IN THE FAMILY DIVISION OF THE HIGH COURT APPELLATE JURISDICTION AT LAUTOKA	
CASE NUMBER:	06 OF 2017
BETWEEN:	SADHNA
AND:	SARISH
Appearances:	Ms. Jowen Singh for the appellant Mr. Tevita Kaloulasulasu for the respondent
Date/Place of judgment:	Tuesday, 4th August, 2020 at Lautoka.
Judgment of:	The Hon. Justice Jude Nanayakkara
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*
Anonymized Case Citation:	SADHNA V. SARISH - Fiji Family High Court Appeal Case Number 06 of 2017.

JUDGMENT OF THE COURT

[A] Introduction

(01) This is an appeal from the decision of the Learned Magistrate at Lautoka, delivered on 18th November 2016. In its decision, the Magistrate's Court made a finding that the appellant and the respondent did not live in a de facto relationship within the definition of Section 154(A) of the Family Law Act, No. 18 of 2003 and dismissed the appellant's application for de facto property settlement.

(02) The essence of the matter before the lower court stemmed from an application filed by the appellant-applicant seeking property distribution. Initially the appellant-applicant filed a Form 9 application on the 15th October 2014 seeking 50% share of the Beauty Salon, 50% of a property situated at Lautoka and 50% of a vehicle X. The Respondent filed his response on the 13th November 2014 seeking dismissal of the application of the appellant-applicant.

(03) Later on the 17th December 2015 the appellant-applicant filed an amended Form 9 application seeking 100% share in the Beauty Salon, half share of the property situated at Lautoka, 100% share from vehicle X and 100% share of the proceeds of the Beauty Salon from the year 2011 to 2015.

(04) The Respondent filed his response on the 09th February 2016 seeking that the amended Application be struck out.

(05) The case was taken up for hearing on the 15th April 2016. The appellant-applicant and the Respondent gave evidence and no other witnesses were called by either of the parties.

[B] The Magistrates' findings:

The Learned Magistrates' findings as to whether or not the appellant and the respondent were in a de-facto relationship are set out at paragraph (23) and (24) of the reasons, where His Worship said;

> *(23) I did not see any of the factors set out in Section 154A were established in this case to decide that the Applicant was in a de-facto relationship. The Applicant was represented by the Legal Aid and it is very clear that the Applicant may have had sufficient legal advice regarding the matters that need to be proved in this case. For reasons best known to the Applicant no independent witnesses or other evidence were produced to corroborate her testimony. Further she gave evidence in a very vague manner especially in respect of the time periods and dates.*
>
> *(24) I am not satisfied that the Applicant was successful in passing the threshold set out in Section 154A of the Family Law amendment Decree to establish being in a de-facto relationship, for the Applicant to qualify to claim for property distribution.*

[C] The Legislation

The Court relied on s.154 and s.154A of the FLA. These sections read:

> ***s.154 – "de facto relationship means" the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other;……***
>
> ***"party to marriage" includes a party to a de-facto relationship;…"***
>
> ***s. 154A – "In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case –***
>
> ***(a) the duration of the relationship;***

(b) the nature and extent of common residence;
(c) whether or not sexual relationship exists;
(d) the degree of financial dependence or interdependence and arrangements for financial support between the parties;
(e) the ownership, use and acquisition of property;
(f) the degree of mutual commitment to shared life;
(g) the care and support of children, if any;
(h) the performance of household duties; and
(i) the reputation and public aspects of the relationship".

[D] Grounds of Appeal

The appellant relied on three (03) grounds of appeal as follows:-

Ground - (01)

That the Learned Magistrate erred in law and in fact when stating that the factors set out in Section 154(A) were not satisfied when the evidence clearly were adduced on these factors.

Ground - (02)

That the Learned Magistrate erred in law and in fact when failing to put much emphasis that was adduced as evidence.

Ground – (03)

That the Learned Magistrate erred in law and in fact, he stated that there is a higher expected decree to be satisfied in a de-facto relationship when the evidence should be based on the balance of probabilities.

