engaged in an adulterous affair with Mr. White after his release. This would take a quantum leap for this court to draw such a conclusion from the husband's unsubstantiated assertions. Moreover, in cross examination the husband clearly stated that he never saw the wife in an inappropriate position with any man including Mr. White. Additionally, according to the Petition Mr. White's release came about in 1989 some Four (4) years prior to the parties getting married. If Mr. White's release was the cause for a change in the wife's behaviour towards the husband so that she did not "love him "no more", called him "boring" and refused him sexual intercourse, as he suggests, even before they were married, why did he go through with the marriage? **I reject the assertion that Mr. White's release from prison influenced any change in the wife's behaviour, during the marriage of the parties.**

[17.] **The Refusal by the wife of sexual intercourse with the husband:** The husband alleges that the wife stopped engaging in sexual intercourse with him. When he would come home, she would lay in bed and turn her back towards him. He also testified that she was verbally abusive towards him, particularly with regard to issues surrounding her refusal of sexual intercourse. He says the verbal abuse started over a child born to him outside of the marriage approximately twenty (20) years ago. The wife contends that he literally brought the child who she knew nothing about at the time home without her knowledge or consent. The wife had brought into the marriage a son of her own from a previous relationship, before marriage to the husband, whom the husband contends he had accepted and treated as a child of the family. The husband acknowledges and confesses to infidelity and the resultant consequence. He admits it took place some Twenty (20) years ago and he has not refuted the wife's allegation that the woman with whom he fathered the child is her own cousin. The husband did not challenge the wife's declaration that she welcomed the child into the family and never displayed any negativity towards the child. The husband was of the view, given these circumstances that the wife had forgiven him the affair. He felt that they

were at idem in both determining to move on in the relationship. However, as time progressed the husband claims that the wife continuously threw the affair and the offspring from it in his face. He remonstrated that he did not return the sentiment concerning her child brought into the family. This, he contends was one of several cruel acts of the wife that he had to withstand. Aside from throwing the child in his face he says the wife was always accusing him of having other extra-marital affairs, to the extent that she accused him of having adulterous affairs with others of her family, and of his own family, including even his own mother. This apparently became the norm and is one of the actions contributing to the reason for the application to dissolve the marriage.

[18.] Addressing the husband's allegations that the wife was cruel in refusing him sexual intercourse the wife responds that even before Mr. White came out of prison she had learnt of the husband's numerous affairs. She does not deny that her sexual responses to her husband changed during the marriage however it was because of the adulterous affairs which the husband continually engaged in, the first of which took place early in the marriage. Aside from the child that the extra-marital affair with her cousin produced, the situation was exacerbated by the wife having to have L.W. bound over to keep the peace. The discovery of this affair and the child, she says "completely obliterated me emotionally."

[19.] Other than the admitted affair with L.W. the Husband has denied having other numerous affairs of which the wife has accused him. One affair amplified by the wife is of a relationship which the husband had with O.M. one of the children's teachers, whom she claims he moved out of the matrimonial home and lived with for six (6) months. The husband denies that he lived with O.M. but rather moved in with his sister. The wife did not expand on her allegation about the husband moving out and living with O.M. For instance she did not give even an address as to where the residence of the husband and O.M. was situated, or even when she saw him there, or how many times she saw him there or even at what times in the day or night she would have seen him there. The wife further avers that she became suspicious of this relationship when she went to the husband's workplace and saw "sheets." The implication being that this was evidence that a sexual act had occurred between the husband and O.M. She tells of the husband having her to buy a basket with fruit and other goods for O.M. for teacher's appreciation day. Then there was the removal of her name from the husband's truck and it being replaced by O.M.'s name. She also tells of O.M. coming to the house and apologizing to the children in her and the husband's presence ostensibly for having the affair with the husband. She did not narrate what was said by O.M. on that occasion. The husband completely denies the affair or that such an apology took place. Where there is no direct evidence to support a claim of adultery, the conduct of the parties may lead to a conclusion that it did occur.

