

[HALLINAN, C.J., AND ZEKIA, J.]

(March 23, 1955)

SEVGI MOUHAREM of Nicosia, *Appellant*,

v.

EZEL NAZIM NOURI of Nicosia, *Respondent*.

(*Turkish Family Court Appeal No. 1/55*)

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Turkish Family (Marriage and Divorce) Law, 1951, section 25(c) – Infamous crime as ground for divorce – What constitutes infamous crime – Prior prosecution unnecessary.

Section 25 (c) of the Turkish Family (Marriage and Divorce) Law, 1951, provides that "a spouse may obtain a divorce where the other party has committed an in-famous crime or has been guilty of such dishonorable conduct as in the opinion of the Court renders life in common impossible or intolerable for the party suing for divorce."

The respondent, the wife of the petitioner, committed some petty larcenies from shops all within a few hours on the same day. The trial Court held that the petitioner had established a valid ground for divorce as his wife had committed an infamous crime, and in lieu of divorce granted a judicial separation.

Held: The wife's conduct was not "infamous"; decree set aside.

(Per HALLINAN, C. j.) Whether a spouse has committed an infamous crime or is guilty of dishonorable conduct, the Court must ask itself very much the same question: has the conduct of the guilty spouse been such that the marriage relating cannot fairly be expected to continue?

(Per ZEKIA, j.) (i) Before a Turkish Family Court determines the issue as to whether a spouse has committed an infamous crime it is not necessary that the spouse be prosecuted for such crime. The judge, however, in making a finding about the commission of an alleged offence should see that the nature and amount of evidence adduced is strong enough to support a conviction had such an offence been tried before a criminal court. (ii) What makes a crime infamous is its being serious in nature and socially degrading either to the offender or to his family.

Appeal allowed.

Appeal by defendant from the judgment of the Turkish Family Court of Nicosia (Action No. 51/54).

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A. *Hikmet* for the appellant.

F. *Korkut* for the respondent.

The facts sufficiently appear in the judgment of this Court which was delivered by:

HALLIN AN, C. J.: In this case the respondent sued his wife, the appellant, for a divorce. They were married on the 13th July, 1953. The wife committed some petty larcenies of lace 'from shops in Nicosia, all within a few hours, on the 13th February, 1954. The husband asked for two alternative forms of relief, first, under section 19(c) of the Turkish Family (Marriage and Divorce) Law, 1951 (No. 4/1951), that the marriage be declared void being induced by a *bona fide* mistake and belief that his wife possessed certain qualities the absence of which would make life in common impossible or intolerable; and, secondly, that the Court grant the husband a divorce under section 25 (c) of that Law on the ground that the wife had committed an infamous crime. The learned trial Judge refused to make a declaration that the marriage was void, but held that the husband had established a valid ground for divorce; however, in exercise of the Court's discretion under section 29 of the Law, he granted in lieu of divorce a judicial separation for six months to give the parties an opportunity of reconciliation.

The point which falls for decision is whether the petty larcenies committed by the wife on the 13th February, 1954, should be considered infamous crimes within the meaning of that phrase in section 25 (c) of the Law. That paragraph provides that a spouse may obtain a divorce "where the other party has committed an infamous crime or has been guilty of such dishonourable conduct as in the opinion of the Court renders life in common impossible or intolerable for the party suing for divorce".

The syntax of this paragraph appears to allow divorce on two separate but closely connected grounds. Dishonourable conduct is not a ground for divorce unless it makes the life in common impossible or intolerable. This is a question of fact for the Court to decide having regard to all the circumstances of the case. Where a spouse has been guilty of a crime, it would appear on first reading the paragraph that the Court should grant a divorce without considering whether the life in common has become impossible or intolerable, provided the Court is satisfied that the crime is "infamous". The attempt of the legislative authority to draw a distinction between 'infamous crime' and 'dishonourable conduct' is not very successful, because the legislative authority has not defined the phrase 'infamous crime' and has thrown

on the Court the duty of saying in each case whether the crime is infamous.

In construing a statute one of the cardinal rules of interpretation is to look to the scope and objects of the statute. Now the statute before us in this case deals with the law of divorce where parties have contracted a monogamous marriage, that is to say, the union of one man and one woman for life. Speaking broadly, it must be assumed that the legislative authority does not intend to confer upon the Courts the power to dissolve a marriage unless "the marriage relation cannot fairly be expected to continue". This very phrase occurs in Article 139 of the Swiss Civil Code from which our section 25(c) appears to have been taken. This article reads:-

"If a married person has committed some dishonourable crime, or if he lives so dishonourably that the marriage relation cannot fairly be expected to continue, the innocent spouse may sue for divorce."

No marriage could survive the vicissitudes of life unless each spouse gives support and support to the other in time of trouble. It is in the interests of society, and indeed is in accordance with the dictates of humanity, that where one spouse is in trouble, even where he or she has offended against the laws of society, that the spouse who is in difficulties should before all look to the other spouse for comfort and guidance. It would be contrary to humanity and destructive of the institution of marriage if one spouse could lightly put away the other who had offended against the laws of society. The public interest requires that the righteous spouse should be encouraged to rehabilitate his or her fallen partner rather than that the law should facilitate the rejection of that partner at a time when help and comfort is most needed. Where however the crime is so abominable as permanently to injure emotional relations between the parties (such as the crimes of bestiality and rape), then the marriage relation cannot clearly be expected to continue; or where a crime or a series of crimes demonstrate that there is no hope of reform, and the position in society of the innocent spouse and the children of the marriage has become intolerable, there again the crime must be considered infamous and a ground for divorce.