[E] Legal Principles – Appellate considerations

(01) In ***Williams v Minister of Aboriginal Land Rights Act , 1983 and The State of New South Wales*** [1] Heydon JA (Spigelman CJ & Sheller JA agreeing) said, in relation to challenges of that kind, that an appeal court:

> *……is in the same position as that ascribed to the Full Federal Court in* ***Minister for Immigration, Local Government and Ethnic Affairs v Hamsher*** *[1992] FCA 184; (1992) 35 FCR 359 at 369 per Beaumont and Lee JJ:*
>
> > *'.....the court is not obliged to proceed to make new findings of fact on all relevant issues and discharge the judgment appealed from if those findings differ from those of the trial judge and do not support the judgment. The court must be satisfied that the judgment of the trial judge*

is erroneous and it may be so satisfied if it reaches the conclusion that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence. The court is unlikely to be satisfied if all that is shown is that the trial judge made a choice between competing inferences, being a choice the court may not have been inclined to make but not a choice the trial judge should not have made. Where the majority judgment in ***Warren v Coombes*** *[(1979) [1979]HCA 9; 142 CLR 531] (at 552-553) states that an appellate court must not shrink from giving effect to its own conclusion, it is speaking of a conclusion that the decision of the trial judge is wrong and that it should be corrected. (See also* ***Edwards v Noble*** *[1971] HCA 54; (1971) 125 CLR 296, per Barwick CJ (at 304), per Menzies J (at 308-309) and per Walsh J (at 318-319).)'*

(02) Heydon JA's observations have been cited with approval in ***Adler v Australian Securities and Investments Commission***[2]; **Dolber v Halverson**[3]; and ***Leeder v The State of Western Australia*** [4].

(03) Those principles are to be applied in this case in the context of the Resident Magistrate's determination that the appellant and the respondent were not in a 'de facto' relationship for the purposes of the Act.

(04) The nature of the decision under challenge is relevant to the court's approach to the assessment of error by the Resident Magistrate. The following observation of Allsop J (as his Lordship then was) in ***Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*** [5] (Drummond and Mansfield JJ agreeing) are relevant to a consideration of the appellate court's task in a case such as the present.

What is error in any given case depends, of course, not only on the evidence, but also on the nature of the findings or conclusions made by the primary judge. The demonstration of error may not be straight –forward where findings or conclusions involve elements of fact, degree, opinion or judgment……

This is not to elevate ordinary factual findings to the protected position of those based on credit, but it is to make clear, first, the advantages of the trial judge and, secondly, the need for demonstration of error. The inability to identify error may arise in part from the unwillingness of the appeal court to be persuaded that it is in as good a position as the trial judge to deal with the issues, because of the kinds of considerations referred to in [24] above. Or, it may be that the nature of the issue is one such that (though not a discretion) there cannot be said to be truly one correct answer. In such cases the availability of a different view, indeed even perhaps the preference

of the appeal court for a different view may not be alone sufficient; see ***Zuvela v Cosmarnan Concrete Pty Ltd*** *[1996] HCA 30;(1996) 71 ALJR 29 at 30-31; [1996] HCA 30; 140 ALR 227 at 229-230. In circumstances where, by the nature of the fact or conclusion, only one view is (at least legally) possible (for example, the proper construction of a statute or a clause in a document, where, although, as often said, minds might differ about such matters of construction, there can be but one correct meaning: see generally* ***Enfield City Corporation v Development Assessment Commission*** *[2000] HCA 5; (2000) 199 CLR 135, 151-156) the preference of the appeal court for one view would carry with it the conclusion of error. However, other findings and conclusions may be far more easily open to legitimate differences of opinion eg valuation questions,* ***see Fenton Nominees Pty Ltd v Valuer-General*** *(1981) 27 SASR 258, 259-263; 47 LGRA 71 at 73-76.*

> *…….in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.*
>
> *The degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge. Sometimes, where matters of impression and judgment are concerned, giving 'full weight' or 'particular weight' to the views of the trial judge might be seen to shade into a degree of tolerance of divergence of views…..However, as Hill J said in* ***Commissioner of Taxation (Cth) v Chubb Australia Ltd*** *[1995] FCA 1146; (1995) 56 FCR 557, 573, 'giving full weight' to the view appealed from should not be take too far. The appeal court must come to the view that the trial judge was wrong in order to interfere. Even if the question is one of impression or judgment, a sufficiently clear difference of opinion may necessitate that conclusion.*

(05) In ***T and C*** [6], Thackray CJ noted the observations of Gleeson CJ concerning the concept of de facto marriage in the case of ***MW v The Department of Community Services*** [7]. In that case, Gleeson CJ made the following observations which provide some guidance as to the interpretation of the expression 'marriage –like relationship'.