[20.] When a spouse, the wife in this instance refuses her husband sexual intercourse it may amount to cruelty;

In **H v H** FAM/div No. [640 of 2009] *Bain J* (as she then was) referred to **Evans v. Evans** [1965] 2 All E.R. 789 where *Cairns J.*, opined that at page [792] of the judgment.”

“Refusal of intercourse can amount to cruelty if it is unjustified, if in all the circumstances of the case it can properly be regarded as a grave and weighty matter, and if it has an adverse effect on the health of the other spouse.”

[21.] Additionally, in **Lundy v Lundy** [1993] BHS J. No. 9, *Sawyer J* (as she then was) made reference to the case of **Sheldon v. Sheldon** [1966] p. [62] in which the husband's persistent refusal of sexual intercourse with his wife who ardently desired a child over a long period without explanation, was held by the Court of Appeal in England to amount to cruelty since the wife's health had actually been injured by the husband's conduct.

[22.] I take particular notice of the words used in the above authorities **“unjustified”** in **H v H** and the words **“without explanation”** in **Lundy** and **Sheldon**.

[23.] In my assessment there is no clearer evidence of adultery than the existence of a child from such relationships. That child's existence is not even at issue between the parties. Nor is it at issue that the affair occurred with L.W., a member of the wife's own family. As for the alleged affair with O.M. the wife had reason to suspect an adulterous affair was taking place between O.M. and the husband. The husband denied that he was living with O.M. but with his sister while the other evidence of “sheets” at the school and of O.M. apologizing to the children was somewhat vague, I believe the wife when she said that the husband was living with O.M. for Six Months. That O.M. came to her home and had some interchange with her children concerning the Respondent and their relationship. The fact that the husband and O.M. dressed alike and that the husband removed her name off of his vehicle and put O.M.'s name on the truck is sufficient to create a strong presumption that the husband was involved in an adulterous relationship with O.M. In any event such behaviour is contrary to matrimonial harmony and together with certain other conduct points also to cruelty. The wife's suspicions about her husband and O.M. together with the husband's inappropriate conversations on the telephone with other females increased the wife's suspicions that he was having affairs, this led to serious trust issues for the wife. The withholding of sexual intercourse from the husband was most likely a defense mechanism which is understandable and **justified** in the circumstances.

[24.] **The Husbands allegations that the wife refused to communicate:**

The husband's asserts that the wife refuses to communicate with him. He further avers that she resorts to verbal abuse and insulting him in front of relatives, that she is cold, and uncaring. The wife's explanation is that the refusal was due to suffering from a sexually transmitted disease (STD) which she claims to have contracted from the husband. She explains that it occurs only

when she engages in sex with the husband. Despite advising her husband of the condition and that he was the cause the husband ignored her remonstrations and insisted on having sex with her. The husband denies that she told him of her condition and that during these proceedings was when he first became aware of her complaint of the STD but thought the wife's condition was a yeast infection or a similar minor health issue. The wife explained further that the STD resulted in her having to undergo a hysterectomy in 2015, in an attempt to avoid contracting cancer. She speaks of the husband also forcing her to have sex during her menstrual cycle (despite her protestations). Effectively raping her. The gravity of the incidents extended to the husband threatening to shoot her. These attempts to refuse sex has resulted in numerous complaints made by her to the police, who even picked the husband up on one occasion. She *explains* her cold uncaring attitude towards her husband and her refusal to communicate, is as a result of these circumstances and therefore warranted.

[25.] I accept the wife's evidence that she suffered a STD (absent any medical report to the effect). I also accept the wife's assertions that she complained to the husband about her medical problems. However, it is also clear that the husband was callously indifferent to the wife's medical condition, and her objections to sexual intercourse. Callous indifference may lead to a finding of a marital offence entitling the other party to a decree of divorce;

