IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : FROST, J.

Friday,

21st March, 1969.

BETWEEN DAVID HAIKARE
Appellant

AND KILA ROGE
Respondent

REASONS FOR JUDGMENT

This is an appeal against the order of the Local Court at Port Moresby on the 5th September, 1968, upon a complaint under Section 5(1) of the Deserted Wives and Children Ordinance 1951-1961 that the appellant did desert his wife, the respondent and the three children of the marriage, whereby the Court ordered that the appellant pay as maintenance to the respondent $10.00 per month, to each of the children, $8.00 per month, and for the third child, $4.00 per month.

The relevant Sections of the Ordinance are as follows:-

Section 5 - (1) Where -

(a) a husband has unlawfully deserted his wife or left her without means of support;

(b) a father has deserted his child or left him without means of support; or

(c) a husband or father is about to remove out of the Territory without making adequate provision for the support of his wife or child,

a Court may, upon complaint on oath being made by the wife or by the mother of the child or by a reputable person on behalf of the wife or child, issue a summons requiring the husband or father to appear before it to show cause why he should not support his wife or child, or may, where the circumstances seem to it to require it, issue a warrant for the apprehension of the husband or father.

(2) .....

Section 6 - (1) Upon the hearing of a complaint under the last preceding section, the Court shall inquire into the matter of the complaint, and -

(a) if it is satisfied that the wife is in fact left without means of support or that the defendant is about to remove out of the Territory without making adequate

provision for her support, may order the defendant to pay, for the use of the wife, such allowance as it considers reasonable, and may commit the legal custody of a child of the marriage to the wife or some other person and order the defendant to pay, for the support of the child, such allowance as it considers reasonable; and

(b) if it is satisfied that a child of the defendant is in fact left without means of support or that the defendant is about to remove out of the Territory without making adequate provision for the support of the child, may order the defendant to pay, for the support of the child, such allowance as it considers reasonable, and may commit the legal custody of the child to the mother or some other person.

(2) .....

(3) .....

(4) Upon the hearing of a complaint under the last preceding section, the Court may, upon reasonable cause show for the desertion, the leaving without support, or the removal, decline to make an order.

(5) .....

It is not disputed that the respondent is the wife by native custom of the appellant, and therefore pursuant to the provisions of the Marriage Ordinance 1963, Section 55, entitled to proceed under the Deserted Wives and Children Ordinance 1951-1961.

Having made a complaint on the 12th July, 1968 pursuant to the Ordinance Section 5, that the appellant had deserted her (no point was taken that the complaint did not follow the words of the Ordinance "unlawfully deserted") and praying the Court to order maintenance under Section 5(1) of the Ordinance, the Magistrate issued a Summons requiring the appellant to answer the complaint. On the return day the respondent appeared but there was no appearance of the appellant. The respondent then gave evidence as to her marriage by native custom, and the minutes of evidence proceed as follows:-

"From 1960 we lived as husband & wife quite happily, till Sept 1967 When PWD sent my husband to work at Losuia as a plant operator. Then in Nov, 1967, he wrote a letter to me informing me that he had married another wife. He sent me regularly some money from Losuia during the months (Sept - Dec 67). Then from Jan 68 this allowance ceased entirely. When he was posted to the N.B. area

in Sept 67 he took me with him. I lived at ALOTAU. When he stopped sending me allowance money in Jan 68 I approached the District Officer, Alotau in Feb 68 & through some mediation he paid me $60.00 in Feb 68. I left Alotau in Feb 68 as I was pregnant & came to live in Port Moresby with my Brother-in-law. The baby was born 28th April 68. In March 68 I saw Sister Fairhall & on 5th May 68 my husband sent me $41.00. In June 68 Sister Fairhall again approached my husband & I received $20.00. During Aug 68 he sent another $10.00.

During my marriage with DAVID I have had 4 children. Their names & birthdays are as follows:-

(1) Marian (f) 14th Oct. 1961.
(2) Rosie (f) 5th July 1962.
(3) Herea (f) 1st Sept. 1966 (this child is with the father at present).
(4) David (m) 28th April 1968."

From the record of the proceedings, in making the order the Resident Magistrate was satisfied that (1) a customary marriage existed between the parties, and (2) the respondent "is not paying a regular sum towards the maintenance of his wife and children that she is looking after."

On the 4th October, 1968 a notice of appeal was given setting out the grounds of appeal as follows:-

(1) That the order was wrong in law in that there was no evidence of desertion by the appellant of the respondent;

(2) That the amounts set out in the order are excessive.

Subsequently the Resident Magistrate gave written reasons for judgment, as he was asked to, the inference from which is that he considered that desertion was constituted by the failure of the appellant to provide the respondent with sufficient means of support. He also stated that the amount of maintenance ordered to be paid was arrived at on the basis that the appellant received about $65.00 a month as a plant operator, as to which from the minutes of evidence, no evidence was given. The appellant's counsel strongly relies on these subsequent reasons for judgment as showing that the Resident Magistrate misdirected himself as to the meaning of desertion in the Ordinance and applied a wrong test of the appellant's liability to maintain the respondent and her children, so that the order cannot stand. He submitted that in the indigenous society of the Territory

where polygamy is common, no inference of desertion could be drawn from the appellant's second marriage.

Although he conceded that the respondent was in fact without means of support, he submitted, in relation to the children that "leaving without means of support" means something more than then failing to contribute to the support of the children, relying on Chantler v. Chantler (1), and that the respondent had not excluded the possibility that the appellant was prepared himself to support the children in his own home.