> *Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil*

union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved.

Marriage in Australia and New Zealand, involves legal requirements of formality, publicity and exclusivity. A person may be a party to only one marriage at a time. De facto relationships, on the other hand, do not involve these elements. They are entered into, and may be dissolved; informally….It goes without saying that there is no mandatory public registration of sexual relationships, even if they involve cohabitation. De facto relationships may co-exist with the marriage of one or both parties and, at least in some circumstances, people may be parties to multiple de facto relationships. Yet the law to be applied in this case acknowledges that some are, and some are not, in the nature of marriage. How is the difference to be determined? No single and comprehensive answer to that question can be given, but there is one test that applicable to the present case.

(06) In ***Stack v Dowden*** [8], Baroness Hale of Richmond J. said:

'Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage….So many couples are cohabiting with a view to marriage at some late date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, Personal Relationships and Marriage Expectations (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45.'

(07) In the Federal Court case of ***Lynam v The Director-General of Social Security*** [9], the court considered whether a man and a woman were living together 'as husband and wife on a bona fide domestic basis'. Fitzgerald J said;

Each element of a relationship draws its color and its significant from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for

consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.

[F] The Witnesses

(01) As I have said above (paragraph (5)), the appellant and the respondent gave evidence and no other witnesses were called by either of the parties at the hearing before the lower court.

[G] The affidavit of the Appellant

(01) The appellant tendered in evidence an affidavit evidence in chief sworn by her on 22/04/2015. The appellant submitted that her affidavit evidence in chief should be admitted into evidence. Without any objections from the respondent, the appellant's affidavit evidence in chief sworn on 22/04/2015 was admitted into evidence, with the leave of the lower court.

(02) The appellant was available to be cross- examined about matters to which she has explicitly deposed in her affidavit evidence in chief which are inconsistent with the evidence of the respondent and matters which are important in this case.

(03) The following exchanges took place after the conclusion of the evidence in chief of the appellant (at page 14 of the transcript)

> ***Court: Ask him whether he wants to ask any questions from her?***
> **A: No Sir.**
>
> ***Court: You don't want to ask any questions from her? Could you ask him again? Whether he wishes to ask any questions from her?***
> **A: I don't have any questions.**

(04) The respondent says "*I do not have any questions*". Later, the respondent in his evidence in court stoutly denied that the relationship between them was a de facto relationship. Put another way, he rejected the appellant's evidence that they lived together as a couple in a relationship in the nature of marriage or civil union. He deposed about matters which are inconsistent with the evidence of the appellant. **But the respondent failed to cross-examine the appellant at all. He refrained from cross-examining the appellant at all. Not one question has been directed either to the credit or to the accuracy of the facts she has deposed to in the affidavit evidence in chief. I say, by the absence of cross-examination upon evidence showing that they lived together as a couple in a relationship in the nature of marriage or civil union; the respondent does admit that the evidence of the appellant is true. What is there for the court?**

For example, in **Cross on Evidence (2nd Australian ed, 1979)** the authors stated (at para 10.50):

"Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, a failure to do this may be held to imply acceptance of the evidence in chief".

See, **Phipson on Evidence (12th Edition, 1976) at para 1593**.

(05) The evidence adduced by the respondent should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**[10]. The rule in **Browne v Dunn** applies in both civil and criminal proceedings. **Browne v Dunn** is a ground for the exclusion of evidence. The court does have the power to reject relevant and otherwise admissible contradictory evidence on the ground that it should have been, but was not, put to a witness in cross-examination.

(06) The Learned Magistrate erred in law in failing to apply the rule in **Browne v Dunn.** The inclusion of the contradictory evidence of the respondent, in the circumstances has led to a miscarriage of Justice. The rule in **Browne v Dunn** was neither considered nor applied. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.

(07) The Learned Magistrate did have the power to refuse to admit the evidence of the respondent that, was not put to appellant in accordance with the rule in **Browne v Dunn**. In **Schneidas**[11] the rule was applied even in circumstances where the accused was a lay person conducting his own defence. Schneidas was discussed by Hunt J. in **Allied Pastoral Holdings Pty Limited v FCT**[12] without dissent. In **Regina v Body**[13] **Gleeson CJ, Carruthers and Bruce JJ**, followed the decision in Schneidas. The court upheld the decision of the trial Judge that evidence sought to be adduced by the accused should be rejected on the basis of the unfairness caused to the crown by contravention of the rule in **Browne v Dunn**.