[26.] In *Cade v Cade* [1957] 1 All E.R. 609, *the parties married in 1951, and when their third child was born in July 1956, the husband had established a course of callous indifference and neglect regarding his wife and three children. He stayed out until early in the morning, although she frequently asked him not to leave them alone in the house. He registered the new-born child with a name not agreed by his wife, ignored the child and refused to sleep with his wife. He told her he had lost interest in her and wanted a separation. As he continued to ignore them completely, she left him. She wrote him asking him to change his ways and to treat them in an affectionate manner. He responded that it would be best to separate. Medical evidence indicated that her health deteriorated over the period from September 1955 to October 1956. The court found that the husband's conduct amounted to cruelty, as he had persisted in a course of callous indifference and neglect in respect of the wife in spite of her objections and his knowledge of her condition and the effect on her health. It was held that the wife had established constructive desertion by her husband, as his conduct amounted to expulsive conduct.*

[Emphasis mine]

[27.] The wife complaining to the husband meets the criteria of “**explanation**” set out in *Lundy* supra. I also find that in those circumstances the wife's refusal of sexual intercourse with the husband is therefore “**justified**” as in *H v H* supra. In my assessment the wife's refusal to communicate with her husband and apparent rancorous response and accusations when she did communicate with the husband, can factor into findings of cruelty against the wife (as alleged by the husband) but must be weighed in all of the circumstances, and those circumstances ultimately assist the court in determining the case.

[28.] The Husband's allegation that the wife engages in explicit phone exchanges with other men:

Under cross examination, the husband averred that he saw explicit messages about naked photos in his wife's phone with a man named "E". Counsel for the Respondent suggested to the husband that his testimony was a recent fabrication because none of it was included in his petition. The husband agreed that much of his testimony was not included in his petition. The husband's account of text messages he saw in the wife's phone suggesting that she was having inappropriate connections with other men, which is denied by the wife, is of no significance in proving any adulterous behaviour by the wife and to my mind does not support a finding that the wife was cruel to the husband. The request from a third party for more photo's proves' nothing against the wife particularly since her alleged response, which she denies in its entirety, but according to the husband was "my husband always checks my phone." This response is not in any way conclusive of an adulterous affair or cruelty, but what it does confirm is the husband's unauthorized and unwelcome snooping around in the wife's telephone in violation of her privacy. This court does not accept this testimony, heard for the first time from the husband on the witness stand, as attributing adulterous behaviour to the wife. I place no credence in it. This is amplified by the fact that the husband admitted that he has never seen his wife with any man including, P.W. since his release from prison. He further admitted that since seeing the text messages in his wife's phone, he still had sexual intercourse with her, and he remained in the matrimonial home with her for two to three months. In my assessment this allegation by the husband is gratuitous since he did not bother to plead it in his Petition as an allegation of adultery or cruelty.

[29.] The husband's allegations that the wife was cruel because she stopped cooking for him:

The husband contends that the wife stopped cooking for him. This accusation was made without any further support or substance. Initially the wife admitted to this allegation in her Answer and Cross Petition, but later testified that she continued to cook and clean.

[30.] In my assessment, if the wife did refuse to continue cooking for the husband it does little to support a claim of cruelty. Much is dependent upon the circumstances under which the husband came to expect that the wife should perform cooking services exclusively in the marriage? Was this a specific promise made to the Petitioner by the wife, that she would forever and always cook his meals? Was he suffering some disability with his hands that made it impossible for him to cook his own meals? In modern society where it is usual that both husband and wife go out to work, as is the case here, it is no longer usual or expected that the wife should bear the brunt of cooking meals for the family. In many relationships in fact the opposite maintains, where the husband may in fact be the one who stays home and carries out the homemaking duties including cooking. **I do not accept that a failure to cook for the husband can without extenuating circumstances, in and of itself be deemed a cruel act. It is not of a grave and weighty nature sufficient to amount to cruelty.** However it might with other

conduct by the wife contribute to a finding of cruelty against the wife. S. 2 MCA definition requires that all the circumstance of the case, be taken into consideration. An exposition of the principal is found in;

Gollins v. Gollins [1963] 2 All ER 966 *the House of Lords* in considering the meaning of cruelty stated that the principle to be considered in determining cruelty:-

"Whether cruelty, as a matrimonial offence has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by an objective standard, accordingly in cases where the two spouses are of normal physical and mental health, and the conduct of respondent spouse so considered, is so bad that the other should not be called upon to endure it, cruelty is established and it does not matter what was the respondents state of mind, e.g. it is immaterial whether the respondent's conduct was "aimed at" the other spouse or due to unwarranted indifference attributable perhaps to selfishness."

