

IN THE SUPREME COURT OF FIJI
Appellate Jurisdiction

Civil Appeal No. 4 of 1958

Between

AISHA

Appellant

AND

WALI MOHAMMED AND WALI AHAMED Respondents

Writ of *habeas corpus ad subjiciendum* custody of children—section 17 (1) (c) Magistrates' Courts Ordinance (Cap. 5)—jurisdiction of Magistrates.

The applicant made application for the issue of a writ and supported her application by an affidavit in which she alleged that her children were "unlawfully detained". There was no allegation that the children were wrongfully imprisoned. The writ was issued and the matter was determined by the Magistrate.

Held.—(1) The Magistrate who issued the writ had no jurisdiction to do so as the affidavit of the applicant did not allege wrongful imprisonment in addition to wrongful detention.

(2) The subsequent proceedings in the lower court were a nullity.

Appeal dismissed.

S. M. Koya for the appellant.

K. P. Mishra for the respondents.

LOWE, C.J., [8th September, 1958]—

In the trial court the applicant, mother of the children named in her application, applied to the court for the issue of a writ of *habeas corpus ad subjiciendum* in an attempt to obtain the custody of the children.

A writ was issued and apparently the children were brought before the court. After a long hearing the Magistrate wrote a carefully considered judgment in which he found that four of the five children did not wish to return to their mother and he made no order in their respect. However, he made an order that the custody of the child Amina be given to the mother forthwith.

The mother has appealed against this order on the grounds that the learned trial Magistrate misdirected himself, *inter alia*, in considering the wishes of the children and she seeks also their custody. In fact the proceedings were wrongly conceived and the learned trial Magistrate was completely without jurisdiction, as was his predecessor in office in issuing the writ calling on the respondents to bring the children before the court.

The application was made under section 17(1)(c) of the Magistrates' Courts Ordinance (Cap. 5) which is as follows:—

"A magistrate empowered to hold a court of the first class, shall, in addition to any jurisdiction which he may have under any other Ordinance for the time being in force, have and exercise jurisdiction in civil causes—

(c) to issue writs of *habeas corpus* for the production before the court of any person alleged upon oath to be wrongfully imprisoned and detained, and to make orders thereon;"

There is no necessity for me to consider whether or not the case was a "civil cause".

In the proceedings there was no evidence, nor even any suggestion that the children were "wrongfully imprisoned". In her affidavit the mother had claimed merely that the children were unlawfully detained. This is insufficient to satisfy the requirements of section 17(1)(c) so as to enable the Magistrate to assume jurisdiction under that section as there must be an allegation on oath that the persons sought to be brought before the court are not only wrongfully detained but also are wrongfully imprisoned.

The Order made by the Magistrate as to the custody of the child Amina is therefore, a nullity and is quashed. The appeal is dismissed with costs to the respondents.