(08) In my opinion, the Learned Magistrate erred in law and the admission of the respondent's evidence, in the circumstances has led to a miscarriage of Justice.

[H] The Findings that are subject to the appeal

(01) Let me now concentrate on the findings of the Learned Magistrate that are subject to this appeal.

(A) Duration of the relationship

(02) The appellant clearly deposed in paragraph (1) – (5) of her affidavit of evidence in chief sworn on 22.04.2015, that she commenced a relationship with the respondent in the year 2000. She claims that they became de facto partners and remained so. The appellant said

in her evidence in court that she was in a de facto relationship with the respondent for 14 years and it ended in 2014. It was a long term relationship.

(03) The respondent failed to cross-examine the appellant at all. That is a good reason for accepting her evidence. Her evidence appears to be credible and convincing.

As I said in paragraph (04) – (08) in part (G) the rule in **Browne v Dunn** will result in the exclusion of the contradictory evidence adduced by the respondent.

(04) The Learned Magistrate erred in law and fact by failing to determine the duration of the relationship. The result was detrimental to the appellant's case.

(05) The evidence overwhelming supports that the relationship between the appellant and the respondent was a long term relationship which lasted for 14 years. It was open to the Learned Magistrate to arrive at that conclusion on the evidence found by His Worship.

(B) The nature and extent of common residence

(06) This includes things like how often the two people stay in the same residence and share household chores and duties.

(07) The appellant explicitly deposed in paragraph (5), (9), (10) of her affidavit of evidence in chief that;

> *(5) THAT as our relationship developed the Respondent would visit me at my father's house and stay for a day, at times weekend and sometimes even stay for a week. At other times he would book a hotel room for us to stay in. Such was the trend for the 14 years of my relationship with the Respondent man.*
>
> *(9) THAT throughout the 14 years of our relationship the Respondent would always drop me home from work and at times he would even have dinner with me at my home and then leave.*
>
> *(10) THAT most Sundays throughout the period of our relationship the Respondent would come to my father's home and help him in the garden and whenever my father would leave the country the Respondent would stay with me for at least one week. I have photos to prove the same. [Annexed marked "A" are photos of some of our outings]*

The respondent did not cross-examine the appellant at all. He accepted the appellant's account in its entirety.

(08) The Magistrate's finding that *"He further said that he was married to his wife for 32 years and he never left his house"* reflects the Magistrate acceptance of the substance of the respondent's evidence recorded in the hearing.

(09) As stated earlier, the evidence adduced by the respondent should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**. The rule in **Browne v Dunn** applies in both civil and criminal proceedings. **Browne v Dunn** is a ground for the exclusion of evidence. The court does have the power to reject relevant and otherwise admissible contradictory evidence on the ground that it should have been, but was not, put to a witness in cross-examination.

(10) The Learned Magistrate erred in law in failing to apply the rule in **Browne v Dunn.** The inclusion of the contradictory evidence of the respondent, in the circumstances has led to a miscarriage of Justice. The rule in **Browne v Dunn** was neither considered nor applied. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.

(11) In my opinion, the Learned Magistrate erred in law and the admission of the respondents evidence, in the circumstances has led to a miscarriage of Justice.

(C) The degree of financial dependence or interdependence and arrangements for financial support between the parties

(12) The appellant deposed in paragraph (16) of her affidavit of evidence in chief that she gave her bank card to the respondent.

(13) The appellant deposed in paragraph (22) of her affidavit of evidence in chief that *"the respondent had gone to Malaysia on 07th January, 2008 and withdrew from my account to fund the trip".*

(14) The respondent failed to cross-examine the appellant at all. I find that it was open for the lower court to accept the evidence of the appellant and find that the appellant has financially supported the respondent. The learned Magistrate erred in fact by holding that *"there was no financial dependency or interdependency existed in the relationship".* The learned Magistrate erred in law by seeking corroborative documentary evidence from the appellant in relation to financial transaction, despite the respondent's failure to cross-examine her evidence at all.

The evidence adduced by the respondent should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**.