[31.] The effect of the behaviour by one party on another must be considered in determining whether one party has treated the other with cruelty. Thus the court must consider the case as a whole but must also be mindful of the guardrails to be erected where individual personalities might unduly influence the decision making process. In keeping with;

Kalefsky v. Kalefsky [1950] 2 All ER 398 - ***"If the door of cruelty were opened too wide the court would soon find itself granting divorce for incompatibility of temperament."***

[32.] It cannot be emphasized enough that he who alleges must prove and the Petitioner has the burden to establish that the Respondent's conduct meets the definition of cruelty and the well-established "grave and weighty" test.

In ***CRW v. SAW*** [2010] 4 BHS J. No. 8 per Hepburn J.

"This test is long standing. It was first propounded in 1790 by Sir William Scott in Evans v Evans 1 Hag. Con. 35 at 37. It has never been challenged and is now a part of our law.

Cases founded on mere trivialities and incompatibility do not satisfy the grave and weighty test. Nor do cases in which there is no evidence of injury to health or reasonable apprehension of injury. (See Gollins v Gollins [1964] AC 644 at 686-687 per Lord Pearce.)"

[33.] The Petitioner's presented no evidence to support his allegations that the wife's conduct caused injury to his health or even cause him to apprehend such. Instead the Petitioner appeared to be the more domineering partner in the marriage and it was the Respondent who had to get the

police involved in altercations with the Respondent when physical injury was visited upon her person and who contracted an STD leading to a hysterectomy.

[34.] To summarize my findings in the husband's case against the wife: The wife's conduct over the many years stemmed from the husband's initial act of infidelity. The wife became mistrustful that the husband was engaged in extra marital affairs with different persons. This was not helped by his conduct with O.M., conversations had with other women on the telephone, him moving out of the home for Six (6) months, (for which he has offered no explanation to the court) and finally the wife contracting a sexually transmitted disease leading to a hysterectomy. I reject the husband's assertions that the wife was cruel to him. I am of the view that her refusal of sex as well as her lack of communication and coldness was a direct result of the husband's conduct in the marriage and therefore her behaviour was justified. The husband has also failed to demonstrate to the court any adverse effect or health issues suffered or apprehended by the wife's conduct. He has failed to convince me that the wife's conduct as he alleges is so grave and weighty a nature that he should not be called upon to continue to endure it, or that aside from frustration over not having his way over sex that her conduct would be detrimental to his health.

The Wife's Case

[35.] Accordingly and The wife's in answer to the husbands allegations has sufficiently convinced the court that her husband not only committed adultery with at least Two (2) women but that he physically, and mentally abused her such that his conduct satisfies the definition of cruelty in the MCA. In light of the circumstances there is little value in regurgitating those facts and findings. However much of the marital activities and the husband and wife's conduct in the marriage arose as a result of the sexual conditions which persisted in the marriage. The wife's refusal of sexual intercourse and the husband forcing the same should be purposely ventilated in this matter and for posterity in similar cases;

[36.] Counsel for the wife accordingly submitted that the physical abuse was callous and grave conduct from the husband amounting to cruelty and relied on the case of **AA v BB** 2021/FAM/div/00412 where *Justice Lewis Johnson* at paragraphs [38 and 39]:

“The Respondent is correct that Bahamian law provides for sex in marriage between the parties as a right; there must be consummation. I am, however, of the view that it ought not to be taken by force and is painful to one party...”

Notwithstanding the Respondent's belief that his actions were his right in marriage. I find the manner in which he carried out that right - his forcing himself on his wife, his ignoring her feeling of not being a willing participant in intercourse resulting in mental

harm to the Petitioner and a feeling of being violated - meets the standard of cruelty under Section 16(1) of the Matrimonial Causes Act.”

