IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 11 of 1984

Between:

RAJENDRA NATH s/o Brij Nath — Appellant

- and -

MADHUR LATA d/o Ram Sewak — Respondent

H.K. Patel for the Appellant
A.H. Rasheed for the Respondent

Date of Hearing : 10th July, 1984
Date of Judgment : 13th July, 1984

JUDGMENT OF THE COURT

Barker, J.A.

This appeal seeks to set aside part of an order pronounced by Kearsley J. in the Supreme Court at Suva on the 26th January, 1984 in which he accepted the recommendation of a Magistrate that custody of the only child of the parties, Rajil Nath, born 4th April, 1978, be granted to the respondent with reasonable access reserved to the appellant. By the same order, the learned Judge accepted the Magistrate's recommendation that the respondent's petition for divorce on the grounds of cruelty be dismissed and that a decree in divorce be pronounced upon the respondent's cross-petition brought on the grounds of adultery.

The order of the Supreme Court was pronounced in the Magistrates Court at Suva on 13th February, 1984; the appeal is brought against the custody order only. It will be convenient to refer to the parties as the "mother" and the "father".

The parties were married on the 10th November, 1975 at Lautoka. The mother who is aged 26 claimed that, from 1980 onwards, the marriage was one in name only. Sometime in 1981, a Mr. Ashok Kumar came to board with the parties: the wife formed an association with him: she is now living with him in a de facto relationship. She left the matrimonial home at the beginning of 1982.

Operation of the custody order was stayed pending appeal: according to her counsel, she has not had any access to the child for sometime.

The father is a librarian at the Lautoka Teachers' College. He is living with a separated woman aged 21: he is aged 32. It is not entirely clear whether the child is presently with them. He has, from time to time, been in the care of various relatives.

Most of the hearing before the Magistrate was concerned with the allegations in the petition and cross-petition for divorce. Far too little of the evidence was concerned with the situation of the child and the reasons advanced by each party for seeking custody. The magistrate called for a report from the Welfare Officer: two reports were given - one by a Probation Officer from Lautoka and one by the Senior Welfare Officer, Central/ Eastern. This latter report concluded with the following passage :

"From my observation of the petitioner and her defacto husband and what I have been able to assess from the information obtained about the respondent, it is my considered opinion that having regards to the future welfare of the child, the petitioner should be granted the custody of the child in this case for the following reasons :-

(i) It would be assured that he would be in the one home and not moved around (aunt/ maternal grandparents/respondent) as appears to have been the pattern these past two years.

(ii) The petitioner would be better able to give closer maternal guidance as she is the natural mother and already experienced in motherhood.

(iii) The petitioner and defacto husband live in a quiet and stable environment which would provide the security necessary for the child's future welfare.

(iv) The relationship between petitioner and defacto husband is very stable and it is quite obvious that they are anxious to consolidate it.

(v) Both petitioner and Ashok Kumar appear to be very sincere and humble people who have expressed a genuine interest in the future well being of this child.

(vi) The petitioner's defacto husband is financially able to comfortably support an additional member into his household."

The other reporting officer also recommended that custody of the child be given to the mother. Mr. Rasheed who appeared as counsel in the Magistrates' Court advised from the bar that the Magistrate had indicated to counsel that the welfare reports were available for perusal by counsel.

The findings of the learned Magistrate are economical in the extreme. He was unable to find persistent

cruelty on the part of the father but held that the adultery of the mother had been proved: he therefore recommended that the petition be dismissed but that the cross-petition for divorce be granted.

On the important question of custody all he said was :

> "On the question of custody the two reports are full and these together with the evidence before me bring me to the conclusion that custody of the child should be awarded to the petitioner."

That recommendation came before Kearsley J. for confirmation: on 26th January, 1984, he declared that the Court was satisfied that proper arrangements in all the circumstances had been made for the welfare and where appropriate the education or advancement of the child. He accepted the Magistrate's recommendation without alteration or comment.

At the commencement of the hearing before us, counsel for the appellant sought leave to adduce additional grounds of appeal as follows :

> "That the learned Judge of the Supreme Court and the learned Magistrate erred in law
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> (a) in not reading out or handing over to the parties all the welfare officer's report;
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> (b) in not assigning reasons when granting an Order for custody to the petioning mother."

Mr. Rasheed for the respondent took the responsible attitude of not raising the point of late notice on the matter concerning the welfare of a young child; he did not oppose the applicotion for leave to adduce further grounds of appeal and the Court granted leave accordingly. We consider that the second of the above grounds compels us to refer the custody applicotion back to the Magistrate for re-hearing. It is therefore premature to discuss the merits of the competing claims for custody.