(D) The degree of mutual commitment to a shared life

(15) In her affidavit, the appellant annexes a photograph depicting the parties enjoying lunch at a Resort.

Some photos depict the parties spending a night in a hotel room at a Hotel.

(16) The appellant's evidence clearly establish that the respondent stayed overnight with the appellant at her father's house more than occasionally. They went out together for dinner or lunch.

(17) The respondent failed to cross-examine her at all. As I said, the rule in Browne v Dunn will result in the exclusion of the contradictory evidence adduced by the appellant. Therefore, the appellant's evidence is uncontradicted by other evidence. The appellant's evidence appeared to be credible and convincing.

(18) As to the ownership, use and acquisition of property, the appellant deposed as follows in her affidavit of evidence in chief;

> *(18) That unbeknownst to me the Respondent would be withdrawing monies that I had deposited into my bank account. For instance on the 7th of March, 2008 the Respondent withdrew $1,700.00 to buy Vehicle Y. The Respondent again withdrew $1,500 on the 31st of May, 2009 bought Vehicle Z. He failed to consult me at first but informed me only after I had queried with him.*
>
> *(19) That to date both the said vehicles bought from my money have been sold and the Respondent has bought in their place another Vehicle Registration no. X.*
>
> *(21) That the Respondent took loans from me to renovate and extend the property situated at Lautoka where he lives with his family. I would record such loan sums in my little booklet. Such loans have not been paid to date.*
>
> *(29) That on the 01st of May, 2011 the Respondent and I set up and opened a shop once again operating at Lautoka.*
>
> *(30) That I had solely given every little cent there is in order to operate the new business. The Respondent only provided the emotional and moral support I needed.*
>
> *(31) That I paid for all assets there is inside the shop required to operate the business.*
>
> *(32) That I paid for all utility bills just so to have the business up and running. The Respondent did not in any way contribute financially to the business however I trusted him, loved him and took him to be an honest man who I expected to be diligent with our business operations but was unfortunately not as I have now come to know.*
>
> *(35) That once the Salon was in operation I continued my tailoring business successfully inside the said shop and the Respondent would manage the Salon operations.*
>
> *(36) That at times when the Respondent was away from the shop, it was I who managed the Salon.*

(19) The respondent failed to cross-examine the appellant at all. That is a good reason for accepting her evidence. Her evidence appears to be credible and convincing.

(20) The evidence adduced by the respondent should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**.

[I] Remarks

(01) Unlike a legal marriage, which is presumed to continue until a party can prove that the marriage has broken down for the purpose of legally dissolving the marriage, in the case of a de facto relationship, it is the party asserting the continuance of the de facto relationship that must positively prove the existence of its defining characteristics, rather than being required to prove the negatives[14].

(02) Therefore, the appellant in this case is required positively to prove the existence of a de facto relationship. The ultimate question for the court is, therefore, whether or not the appellant has proven the existence of a relationship of the required standard.

(03) The appellant bears the onus. The standard of proof that the court apply is one of "on the balance of probabilities". The proceedings in the Family Court comprised of "Civil proceedings".

(04) The appellant tendered in evidence affidavit evidence in chief sworn by her on 22/04/2015. The appellant submitted that her affidavit in chief should be admitted into evidence. Without any objections from the respondent, the appellant's affidavit evidence in chief sworn on 22/05/2015 was admitted into evidence, with the leave of the lower court.

(05) The appellant was available to be cross-examined about matters to which she has deposed which are inconsistent with the evidence of the respondent and matters which are important in this case. The respondent declined to do so.

(06) The respondent in his evidence in court stoutly denied that the relationship between them was a de facto relationship. He deposed about matters which are inconsistent with the evidence of the appellant. But the respondent failed to cross-examine the appellant at all. Not one question has been directed either to the credit or to the accuracy of the facts she has deposed to.

(07) The evidence deposed by the respondent, i.e., *they were friends but not in a relationship*, should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn.**

(08) The Resident Magistrate was wrong. His Worship has accepted the evidence of the respondent. His Worship has given weight to the evidence of the respondent that they were friends and not in a relationship. The decision of the Resident Magistrate is erroneous. His Worship failed to draw inferences that should have been drawn from the facts established by the unchallenged, credible and convincing affidavit evidence in chief of the appellant. His Worship erred in law by seeking corroboration of her version of events by way of documentary and independent evidence.