I concur with Justice Lewis-Johnson’s opinion on this matter and adopt the position in this case.

[37.] A typical approach taken by many men to the wife’s obligation to have sex with them was discussed in *IL v KL* [2023] EWHC 3335 (Fam) – where *The Honourable Mrs. Justice Roberts* - had a copy of a summary of an interview which had been included in an appeal bundle. As that summary makes clear, the father denied that he had ever raped his wife or used any force to make her engage in sexual relations. When he was asked about his understanding in relation to consent, he told the police that –

***“.. he believes there is a presumption of consent in marital sex, in so much as he does not feel the need to ask permission to have sex on each occasion as he may do in a more casual relationship. His attitude can be summarized as presuming consent unless told otherwise*”**

[Emphasis mine]

This appears to have been the husband’s mindset in this case except to say that even when told otherwise he could not accept no for an answer.

[38.] On a much broader scale the violence with which sexual intercourse is extracted from the wife is a complete breach of trust by the husband. In the **Attorney General's Reference No [96] of 2014** [2014] EWCA Crim 2822 - ca, Criminal Division

Lord Justice Davis, Mrs. Justice Nicola Davies DBE, Mr. Justice Stewart –In discussing offences under S.36 of the Criminal Justice Act 1988 – which creates the offence of marital rape in the UK. Jurisdiction;

[39.] ***Nevertheless, this was conduct which involved, as Mr. Heywood said, not simply an abuse of trust in the sense of the trust which a wife places in her husband, but an abuse of power. We agree that it is not an abuse of trust of the paradigm kind for the purposes of this particular guideline – such as, for example, can apply to teachers or clergy or childminders or step-parents or the like. We do not necessarily say that all cases of rape occurring in the course of a marriage will necessarily involve an abuse of trust for the purposes of the sexual offences definitive guideline. But here this was singularly unpleasant conduct which went on over a period of time. On any view, marital rape is at least an abuse of the marital relationship, and indeed involves taking advantage of the marital relationship where a wife has the constraint, more often than not, of trying to keep the marriage together and trying to safeguard the interests of any children there may be. Further, more often than not, there will be a degree of dependency, be it financial or emotional or both.***

[40.] Notwithstanding, that the expose is a direct reference to the offence of marital rape under British law, I consider it to be germane to behaviour that is expected from one party to the marriage

towards the other party, generally. I am also of the view that the term marital rape is a term of art used to describe the taking of sexual intercourse or similar sexual acts by force and/or violence, by a party to the marriage (usually the husband) from the other party while the marriage subsists. This can occur whether the moniker “marital rape” is applied or not. The violent actions and threats perpetrated by the husband against the wife to engage her in sexual intercourse, is a breach of the wife’s trust and confidence in her husband. It offends the obligation placed on him to afford her protection and to be the principle person with whom she placed her trust, the person with whom she had committed her fidelity. **This contributes also to conduct which might be characterized as cruel.**

[41.] Moreover, when a wife is unable to trust her husband her reaction could well be rejection of his sexual advances, as in this case, it buttresses my opinion that her conduct towards him was *justified*.

[42.] I have already intimated above that I accept the wife’s testimony that she contracted a sexually transmitted disease and since no other reasonable or rational explanation has been offered by the Husband as to her catching it otherwise I am satisfied he was the culprit. The husband’s veiled innuendo about P.W. was in no way credible. The transmission by the husband of this disease to the wife is an abusive act which when considered with other factors satisfies the definition of cruelty being *conduct by the husband which is reprehensible and which is a departure from the normal standards of conjugal kindness on his part thereby occasioning injury to the wife’s health as defined in S. 2 MCA*. It is conduct that is so grave and weighty that has proven to be detrimental to her health. (Gollins supra)

[43.] **One of the issues not previously discussed but is an allegation made against the husband by the wife is that her husband financially abused her;**

The wife testified further that she suffers from financial abuse. She stated that her husband collects the rent from all of their rental units with the exception of one which she now collects as this was an agreement that they made a long time ago. She testified that she would have to beg him for money to go to the food store. The wife recalled that there were two instances when her husband left the matrimonial home. The first was in 1999 where he moved out for a month and returned. The second time was in 2005. He returned home later that same year because he lost his job at Atlantis.