In various Commonwealth jurisdictions over recent years, there have been several cases on the duty of Courts and administrative tribunals to give reasons for their decisions, especially where the unsuccessful party has a right of appeal. In some situations there is a statutory requirement to give decisions. (E.g. The Tribunals and Inquiries Act 1971 (U.K.) and the Rent Appeal Act 1973 (N.Z.). But even where there is no such requirement, there is authority that such a requirement is to be implied. One formulation of the duty is found in the judgment of Asprey J.A. in the Court of Appeal in New South Wales in Pettitt v. Dunkley, (1971) 1 NSWLR 376, 382 :

> "In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision, or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues or principles have been resolved, then, in the absence of some strong

> compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached, and the judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decisions adequately for that purpose. If he decided in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."

This case was approved in the Supreme Court of New Zealand by Chilwell J. in Connell v. Auckland City Council (1977) 1 NZLR 630-633. See also T. Flexman Ltd. v. Franklin County Council (1979) 2 NZLR 690.

In the New Zealand Court of Appeal there has been some division of opinion as to the strength of a non-statutory requirement to provide reasons. In R. v. Awotere, (1982) 2 NZLR 644 that Court was prepared only to hold that, in the absence of a statutory requirement to give reasons, it must be always good judicial practice to provide a reasoned decision and that judges should always do their conscientious best to provide reasons which can be regarded as adequate to the occasion.

This view was followed by the majority of a differently constituted Court in R. v. MacPherson, (1982) 2 NZLR 650: the dissenting judge in MacPherson's case, Somers J., held that there was an obligation on a Judge on the first instance to give reasons for his decision in a summary trial. He said on 651 :

"There ore stotements in the books that there is no general rule that reasons must be given for judicial decisions: examples ore - De Smith's Judicial Review of Administrative Action (4th ed, 1980) p 148 and the cases there noted; the article "Statements of Reasons for Judicial and Administrative Decisions" in (1970) 33 MLR 154; R. v. Goming Boord for Greot Britoin, ex porte Benaim and Khaido /1970/ 2 QB 417, 431 per Lord Denning MR. Other cases (mostly in administrative law) ore collected in Pure Spring Co Ltd v. Minister of National Revenue /1974/ 1 DLR 501, 534 et seq. Among the most important expressions of this view is the decision of the Supreme Court of Canada in MacDonald v. The Queen (1976) 29 CCC (2d) 257.

But at least in cases in which Parliament hos given a right of appeal I am of opinion that different considerations opply. Such a right must be intended to be effective. A failure to state reasons may render it impossible for an appellate Court to review the findings of foct or the determinotion of law which has led to the decision. The emphasis may be put in another way. A verdict or decision is only a lawful verdict or decision if the process by which it is reached is olso lowful. Where no reosons are given it is not possible to predicate the requisite quolity of the decision. Errors of law and excess of jurisdiction, to mention but two motters, cannot be perceived."

In the context of o custody cose, where there is o right of appeol or o right to apply for a subsequent voriation, the recent case of Hoey v. Hoey /1984/ 1 WLR 464 is helpful. There, the English Court of Appeal vacated o custody order in circumstances where o County Court judge had indicated thot he did not accept that there was a proper cose for joint custody and that he was not going to give o formal judgment but would state his reasons on request. Cumming-Bruce, L.J. commented ot 464 :

> "I venture, with respect to the judge, to say that on any view that was an inappropriate course, because even if there had been no appeal, there may be and frequently are changes of circumstance in the lives of the parents and in the lives of the children. One party, or another, may apply to the court again for a variation of the existing custody order in the light of the change of circumstance. If the judge has failed to give a judgment stating his findings of fact, which form the basis of the order, in subsequent proceedings the parties and the court may find it difficult to judge whether there has been a relevant chonge of circumstance which changes the basis of the judge's earlier order. I would go further. Aport from that important and practical reason, in contested custody proceedings it is usual, and was the case here, for both porents to be strongly emotionally involved and extremely anxious to succeed in an application for care and control. In such a situation, however inconvenient it may be, the judge should always state his reasons for judgment so that the parents know reasonably precisely how the judge's mind was working. If there is an appeal it is open to the judge, if he wishes, when a note of his judgment has been brought into existence and sent to him for his approval, to elaborate his reasons because an oral judgment delivered, to use the comman phrase, 'off the cuff', is often imperfect and the judge is alwoys entitled to correct it by adding what he would have said if at the time af delivering his judgment he had remembered to cover all the grounds. For that reason the course taken by the judge was unsatisfactory and I would hope it is a course which will not be followed again in a case of disputed issues of care and control."

In our view the reasoning in the cases cited requiring that reasons for decisions be stoted apply with equal force to custody applications in Fiji: a Magistrate sees onJ hears the contesting parties and then makes a recommendatian to the Supreme Court based on his assessment of the evidence and of the welfare

reports. Although he gives a recommendation only and cannot make a binding decision, the Supreme Court Judge necessarily is greatly influenced by the recommendation. The Judge does not see the parties and must accept the magistrate's assessment of credibility and his findings of fact.