(09) There is unchallenged evidence that the respondent visited the appellant at her father's house more than occasionally. She says in her affidavit evidence in chief and it is unchallenged that he stayed overnight with her more than occasionally, at her father's

house. She says in her affidavit evidence in chief and it is unchallenged, that the respondent always dropped her home after work and sometimes had dinner with her at her home and then leave. Therefore, the parties were frequently in each other's company. They interacted on a frequent basis in a number of important respects, which demonstrated that they indeed lived together as a couple on a genuine domestic basis.

(10) Residing together is a characteristic of most marriage like relationships but some spouses have an intimate relationship but live at separate addresses. It is important to note that spending time apart is not necessarily fatal to the existence of a de facto relationship; common residence is only one of the factors. In the end, whether or not two parties are in a de facto relationship is a question of fact that will turn on an assessment of all of the elements of the relationship, no one factor, such as whether the parties are spending time apart.

(11) The Learned Magistrate erred in failing to adopt such an approach when focusing upon whether or not the parties had lived in a de facto relationship.

(12) She says in her affidavit evidence in chief and it is unchallenged that she went out for dinner and lunch with the respondent. He spent nights with her in hotel rooms. The parties presented themselves to the outside world as a couple.

(13) There was also a significant degree of financial dependence by the respondent on the appellant during the period of 14 years which I am satisfied that the appellant undertook on the basis that the respondent would provide for her as her partner. The affidavit evidence in chief revealed that and it is unchallenged that the respondent has travelled overseas in 2008 by the financial assistance of the appellant. The affidavit evidence in chief also revealed that appellant paid the rent for the joint business premises. The appellant paid the utility bills in the joint business premises. These are indicators that the appellant made commitment to financially support the respondent and the respondent relied upon the financial support of the appellant.

(14) There was a degree of common use of property. The affidavit evidence in chief reveals that on 01-05-2011, the appellant and the respondent rented a building and formed the Beauty Saloon at Lautoka. The appellant continued a tailoring business in the premises and the respondent managed the Salon business in the same premises. They used the premises in common. They worked together from 2011 to 2013 to make sure that the household is supported. The evidence further reveals that the appellant financially supported the respondent to renovate and extend the property situated at Lautoka, where the respondent lived with his family. She has made a significant contribution towards the others property.

(15) These are indicators that they had a commitment to a shared life. The parties did not purchase any real property together. The respondent was not prepared to support the appellant financially. There were no children of the relationship. However, these did not mean that the parties were only less a "couple". The relationship that the parties shared provided each of them with support, companionship and a romantic relationship when they were in each other's company.

(16) Having regard to those matters set out in the preceding paragraph (09), (13) and (14), taken together, I find that the appellant has established that she and the respondent lived as de facto partners. I am satisfied from all of the evidence that the relationship between the appellant and the respondent was a personal and intimate relationship and not that of a carer and a person cared for.

(17) This is a finding which was open to the Learned Magistrate on the facts as found by His Worship. **The essence of the appellant's first and the second ground of appeal is that the Learned Magistrate erred in rejecting the appellant's evidence that they lived together as a couple in a relationship in the nature of marriage or civil union. The first and the second ground of appeal succeed. The ground three is dismissed.**

(18) The relationship effectively changed in mid-October 2013 when the respondent brought another lady to the business premises and told the appellant to "*piss off*". I therefore find that the de facto relationship commenced in 2000 and ceased in mid-October 2013.

(19) Perhaps because of the respondent's later denial at the lower court hearing that a de facto relationship had ever existed, His Worship was concerned about the lack of corroborative evidence of the appellant's version and also the lack of documentary evidence. His Worship accepted the respondent's later denial that a de facto relationship had ever existed to that of the appellant's claim that they lived together as a couple in a relationship in the nature of marriage or civil union.