[44.] She stated that his actions affected her health mentally, physically and she was stressed out and unable to sleep. She only started receiving one month of rent after she filed for divorce. She also admitted that she collects \$50.00 rent from her nephew who lives in the house. However she says the husband collects all of the rents otherwise and also the sum of \$400.00 from his son who comes to stay in the matrimonial home when he comes home from working on the Cay. The

husband denied that he financially abused the wife. He agrees that she is allowed to collect rent from one of the apartment units and that she receives some rent from one of their family members.

[45.] I have taken note of the fact that the wife admitted that the agreement made between her and the husband long ago was that he would collect all the rents and pay the bills. This apparently changed as things deteriorated in the marriage. That very deterioration is what in my estimation led to the husband insisting on sticking to the agreement even in the face of the wife's obvious hardship. This was not kind and also contributes to the overall impression that the husband was cruel to the wife.

The Issue of Condonation

[46.] Notwithstanding that this court has determined that the marital offences of adultery and cruelty with which the wife accused the husband have been made out, the issue of condonation may yet operate to deprive the wife of having a Decree Nisi pronounced in her favour. This incites a discussion of and a determination of the issue of condonation.

Has the wife condoned the husband's behaviour?

[47.] The operation of condonation is described by Bucknell L.J in **Richardson v Richardson** [1950] P.[16]

*"The Lord Justice quoted the words of Sir John Nicholl, Dean of Arches, in **Durant v. Durant** Sir John said: "The plainer reason and the good sense of the implied condition is that 'you shall not only abstain from adultery, but shall in future treat me - in every respect (to use the words of the law) with "conjugal kindness".'" Finally, there is a judgment of Sir Francis Jeune P., in **Houghton v. Houghton** ⁽³⁾ where he said: "The principle is as clear as possible. When the law speaks of condonation and revival, it means that the offence is condoned on the condition that there shall be in the future a proper compliance with the matrimonial decencies and duties,*

Later in his judgment he went on to state;

" I think that the proper test to apply is one which is indicated by the words of Sir Francis Jeune P. to which I have just referred, that the conduct of the spouse must be such as to make decent married life together impossible. That is putting it as broadly as I can. I think a matrimonial offence means an offence against the vows of marriage. The vows of marriage are pretty well known. Desertion is certainly one offence, and cruelty as defined by the law is another.

Per Denning L.J.:

Such conduct short of "cruelty" will revive condoned adultery, if it consists of harshness or neglect of a real and substantial kind which is such as to be likely to inflict misery on the innocent party and does indeed lead to a breakdown of the marriage.

[48.] Authority for condonation is also found in **Lockhart v Lockhart** [1995] BHS J. No. [37] which defined condonation as:

"the reinstatement in his or her former marital position of spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not henceforward commit any further matrimonial offence"

[49.] Seemingly, for the Court to accept this position, it must be satisfied that when the initial act of adultery occurred, the wife had not reconciled with the husband for his indiscretions. The element of forgiveness is essential to condonation.

[50.] *Bain J* in the case of **MDM v. EHM** BS [2015] SC 146 referenced **Mackrell v. Mackrell** [1948] All ER 858 where *Denning LJ* stated:-

"Reconciliation does not take place unless and until mutual trust and confidence are restored. It is not to be expected that the parties can ever recapture the mutual devotion which existed when they were first married, but their relationship must be restored by mutual consent, to a settled rhythm in which the past offences, if not forgotten, at least no longer rankle and embitter their daily lives. Then, and not until then, are the offences condoned.