In practice then when a Court has to construe the phrase 'infamous crime' and see whether the phrase in its context can fairly be applied to the facts and circumstances of the case before the Court, in my view, the Court must ask itself very much the same sort of question as it has to ask when considering whether some alleged dishonourable conduct is a sufficient ground for divorce: the crime or series of crimes are 'infamous' if the conduct of the guilty spouse has been such that the

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marriage relation cannot fairly be expected to continue. If that is the state of affairs between the parties it is very much the same as saying that their life in common has become impossible or intolerable. It is significant that the corresponding provision in the German Code (Article 1568) does not attempt to make any distinction between 'dishonourable crime' and 'dishonourable conduct'. It is as follows:

"Either spouse may petition for divorce if the other spouse has by any grave breach of marital duty or by dishonourable or immoral conduct disturbed the conjugal relation to such an extent that the petitioner cannot be expected to continue the marriage."

Applying the considerations which I have mentioned to the facts and circumstances of the present case, I do not consider that the petty thefts committed by the wife amount to infamous crimes as that phrase should be construed in section 25 (c). *The decision of the trial Court granting a judicial separation should therefore be set aside.*

The wife counterclaimed for an order that the husband be required to live together with the defendant in the conjugal home. *The case must in my view be sent back to the trial Court to determine the counterclaim and for that purpose to hear any fresh evidence which the parties or the Court consider it necessary to adduce.*

ZEKIA, J.: The points raised by the appellant were two: In the first place it was argued that there was no evidence before the trial Court and, indeed, no finding by the trial Judge that the thefts committed by the wife rendered life in common impossible or intolerable. One of the grounds of divorce is given under section 25 (c) of the Turkish Family (Marriage and Divorce) Law, 1951, which reads:

"Where the other party has committed an infamous crime or has been guilty of such dishonourable conduct as, in the opinion of the Court, renders life in common impossible or intolerable for the part suing for divorce".

It is clear, to my mind, that the last qualifying words were intended only to describe the kind of dishonourable conduct which might constitute a ground of divorce. This is in line with the Turkish Authorities on the subject (see pages 62-64 of Candarly and Berki on Divorce).

The second point raised was whether the Turkish Family Court in its capacity as a Divorce Court had powers to investigate and arrive at a finding about the commission of an alleged crime before such offence was tried and proceedings concluded in a competent criminal court. Section 25 (c) just cited makes the commission of an infamous crime a ground of divorce and not the conviction of such an offence. This also falls in line with English and Turkish authorities (see page

120, Rayden on Divorce, 5th Edition, under the heading 'unnatural offences' as ground for dissolution of marriage or judicial separation. See also Turkish authority cited above).

The trial Judge, however, in making a finding about the commission of an alleged offence should see that the nature and amount of evidence adduced is strong enough to support a conviction had such an offence been tried before a criminal court.

A third point, although not directly raised, remains for consideration. Is the commission of a theft of any kind, whether of trivial nature or not, sufficient to establish a ground for divorce against the guilty party? This depends on whether the offence committed amounts to an infamous crime within the object and scope of the Turkish Family (Marriage and Divorce) Law, 1951, in general, and of section 25 (c) of the said Law in particular. There is no hard and fast rule dividing crimes into categories of infamous and non-infamous. It seems to me that a certain class of offences could and should be classified as infamous crimes without any hesitation, such as, for instance, the group of offences described as unnatural offences. The revolting character of such offences leaves no room to doubt about its depravity.

Likewise there are certain classes of offences which one can safely describe as non-infamous crimes. Such is the case, for instance, for many statutory offences as distinct from those known to the Common Law, although the former offences might entail severe punishment. Some offences of political character and also minor offences which do not involve moral turpitude come within this category. There is, on the other hand, a big variety of offences which, as a class, might not fall on either side, but each individual case has to be examined separately. Such are, for instance, offences for stealing, fraud, forgery, embezzlement and abortion. This kind of offence permits the examination of each individual case with a view to ascertain its degrading effect. It looks to me that what infamizes an offence is its being serious in nature and socially degrading in character, degrading to the offender and to his family. Many minor offences including petty theft need not necessarily be considered as infamous crimes. Divergence of opinion no doubt is bound to occur among different societies and also among members of the same society as to which category a class of offence belongs or whether a particular offence could properly be described as an infamous crime or not. The descriptive word 'infamous' should be interpreted in its popular sense since it has not been legally defined.

The offence of stealing comprises a wide range of unlawful acts and it is difficult, and indeed unreasonable, to brand all sorts of thefts as infamous crimes. If a person who picks up a lost article on a road

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and believes that with a reasonable effort he could discover its owner and restore it to him fails to do this and retains its possession he commits a theft but it would be harsh and unreasonable, according to the prevailing moral standard, to consider such an offence as an infamous crime entailing the dissolution of a marriage.

The learned trial Judge appears to have considered as adequate ground for divorce the mere commission of a theft regardless of its nature and its surrounding circumstances. He apparently did not direct his mind to the nature and circumstances of the two petty offences committed within a short time, within an hour or so, with a view to consider the social degradation affecting the appellant and her family. I am of opinion that the commission of these petty thefts in the circumstances of the case did not amount to the commission of an infamous crime. Of course if there is recurrence of such offences, although trivial in nature, might indicate a habit on the part of the spouse in fault and the Divorce Judge is, in my opinion, entitled to look at the aggregate effect of such offences and consider it either an infamous crime or, in the alternative, might regard the repetition of such petty thefts, though not infamous in character when taken in isolation, amounting to a dishonourable conduct which renders life in common impossible or intolerable and grant a relief to the complaining spouse.

I agree that the appeal should be allowed and the separation order be set aside. The case to be remitted to the trial judge with a view to consider the counterclaim and if needed to hear further evidence on the matter touching the counterclaim and decide accordingly.