(20) Where conflicting evidence of a significant nature is given by the appellant, how could the respondent attribute falsehood to her? He refrained from cross-examining her at all. He told the Magistrate "*I do not have any questions*". Her affidavit evidence in chief had been let go unchallenged so far as the conduct of the respondent's case is concerned. By itself, it does prove that the respondent did not have reasonable grounds to suspect the evidence of the appellant. In other words, the absence of any grounds for suspicion has been provided by the respondent. It must be accorded weight. The appellant on the other hand, had no practical scope for responding to the respondent's ultimate denial of the existence of such relationship. Clearly, it was open to the Resident Magistrate having regard to all of the evidence, to prefer appellant's version to that of respondent's **later denial** of the existence of such relationship. **It was not available to the Resident Magistrate to prefer the respondent's later denial of the existence of such relationship without setting out His Worships findings as to how His Worship comes to accept the one over the other.** This warrants reversing the primary court's decision. I confess, that I cannot resist my temptation to say that the respondent is not allowed to blow hot and cold in the attitude that he adopts. He cannot adopt two inconsistent attitudes. He must elect between them, and having elected to adopt one stance, cannot be permitted thereafter to go back and adopt an inconsistent stance.

(21) His Worship was plainly wrong. The evidence deposed by the respondent, viz, *the relationship was not personal and intimate,* should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**. The rule in **Browne v Dunn** applies in both civil and criminal proceedings. **Browne v Dunn** is a ground for the exclusion of evidence. The court does have the power to reject relevant and

otherwise admissible contradictory evidence on the grounds that it should have been, but was not, put to a witness in cross-examination.

(22) Why should the appellant lead corroborative evidence to satisfy the court that they lived together as a couple in a relationship in the nature of marriage or civil union when the respondent failed to cross-examine the appellant at all on the matters she has **explicitly** deposed in her affidavit evidence in chief claiming that their relationship was in the nature of marriage or civil union? Why should the appellant produce documentary evidence to satisfy the court as to the accuracy of the financial transactions when the respondent failed to cross-examine her at all on the financial transactions she has **explicitly** deposed in her affidavit evidence in chief? If the matters she has deposed in her affidavit evidence in chief are false, why did the respondent admit her evidence in its entirety by declining to cross – examine her at all? The respondent's later evidence to the opposite effect should have been rejected *in limine.*

Corroborative evidence refers to evidence that has the effect of "adding of strength or reinforcement from an independent source for the truth and accuracy of the (witness's) evidence'. The appellant's affidavit evidence in chief appeared to be credible and convincing and the respondent admitted it in its entirety. Therefore, it must be accorded weight. That being the case, why should the court look for corroboration?

(23) I recognize the wisdom of the words of Meagher JA in the NSW Court of Appeal in **Beale v Government Insurance Office of NSW**[15] where His Lordship said;

> *No mechanical formula can be given in determining what reasons are required. However, there are three fundamental elements of a statement of reasons, which it is useful to consider. First, a judge should refer to relevant evidence. There is no need to refer to the relevant evidence in detail, especially in circumstances where it is clear that t*[16]*he evidence has been considered…… Where conflicting evidence of a significant nature is given, the existence of both sets of evidence should be referred to.*
>
> *Secondly, a judge should set out any material findings of fact and any conclusions or ultimate findings of fact reached. Where one set of evidence is accepted over a conflicting set of significant evidence, the trial judge should set out his findings as to how he comes to accept the one over the other. But that is not to say that a judge must make explicit findings on each disputed piece of evidence, especially if the inference as to what is found is appropriately clear…… Further, it may not be necessary to make findings on every argument or destroy every submission, particularly where the arguments advanced are numerous and of varying significance….*
>
> *Thirdly, a judge should provide reasons for making the relevant findings of fact* (and conclusions*) and reasons in applying the law to the facts found. Those*

reasons or the process of reasoning should be understandable and preferably logical as well.

(24) His Worship erred in failing to adopt such an approach when focusing upon whether or not the parties had lived in a de facto relationship. This gave rise to a miscarriage of justice.

So in the end, I am driven to conclude that counsel for the appellant is right. The appeal should be allowed.

[J] ORDERS

(01) The appeal is allowed.

(02) The decision of the Learned Magistrate dated 18-11-2016 is set aside.

(03) I conclude that the parties lived in a de facto relationship within the definition of Section 143 (A) of the Family Law Act, No. 18 of 2003 since the year 2000 to 14th October, 2014.

(04) The case record is remitted back to the Magistrates Court for trial on the issue of de facto property distribution.

(05) **The trial on the issue of de facto property distribution should be concluded within three (03) months from the date of this judgment.**

(06) Each party to bear their own costs of the appeal proceedings.

.....

Jude Nanayakkara
[Judge]

At Lautoka
Tuesday, 04th August, 2020