*Reconciliation being the test of condonation, nothing short of it will suffice. The fact that the parties continue to live in the same house or the fact that the guilty party is reinstated in his or her former position is, indeed, evidence from which reconciliation may be inferred, but it is by no means conclusive. The longer the parties continue together and the closer their relationship, the stronger, of course is the evidence of reconciliation... In my opinion therefore, attempts to effect a reconciliation do not amount to condonation unless and until a reconciliation is actually achieved. The only exception to this is the positive rule that one act of sexual intercourse by a husband with full knowledge of his wife's guilt is conclusive evidence of condonation, but as *Bucknell, LJ* said in **Fearn v. Fearn** [1948] 1 All ER 459 that is because of the serious prejudice to the wife that may hereby be occasioned. She may have a child as a consequence of it."*

[51.] A decision as to whether or not the wife condoned the husband's adultery with LM is to be decided on a balance of probability. In **Blyth Appellant v Blyth Respondent** [1966] A.C. 643 it was held inter alia that "there is no statutory requirement that the absence of condonation must be proved beyond reasonable doubt. In matrimonial cases, as in other civil cases, the proof must be by the preponderance of probability, the degree of probability depending on the subject-matter, so that in proportion as the offence is grave. So the proof should be clear.

[52.] Applying the Blyth standard, and in light of the foregoing authorities I find on a balance of probabilities that the adultery with O.M. and the suspicious telephone calls between the husband and other females were at the very least a breach of conjugal kindness (**Durant**), making decent married life together impossible (**Richardson**) which revived the initial adultery with LM, thereby setting aside the wife's conditional intention to forgive the husband (condonation). In the case of the husband I did not find that he made out a case that the wife was cruel to him making his evidence about the wife sleeping with him after he supposedly discovered the telephone message, irrelevant.

Statutory Bars to a Grant of Decree Nisi

[53.] The Courts in deciding matters must be satisfied that both parties have met the procedural requirements under the Act. S. 18 MCA speaks specifically to grounds for dismissing Petitions. S. 28 MCR sets out the requirement where discretion is being prayed by the Party to the cause. This cannot be overlooked by the court given the cross Petitions by both parties for dismissal of the other party's petition. The husband did commit adultery with Two (2) women. One admitted and one I found to be so. Yet he failed to pray for the court to exercise discretion in his favour, to grant him a Decree Nisi of divorce. He is the offending party here and dismissal is an unavoidable consideration.

[54.] *Sawyer J* in **McMinns v McMinns** [1993] BHS J. No.28 expressed succinctly the same view held by this court:

"I think it is incumbent upon me, before leaving this judgment, to say something about the practice in divorce proceedings as it appeared in this case.

In the past I have pointed out to various counsel the provisions of Rules 28 and 30 of the Matrimonial Causes Rules regarding the filing of discretion statements and the standard of proof where cruelty or adultery are put forward as the grounds for the petition. Those rules as well as the other rules under the Act are part of the law of this country and as such are meant to be observed by those who practice in these courts. They cannot simply be ignored or treated as an inconvenience because in this country - unlike, eg. The United Kingdom and some Caribbean countries - the grounds for divorce are still quite serious matters and the conduct of the spouses may be an important consideration when matters affecting the distribution of property are to be considered.

Further, because of the very nature of marital discord, it is at times almost impossible to arrive at any sensible decision as to what really happened so that unless both parties conscientiously seek to bring all the relevant facts before the court, justice can never really be done.

[55.] The repercussions of failure to follow the requirements laid down in S.18 MCA and S. 28 MCR is fatal to the Husband's petition.

CONCLUSION

- [1.] The Court dismisses the Petition of the husband.
- [2.] A Decree Nisi is therefore granted to the wife, on her Answer and Cross-Petition, on the ground that since the celebration of the marriage, the Respondent has committed adultery with L.M. and O.M. and has treated her with cruelty.
- [3.] The Decree is not to be made absolute until Three (3) months from the making hereof.
- [4.] And the Court Declares that pursuant to S. 73 (1) (a) of the Matrimonial Causes Act Chapter 125 of the Statute Laws of The Commonwealth of The Bahamas there are no children of the family to whom the section applies.
- [5.] Costs of these proceedings is granted to the Wife to be fixed by the Court.

Dated this 13th day of December, 2024



The Honourable Madam Justice C.V. Hope Strachan,
Justice