Mr. Kinna submitted that although the Resident Magistrate may have used the wrong test, upon the evidence there was desertion in fact, and also evidence of the wife and children having been left without means of support, and he went on to submit that, accordingly, there was no substantive miscarriage of justice, pursuant to the Local Courts Ordinance Section 43(4).

Now, turning to the Ordinance, Sections 5 and 6 do not fit in well with each other, because if the wife's complaint is that she was unlawfully deserted, although the Court, under Section 6, is to enquire into the matter, and the terms prescribed for the Summons are that the husband or father is required to show cause why he should not support his wife or child, the Court may make an order only if it is satisfied that the wife or children are "in fact left without means of support". Accordingly in the actual decision of the case it is unnecessary for the Court to decide whether there was desertion. In Chantler v. Chantler (supra) the High Court considered the words "in fact left without means of support" in Section 7 of the New South Wales Act the words of which are followed in Section 6 of the Territory Ordinance, which is plainly derived from the New South Wales Statute. As to these words, in relation to the children of the marriage, Griffith C.J. said "that may be by actual desertion, going away from them and leaving them, or it may be without committing any act of desertion in the ordinary sense by leaving his wife and children in his house and making no provision for their maintenance. But where somebody, without his consent takes the child away from his house where he was willing

(1) 4 C.L.R. 585.

to provide for its support, and he refuses to maintain it elsewhere, it is an extraordinary thing to say that is leaving the child without means of support in any sense which should make him punishable." Supra at p. 592. See also in relation to the similar sections of the Maintenance Acts of Queensland Uppman v. Uppman, Ex parte Uppman (2) per Stable J. Thus proof of desertion is merely one means of establishing the fact of the defendant leaving his wife or children without means of support.

In my opinion, also, the Territory Ordinance should be given the other interpretation referred to in Chantler v. Chantler (supra), viz, that more is imported than that the wife or children are in fact without means of support, the word "left" requires "that there should be proved some fault on the part of the defendant which contributed to the wife or child being without means of support". Ex parte Sharah; Re Sharah & Anor. (3), Donkin v. Donkin; Ex parte Donkin (4) per Gibbs J. at p. 43.

Now the issue before the Resident Magistrate was whether the wife had shown that she and the children had been left by the appellant without means of support. This onus could have been satisfied by showing, as laid down by Griffiths C.J. in Chantler v. Chantler (supra) either actual desertion - constructive desertion does not arise on the facts of this case - or failure by the husband to provide for her or the children. "Desertion" may be defined broadly as a wilful separation by one spouse of the other without reasonable cause and without the consent of the other, Kay v. Kay (5) per Gorell Barnes J. It is certainly not the same thing as failure to provide, although the latter may be evidence of desertion.

It is thus clear that the notice of appeal is misconceived so far as the first ground of appeal is concerned. I have considered the brief finding made by the Resident Magistrate at the conclusion of the hearing, and I have come to the conclusion that he did in fact direct his mind to the correct issue viz, whether the respondent and children had been left by the appellant without means of support.

(2) (1961) Q.R. 482, at p. 486.
(3) (1957) S.R. N.S.W. 51 at p. 55.
(4) (1963) Q.R. 36 per Gibbs J. at p. 43.
(5) (1904) P.D. 382 at p. 395.

It is true that later when giving reasons for his decision, probably misled by the terms of the Notice of Appeal, it does appear that he considered desertion and unlawfully leaving without support identical, but he may have been confining his remarks to the particular case before him.

Further on the wife's evidence which the Resident Magistrate accepted, the only inference to be drawn was that the husband having been away at Losuia to work - whether because he was supporting another wife, or for some other reason - had ceased to maintain the respondent and children, and in the absence of any evidence whatever by the appellant and in particular, that he was prepared to support them elsewhere, a reasonable magistrate properly directing himself as to the issue whether the respondent and children had in fact been left without means of support would in my opinion, without doubt, have been so satisfied. Accordingly, when the Magistrate decided that the appellant was liable to maintain the Respondent and the children, if that were the only issue, there was no substantial miscarriage of justice within the meaning of the Local Courts Ordinance Section 43(3). Stirland v. Director of Public Prosecutions (6).

Accordingly the first ground of appeal fails. As to the second ground of appeal, there is no minute of any evidence as to the means of the appellant and it seems that the Resident Magistrate may have acted on his general knowledge. Accordingly, so far as quantum is concerned, the order cannot be supported. The case must go back to the Resident Magistrate for re-hearing, when the Respondent will have an opportunity to call evidence as to the appellant's earnings and the appellant, if he appears, will be entitled to call evidence on the issue of both liability and his means.

Before leaving the case, I propose to refer to the Resident Magistrate's reasons for judgment, which regrettably are couched in a quite injudicial tone. The following passage appears:-

"The husband is one of many thousands of native men who treat their wives and children as chattels. I feel strongly about the sacred trust given me to see that deserted wives and children

(6) (1944) A.C. p. 315.

are looked after by their flighty husbands."

In fact the sole duty of the Resident Magistrate was to decide the issues between the parties in a judicial manner, and it is regrettable that occasion should have arisen for this Court so to make i clear.

Appeal allowed, decision reversed, matter to be reheard by the same Local Court.

Solicitor for the Appellant : W.A. Lalor, Public Solicitor.

Solicitor for the Respondent : S.H. Johnson, Crown Solicitor.