It is usually the position that in custody disputes that the parties are in highly emotional state: it is of importance for their peace of mind and stability that they should know why one of them should gain custody of their child and the other lose it. Because there is a right of appeal, the unsuccessful party cannot properly assess his or her chances on appeal without an indication of the reasons for the magistrate's recommendation. In custody cases too, there is the further consideration that custody of a child is never immutably fixed. Custody can in a proper case be varied upon proof of change of circumstances. It would be impossible to prove the change of circumstances if a party did not know what had been found to have been the circumstances existing at the time when the order was made.

It follows therefore that the appeal must be allowed on the ground that proper reasons for the magistrate's recommendation were not given: accordingly, pursuant to section 91(3)(b) of the Matrimonial Causes Act we order a re-hearing of the custody application before the same magistrate.

The statute provides that this Court may impose terms and conditions on the re-hearing: counsel asked that we should take this opportunity to provide

some guidance for magistrates faced with the difficult task of deciding custody of children.

In some jurisdictions, notably Australia and New Zealand, a specialist court has been set up by the Legislature to deal with all family oriented disputes: dissolution of marriage, separation, matrimonial property claims and custody of children are included. The present system in Fiji derives more from the English system whereby custody and some other matrimonial matters can be dealt with at first instance by magistrates. The Fiji Matrimaniol Causes Act is economical on the procedure to be adopted on hearings of this nature: therefore much reliance is placed on the good sense and judgment of magistrates who must of course obey the statutory direction in section 85(1)(a) to consider the interest of the child as the paramount consideration.

We therefore suggest, that the following points of practice be observed by magistrates as a guide in the generality of custody cases :

(a) The magistrate should hear both parties to the dispute. Each party should outline his or her proposals for custody and access in some detail. In cases such as the present where each party is living in a de facto relationship (or where either or both has remarried) the magistrate should hear evidence from the new spouse or the de facto spouse of each party. The reason behind this suggestion is that the partner of the custodial parent will inevitably have an effect on the child: particularly

in cases such as the present where the parties live at opposite ends of Vitilevu and access to the non-custodial parent will be limited by reasons of distance and finance;

(b) Reports from the welfare officer should be obtained as a matter of course in all cases: they should normally be made available to counsel for the parties (where counsel have been retained) before the hearing begins if practicable. The reason for this suggestion is that welfare officers perform a very useful function in these cases: their reports have a great sway with the magistrate. However, even with the most conscientious officers there is the possibility of misinterpretation or incorrect information being present in a report: counsel should have the opportunity of correcting any information in the reports. We suggest that whether the reports should be shown to the parties should be left to the discretion of the magistrate. This comment applies particularly when the parties are unrepresented. In saying this, we are mindful of the need for the welfare officers to be frank and direct: a perceptive comment could easily be misunderstood by a party suffering under the emotional strain of a custody dispute.

(c) The magistrate should where practicable interview the child to ascertain his or her wishes in respect of custody, unless the child

is of very tender years. This is a statutory requirement in several jurisdictions: whilst we can not elevate it as such in Fiji we think that, particularly with older children, a magistrate will be assisted by an informal chat with the child. In our experience, such children are often quite perceptive in their understanding of the dispute and of the tactics employed by warring parents. The interview should take place in Chambers. The only other persons present should be the Court Clerk and interpreter (where required). In the present case, the little boy is now aged 6: he attends school: we do not think it would be a waste of time for him to be interviewed at the re-hearing;

We note on this topic, a cognate requirement in section 8(a) of the Adoption of Infants Act for consideration of a child's wishes.

(d) For the reasons given earlier, we think that the magistrate should set out in reasonable detail his reasons for recommending an award of custody to one party or another;

(e) The welfare officer should be asked to comment on access in the alternative situations of the mother or the father having custody.

Although there is little on this topic in the record, we perceive in the present case that there are some difficulties over access. In this case, as in all others, the parties must realise that access is the right of the child and not the right of the parents. Whatever the differences between the parents, both should co-operate, for the sake of the child, to ensure that the non-custodial parent has reasonable access. In the present case we are sure that both parties have something to offer this little boy: it would be a tremendous shame if he were to grow up, not knowing one parent. Since the parties are separated by distance, school holiday access for the non-custodial parent would probably be appropriate.

Accordingly, it follows that the appeal must be allowed. The respondent's application for custody remitted to the magistrate for re-hearing de novo with the following directions :

(i) An up-to-date welfare report (or reports) be obtained on the parties and on the child: included in the report should be comments on the child's schooling and on suggested access.

(ii) The report is to be made available to counsel for the parties at least a week before the hearing: it is not to be shown to the parties without the consent of the magistrate.

(iii) At the hearing, the parties should give evidence of their up-to-date situation: evidence should also be given by the de facto of each of them.

(iv) The magistrate should give serious consideration to interviewing the child to ascertain his wishes.

(v) Full reasons for his ultimate recommendation must be given by the magistrate.

(vi) The re-hearing should be held as soon as possible in view of the delay that has elapsed since the initial hearing.

In the circumstances, we make no order as to costs.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal