IN THE COURT OF APPEAL ON APPEAL FROM THE SUPREME COURT OF VANUATU **Civil Appeal Case No. 10 of 1999 2000**

BETWEEN: **GEOFFREY DENNIS KONG**
Appellant

AND: **RACHAEL PRUNELLA KONG**
Respondent

CORAM: Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Oliver Saksak
Hon. Justice Roger Coventry

COUNSEL: Mr Robert Sugden for the Appellant
Mr Garry Blake for the Respondent

JUDGMENT: 6th **December 2000**

JUDGMENT

von DOUSSA, FATIAKI AND SAKSAK JJ:

Introduction:

1 This is an appeal in a matrimonial cause from the judgment and orders of Acting Chief Justice Lunabek.

2 The proceedings were commenced by a petition for dissolution of marriage in the form required by the *Matrimonial Causes Act 1986* [Cap. 192] by the respondent Rachael Prunella Kong (Mrs Kong). The petition alleged that the appellant Mr Kong had since the celebration of their marriage committed numerous acts against Mrs Kong and her children

amounting to persistent cruelty. The petition claimed the following relief:

> *"(a) That the marriage between the Petitioner and the Respondent be dissolved;*
>
> *(b) That the Petitioner may have custody of the minor children of the marriage namely, DAVID MALAU KONG and ELLESE MAY TAUPA KONG.*
>
> *(c) That the Respondent pay maintenance to the Petitioner by way of spousal maintenance and maintenance for the children.*
>
> *(d) That the Respondent vacate the matrimonial home and allow the Petitioner and the children to peacefully reside therein.*
>
> *(e) That the Respondent be permanently restrained from molesting, harassing, assaulting or abusing the Petitioner or the children in any way whatsoever and that the Respondent not attempt to contact the Petitioner or come within 3 metres of her at all until further Order.*
>
> *(f) Such further and other relief as may be just."*

3 Reconciliation being impossible, the matter was set down for trial. The parties were directed to file in affidavit form the evidence intended to be relied upon by each of them. After a trial extending over some seven days, the Acting Chief Justice reserved judgment on 11 May 1999. On 22 June 1999 Mrs Kong sought to reopen the case and call further evidence of an alleged assault by Mr Kong upon her after judgment had been reserved. The application was opposed. His Lordship declined to receive the further evidence and said that he would give reasons for that decision when judgment was delivered.

4 Judgment was delivered on 22 October 1999. His Lordship accepted the evidence of Mrs Kong and found that the allegation of persistent cruelty had been proved. The following orders were pronounced:

> *"1. That the marriage between the Petitioner and the Respondent be dissolved;*
>
> *2. That the Petitioner may have custody of the minor children of the marriage namely, David Malau Kong and Ellese May Taupa Kong.*
>
> *3. That the Respondent/father will have reasonable access to the minor children of the marriage namely, David Malau Kong and Ellese May Taupa Kong;*

4. *That the Respondent be permanently restrained from molesting, harassing, assaulting or abusing the Petitioner or the children in any way whatsoever;*

5. *That the Respondent vacate the matrimonial home and allow the Petition and the children to peacefully reside therein;*

6. *That the Respondent pay maintenance to the Petitioner by way of spousal maintenance and maintenance for the children;*

7. *That the petitioner and the respondent have liberty to apply within 2 days notice to the other party in respect to the following;*

   (a) The determination of the amounts of spousal maintenance and the maintenance of the children;

   (b) The property settlement;

   (c) Practical arrangements as to the right of access to the two (2) minor children of the marriage above-named in particulars 2 and 3 of the Order.

8. *That the costs of the action follow the event and be taxed failing agreement."*

5 The respondent appeals against each of these orders on a number of grounds which are discussed below. The appellant seeks to have all the orders set aside and the matter retried before another judge.

Evidence at trial:

6 At trial the evidence established that the parties had been married on 19 March 1993 at Port Moresby, Papua New Guinea. They had two children from this marriage:

David Malau Kong, born 21 June 1994 in Papua New Guinea, and

Ellese May Tapua Kong, born 15 September 1996 in Port Vila, Vanuatu.

7 By earlier relationships Mrs Kong also had three other children, namely:

Harry Bacca, born 28 November 1981;

Simon Davis, born 24 October 1983; and

Adele Davis, born 21 February 1986.

In the period leading up to the commencement of the proceedings these three children lived with the appellant and Mrs Kong.

8 Mrs Kong gave evidence that she had suffered both physical and emotional cruelty. She said that since their marriage Mr Kong had regularly insulted and assaulted her and her three older children. She recounted several incidents of violence against herself and her older children. The incidents of violence included Mr Kong attempting to choke her, striking her around the head, and kicking her in the ribs and back. She said the assaults emanated from minor incidents. She said Mr Kong often swore at her and described her in derogatory terms. She gave evidence that in October 1998 there was a disagreement about food served for dinner. She said Mr Kong smashed a plate of food on the floor and went out to eat. When he returned later in the evening he forced her and her three older children out of the house to sleep in a primitive shed with no floors, windows or beds. This state of affairs continued for two months (until shortly after the petition was issued on 3 December 1998). During the day Mrs Kong returned to the house to clean, cook and look after the two children of the marriage.

9 Counsel for Mr Kong extensively cross-examined Mrs Kong, over some three days, challenging the veracity of her story, particularly by reference to brief diaries which she kept which, whilst recording various assaults, did not record on the days alleged all the assaults about which she gave evidence. She was cross-examined in an attempt to show that she had a selfish disposition and that she was alleging cruelty solely to obtain a divorce to enable her to lead a single, carefree life, and to this end was exaggerating minor incidents to support the allegation of persistent cruelty.

10 Mr Kong gave evidence that he had never accepted Mrs Kong's three older children as children of the marriage, but as an act of humanity had provided food and accommodation. He blamed marital unhappiness on the undisciplined behaviour of these children. He said that he could not remember the incidents of assault and insult described by her but said that if they occurred they would not have been of the degree of violence stated by Mrs Kong. He admitted that there had been other occasions when he hit Mrs Kong and abused her. He said that the violence was not all one sided. He admitted that he had forced Mrs Kong and Harry and Simon to sleep outside in the shed but he said he did not force Adele to do so.

11 By the time Mrs Kong was allowed to return to the house both parties had instructed solicitors. By agreement negotiated through them the parties continued for a time to reside under the same roof. Mr Kong gave evidence that on being allowed back into the house, Mrs Kong slept at times in the same bed as the appellant, although there was no physical contact between them, and on these occasions one or both of the younger children was sleeping in the same room. He gave evidence of a proposal discussed with Mrs Kong that they spend an evening together on Hideaway Island without the children, and he also gave evidence of the receipt of a Christmas card and a letter around Christmas 1998 which was said to contain expressions of continuing love by Mrs Kong for Mr Kong. It was contended at trial that these events amounted to a condonation of the earlier acts of cruelty.

The *Matrimonial Causes Act 1986* [CAP. 192]

12 The following sections of the *Matrimonial Causes Act* are of direct relevance to the grounds of appeal:

> *"5. Subject to the provisions of section 6, a petition for divorce may be presented to the Court either by the husband or the wife –*
>
> *(a) on the ground that the respondent –*
>
> ...
>
> *(iii) has since the celebration of the marriage treated the petitioner with persistent cruelty;*
>
> ..."

Section (6) restricts the filing of a petition for divorce during the first two years after marriage, and is not presently relevant.

> *"9. (1) ...*
>
> *(2) On the hearing of a petition for divorce it shall be the duty of the Court to inquire, so far as it reasonably can, into the facts alleged and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any countercharge which is made against the petitioner.*
>
> *(3) If the Court is satisfied on the evidence that –*

(a) the case for the petitioner has been proved; and

(b) ... where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents,

the Court shall pronounce a decree of divorce, but if the Court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

...

14. (1) ...

(2) On any decree for divorce or nullity of marriage, the Court may, if it thinks fit, by order direct the husband to pay to the wife, during such period or until her re-marriage, such weekly, monthly or annual sum for the maintenance and support of the wife as the Court may think reasonable.

...

15. (1) In any proceedings for divorce or nullity of marriage the Court may, from time to time, either before or after the final decree, make such provision as appears just with respect to the custody, maintenance and education of the children of the marriage.

(2) For the purpose of this Act the expression 'children of the marriage' shall include any child of one party of the marriage (including any illegitimate or adopted child) who has been accepted as one of the family by the other party.

16. (1) Subject to the provisions of this section, in any proceedings for divorce or nullity of marriage where the Court has jurisdiction in relation to any child of the marriage, the Court shall not make any decree for divorce or nullity of the marriage unless and until the Court is satisfied, with respect to every such child who has not attained the age of 16 years, that –

(a) arrangements have been made for the care and upbringing of the child, and that these arrangements are satisfactory or are the best that can be devised in the circumstances;

(b) it is impracticable for the party or parties before th

Court to make any such arrangements.

(2) ..."

Preliminary matters:

13 Before turning to the grounds of appeal there are two matters that we think require comment.

14 The first matter arises from the provisions of s 18 of the *Matrimonial Causes Act* which provides:

> *"(1) Either the husband or the wife may within 21 days appeal to the Supreme Court against the decision of the Court granting or refusing to grant a decree of divorce or nullity as the case may be on the ground that the Court misdirected itself as to any question of law or mixed fact and law.*
>
> *(2) Any person in whose favour or against whom, as the case may be, the Court has made an order or orders under sections 13, 14, 15, 16 or 17 may within 21 days appeal to the Supreme Court."*

15 The present appeal is in part an appeal against the decision of the Court granting a decree of divorce. Insofar as the appeal concerns that subject matter s 18(1) by its terms limits the rights of the parties to an appeal on misdirections "as to any question of law or mixed fact and law". Certain of the grounds of appeal plainly raise questions of law or mixed law and fact (for example whether the evidence justified a finding of persistent cruelty). However the appeal in some other respects seeks to challenge pure findings of fact. For example the appellant contends that the trial judge erred in accepting Mrs Kong as a credible witness, and in accepting that the insults and assaults she alleged had occurred. That ground of appeal, being directed wholly to a finding of fact is not a ground within s 18(1). The apparent intent of s 18(1) is to make findings of fact of that kind final.

16 No point has been taken in this appeal that s 18(1) in any way limits the appellant, and in any event, for reasons which appear below we have concluded that a challenge to the acceptance of Mrs Kong's evidence must fail. Had a point been taken under s 18(1), it would have been necessary to consider whether that section is a valid enactment in light of Article 50 of the Constitution of the Republic of Vanuatu which provides that Parliament

shall provide for appeals from the original jurisdiction of the Supreme Court to a Court of Appeal. When the issue arises for decision, it will be necessary to decide whether a restriction on the grounds of appeal, of the kind appearing in s 18(1), is consistent with that Article.

17 The second matter concerns Lunabek ACJ's refusal of the application to reopen the case to receive evidence of a further assault on Mrs Kong. In his judgment, his Lordship gave reasons for that decision by paraphrasing a passage in the judgment of Muirhead J in *Murray v Figge* (1974) 4 ALR 612 at 614 where an application to receive additional evidence after the trial had concluded was refused as his Honour thought that the evidence would in no way alter the views which he had formed concerning an important issue of credibility in the case, nor would the additional evidence affect the factual findings upon which the case would turn. In other words, his Lordship decided not to accept the additional evidence as he was of the view that the evidence already before the Court made out Mrs Kong's case. *Murray v Figge* was a negligence action, and the additional evidence sought to be called was evidence that had been available at the time of the trial but was not called through the oversight of counsel. We do not think that situation is analogous to the present one where the evidence was not available at the time of the trial but arose subsequently. Further, *Murray v Figge* was not a case concerning the welfare of children.

18 As Lunabek ACJ explained in *Molu v Molu*, Civil Case No. 30 of 1996/Mat Case No 130 of 1996, judgment 15 May 1998, the laws of Vanuatu must take account of Article 3(1) of the Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989, and ratified by the Vanuatu Parliament by *Ratification Act No. 26 of 1992*. Article 3 provides that in all actions concerning children the best interests of the child shall be a primary consideration. In matters concerning the welfare of children the common law also requires that the best interests of the children receive paramount consideration.

19 To give effect to these principles, we consider that in a matrimonial cause where questions of custody, access and maintenance of children of the marriage arise, the Court's discretion to receive further evidence, particularly new evidence that has arisen since the trial concluded, should generally be exercised in favour of the receipt of the evidence if the evidence is relevant to issues concerning the children. In the present case, we think evidence

of an assault by Mr Kong shortly after the conclusion of the trial is evidence of that kind. In our opinion his Lordship erred in treating *Murray v Figge* as an analogous case, and in declining to reopen the case.

Grounds of appeal:

Challenge to acceptance of Mrs Kong's evidence:

20 Counsel for Mr Kong strenuously argued that his Lordship erred in his findings expressed in the following passage from the judgment:

> *"Having heard all the evidence, and observing the demeanour of the petitioner and the respondent in the witness box, I find that the petitioner is a reliable witness whose evidence of cruelty which goes beyond that which has been admitted by the respondent should be accepted and that the admissions of the respondent only serve to support such allegations."*

21 Counsel contended that Mrs Kong's cross-examination showed her to be unreliable. Entries in her diary did not coincide with her evidence. Many inconsistencies were said to exist between her evidence and that of her son, Harry Bacca and with an affidavit of her former partner Mark Davis which was received in evidence even though Mr Davis was not available for cross-examination. There is not a full transcript of evidence, and the judge's notes fall well short of a verbatim transcript of what was said. The judge's notes nevertheless indicate the range of topics covered and the gist of answers given. A perusal of the notes does not persuade us that his Lordship erred in accepting the credibility and evidence of Mrs Kong. There were many instances where diary entries did not record on particular days the happening of events described by her in evidence. However the diary appears to have been a sketchy and incomplete document, and the absence of entries could in part be due to that incompleteness, or could be due to an understandable mis-recollection of the date on which the particular events occurred. Memory failures or mistakes of that kind are not uncommon, particularly when, long after the event, the parties to a matrimonial cause are called upon to recollect acrimonious incidents in the course of their relationship. It is of significance that there were other entries indicative of events of cruelty which were not given by the petitioner in her evidence in chief. Insofar as other inconsistencies were said to exist, for the most part they depended upon the acceptance by the trial judge of evidence from other witnesses, including Mr Kong. The argument is therefore a circular one. Once his Lordship decided to prefer the evidence of Mrs Kong, the basis for asserting the existence of inconsistencies

largely disappeared. Moreover, many of the alleged inconsistencies were in any event on matters of peripheral detail of little significance to the credit of Mrs Kong on central issues.

22 A trial judge who has seen and heard the witnesses giving their evidence has an undoubted advantage over Courts of Appeal. Courts of Appeal will not interfere with findings of credit unless it is plain that the trial judge has misused that advantage. In this case our perusal of the evidence does not lead us to that conclusion.

23 It will be noted from the finding of his Lordship set out above that his acceptance of Mrs Kong as a reliable witness had the support of admissions by the appellant that assaults had occurred, that there had been abusive and insulting criticism by him of Mrs Kong, and that he had ordered her and her older children to the shed in October 1998 – conduct which he admitted was "inappropriate".

24 A major part of the cross-examination of Mrs Kong at trial was intended to support the "motive" argument that she was self-centred and motivated to allege cruelty to free herself from the burdens of marriage. It is hardly surprising that his Lordship was not attracted to that contention. The evidence, including that of the appellant, demonstrated Mrs Kong's strong attachment for all her children. The kind of freedom suggested would hardly be available to a single woman with such a strong attachment for her five children, some of whom were of tender years.

25 It is argued that his Lordship fell into error of law for not dealing expressly in the reasons for judgment with the motive argument. The motive argument was one of the attacks made on Mrs Kong's credit. We think that his Lordship has adequately explained his reason for preferring Mrs Kong to that of Mr Kong, and that preference is in itself a plain rejection of the argument.

Lack of corroboration:

26 It is contended that his Lordship should not have accepted Mrs Kong's evidence as the incidents upon which she relied were not supported by corroborative evidence.

27 In *Niko v Niko* Civil Case No 69 of 1996 Lunabek ACJ quoted with approval the

following passage from the judgment of Tucker LJ in *Kafton v Kafton* [1948] 1 All ER 435:

> *"The requirement by the Court of corroboration where cruelty is alleged is merely a matter of practice, and not a rule of law, and it has never been decided that the Court is not entitled in a proper case, where it is in no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner."*

28 That statement is undoubtedly good law, and is relied upon in Halsbury's Laws of England, 4th ed. vol 13, para 1264. However it must be said that as a matter of practice courts will look for corroboration if, on the face of the complainant's own evidence, it is available. In this case, as counsel for Mr Kong points out, it is likely that there would have been medical evidence of certain of the injuries alleged by Mrs Kong which could have been called. Besides pointing to this shortcoming in the evidence counsel contends that this is not a case where it can be said that, in Tucker LJ's words, "it is in no doubt where the truth lies".

29 It is well recognised that in cruelty cases it is impossible to expect a petitioner to be able to provide evidence that corroborates the happening of every act of cruelty, as many of those acts, in the nature of things, are likely to have occurred in the privacy of the matrimonial home: *Davis v Davis* [1950] 1 All ER 40 at 43. The court therefore as a matter of practice looks for evidence that is supportive of important components of the petitioner's evidence, rather than applying strictly the principles which define corroborative evidence in the criminal law.

30 In this case, contrary to the argument of Mr Kong's counsel, there plainly was evidence of this kind, indeed evidence that in terms of the criminal law would amount to corroboration. Mr Kong has himself admitted insulting and assaulting Mrs Kong, although challenging matters of degree, and he has admitted ordering Mrs Kong and her older children to the shed. Those admissions provide cogent supporting or corroborating evidence sufficient to satisfy the trial judge that there was no doubt as to where the truth lies.

Meaning of persistent cruelty:

31 Lunabek ACJ applied a general definition of cruelty which he had articulated in *Niko v Niko* namely that:

> *"Cruelty is generally described as conduct of such a character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a*

reasonable apprehension of such danger."

32 His Lordship indicated in *Niko* that the definition had its source in the third edition of Halsbury's Laws of England. That precise definition is also adopted in the fourth edition of Halsbury's Laws of England, vol 13, para 1269. However counsel for Mr Kong contends that his Lordship erred in applying a concept of cruelty that was too liberal, and paid too much regard to emotional arguments which were advanced on Mrs Kong's behalf. Counsel argued that:

> *"... under divorce legislation such as that of Vanuatu, the individuals had to justify to the Court why they should be given a dissolution. Petitioners must show that there has been a matrimonial crime to qualify for divorce. Their individual feelings about the marriage and their partners are not relevant unless they reach such a pitch as to be life threatening and even then only if the ground is cruelty."*

33 To bolster this argument counsel cited a passage from the speech of Lord Herschell in *Russell v Russell* [1897] AC 395 at 457 where his Lordship said:

> *"There must, however, be bodily hurt, - not trifling or temporary pain; or a reasonable apprehension of bodily hurt."*

34 In *Russell v Russell* the House of Lords explored what was required to establish cruelty in the technical legal sense in the Ecclesiastical Courts prior to 1858. As a matter of legal history and as providing a background against which to understand more recent developments in the English legal system *Russell v Russell* remains a decision of interest, but the suggestion that legal principles which regulated matrimonial causes in the Ecclesiastical Courts of England more than 150 years ago are directly relevant to a present day community is not an appealing one.

35 By 1902 it was recognised in matrimonial law, at least in Scotland, that Lord Herschell's statement was not limited to physical bodily hurt: *Aitchison v Aitchison* (1902) 10 S.L.T. 331, and well before 1938 mental cruelty was a well recognised ground for an action for separation: *Jamieson v Jamieson* [1952] AC 525 at 533. In *Jamieson v Jamieson*, Lord Merriman at 545 summarised the test of cruelty established by *Russell v Russell* in terms that recognised mental cruelty, namely that cruelty was conduct of such a character as to cause danger to life, limb or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. This is the test now repeated in Halsbury and adopted in *Niko*.

36 Cruelty became one of the grounds of divorce available under the *Matrimonial Causes Act 1937* (UK). The concept of cruelty in this context was discussed by the House of Lords in the leading cases of *Gollins v Gollins* [1964] AC 644 and *Williams v Williams* [1964] AC 698. In *Gollins v Gollins* it was held that a husband whose incorrigible and inexcusable laziness and selfish conduct brought the petitioner's state of health to the point where she could no longer earn her living or maintain her children constituted cruelty. It was a case where there were no acts of violence or insulting conduct. Lord Reid described the case as "a plain uncomplicated case of a husband fully responsible for his conduct, knowing that it was injuring his wife's health, and yet persisting in it, not because he wished or intended to injure her but because he was so selfish and lazy in his habits that he closed his mind to the consequences" (at 659). The issue in the case was whether it was necessary for the petitioner to prove that the respondent's conduct was intended to affect the health of the petitioner in the sense that it was "aimed at" the petitioner. By a majority the House of Lords held that the conduct of the respondent may amount to cruelty whatever the state of the respondent's mind.

37 In *Williams v Williams* the issue was whether persistently false accusations of adultery made by a mentally ill person against his wife, which damaged her health, could amount to cruelty. Consistently with the decision in *Gollins v Gollins*, a majority of the House of Lords held that it could. In his speech Lord Reid said at 723:

> *"In my judgment, decree should be pronounced against such an abnormal person, not because his conduct was aimed at his wife, or because a reasonable man would have realised the position, or because he must be deemed to have foreseen or intended to harm he did, but simply because the facts are such that, after making all allowances for his disabilities and for the temperaments of both parties, it must be held that the character and gravity of his acts were such as to amount to cruelty."*

38 Following the judgments of the House of Lords in these two cases, a learned commentator observed in the Modern Law Review:

> *"A ... feature of the cases under review is that they play down such subjective elements as intention, guilt, blameworthiness, culpability, not only in cruelty but also ... in constructive desertion. Judged from the standpoint of the objective observer, these matrimonial offences have become, in criminal terms, offences of absolute prohibition, for which a guilty mind is no longer indispensable. But if matrimonial offences (or some of them) are to be drained of their culpability, what happens to the doctrine of the matrimonial*

> *offence as the basis of our divorce law? Once one allows that there can be cruelty without culpability, then one has divorce without fault. Lip service may still be paid to the doctrine of the matrimonial offence, but behind this legal fiction the courts are accepting the principle of the breakdown of the marriage as the basis for divorce. Much of the language of the majority in the House of Lords reflects this approach. Thus, the extensive arguments based upon a balance of hardship fit strangely into the context of the doctrine of the matrimonial offence but are more appropriate, say, to the ground of incurable insanity, confessedly a ground posited upon the principle of breakdown. And Lord Pearce stated the* ratio legis *behind the ground of cruelty to be that of alleviating the hardship to both spouses in being tied for life 'to a marriage that had broken down'."* (Brown "Cruelty without Culpability or Divorce without Fault" (1963) 26 Mod L Rev 625)

As this comment points out, the decisions of the House of Lords do not reinforce the notion that there must be, in the words of counsel for Mr Kong in this case,"a matrimonial crime to qualify for divorce".

39 In *Sheldon v Sheldon* [1966] P 62 the Court of Appeal held that a failure of a relatively young husband to engage in sexual intercourse with his wife amounted to cruelty when he knew that his conduct distressed his wife and had an affect upon her health.

40 These cases emphasise that the bodily hurt caused by or apprehended in consequence of the cruelty need not be a physical hurt nor a life threatening bodily hurt. Mental harm affecting health such as an anxiety condition or depression brought about by the respondent's conduct will suffice.

41 *Gollins v Gollins* and *Williams v Williams* were applied in Australia under the *Matrimonial Causes Act 1959-1965* (Cth) which provided grounds for divorce based on cruelty. In *Ainsworth v Ainsworth* (1967) 10 FLR 396 Selby J summarised the effect of those decisions, after quoting from them, as follows at 402:

> *"The courts have consistently declined to attempt to give an exhaustive definition of the legal concept of cruelty and I certainly have no intention of departing from that tradition, but the passages which I have cited indicate that it is now firmly established that, in matrimonial causes, before a spouse can be found guilty of cruelty, certain elements must be present. They may be listed as follows: 1. The conduct must cause injury or reasonable apprehension of injury to the health of the other party, irrespective of whether such result was intended. 2. The conduct which is alleged to constitute cruelty must be grave and weighty. 3. The conduct, viewed as a whole in the light of all relevant circumstances, must be capable of bearing the description of*

cruelty in the generally accepted use of that word."

42 In our opinion in this case his Lordship did not apply an incorrect test of cruelty. The requirement of s 5(a)(3) of the *Matrimonial Causes Act* is proof of "persistent cruelty". Persistent cruelty normally requires a course of cruel conduct which is persisted in by the defendant, not a single isolated act of cruelty. In the present case the acts of cruelty described by Mrs Kong extended over a considerable period of time, culminating in her being ordered from the house.

43 It was plainly open to his Lordship to hold that the physical blows which Mrs Kong received amounted to physical harm that went beyond mere trifling or temporary pain, and to find that the abuse and her ejection from the house gave rise to a reasonable apprehension of mental harm arising from the distress and humiliation thereby caused.

Cruelty to children:

44 It was submitted that his Lordship wrongly allowed the admission of evidence of acts of alleged cruelty by Mr Kong to Mrs Kong's three older children, and that such evidence was wrongly relied upon in reaching the finding that Mr Kong was guilty of persistent cruelty. It is argued that as the older children were not the children of the marriage, cruelty to them cannot amount to cruelty to Mrs Kong unless the older children were accepted by Mr Kong as children of the family. It is said that his Lordship erred in finding that Mr Kong had accepted them as children of the family within the meaning of s 15(2) of the *Matrimonial Causes Act*.

45 We consider this submission fails on a number of grounds. First, we do not think that his Lordship's decision rested to any significant extent upon a finding that acts of cruelty to the older children were acts of cruelty to Mrs Kong. Earlier in these reasons we cited the conclusion of his Lordship. He rested his finding of persistent cruelty upon insults and assaults by Mr Kong to Mrs Kong. It was only in respect of the shed incident that his Lordship refers to the other children, and then simply as a description of the people who were banished to the shed. We understand his Lordship to have treated this incident as one which directly affected Mrs Kong, independently of how she viewed the position of her children.

46 There is long standing and ample authority for the proposition that cruelty to a child of the marriage may be cruelty to the petitioner, as where the act of cruelty is committed in circumstances such that the respondent knew or must have known that the conduct in question would be likely to injure the complainant's health, that is if it were of a nature to shock the petitioner's susceptibilities: *Suggate v Suggate* (1859) 1 Sw and Tr 489 (164 ER 827), Halsbury's Laws of England 4th ed vol 13, para 1275 and the cases there cited, and *Bell v Bell* (1971) 18 FLR 161 at 164-165. These decisions were ones where the child in question was in fact a child of the marriage, and it is hardly surprising that the legal principle arising from them has been expressed in terms that refer to a child of the marriage. In our opinion however that is not an essential requirement. The essential requirement is that the respondent engage in conduct that causes mental injury or reasonable apprehension of such an injury to the health of the petitioner. If the conduct is directed to another person so closely related to the petitioner that the respondent knew or must have known that the conduct in question would be likely to cause serious distress to the petitioner, the conduct may constitute cruelty. It would be an exceptional case where a mother would not be so affected by acts of cruelty to her children, and there is nothing in the circumstances of this case to take it out of the ordinary.

47 In any event, if the admission of the evidence were dependent upon a finding that the appellant had accepted the elder children as children of the family within the meaning of s 15(2) of the *Matrimonial Causes Act*, we consider there was an ample basis for such a finding in the evidence. Whilst the appellant asserted that he had stipulated before his marriage that he did not intend to accept the children as members of his family and had maintained that position thereafter, the facts indicate otherwise. Whilst there were periods when the children were not living in his household, during the period of the marriage, about five years and nine months leading up to the filing of the petition, Adele had lived with the parties for approximately five years, Simon for four years and Harry for three and a half years. During this time the appellant had maintained them, providing food, accommodation and other requirements, and had participated in disciplining them. This evidence amply justified the finding that was made.

Condonation

48 His Lordship noted in his outline of the submissions made on Mr Kong's behalf that

condonation was alleged, but his Lordship did not later refer to the issue of condonation in his reasons for judgment. This oversight makes it necessary for us to consider that issue and evaluate the evidence on the topic, as this is one of the issues about which the Court must be satisfied under s 9 of the *Matrimonial Causes Act*.

49 In our opinion the evidence falls far short of providing a base upon which a finding of condonation could be made.

50 Condonation is a full and absolute pardoning, with knowledge of all that is pardoned or believed to exist, together with the restoration of the offending party to the same position as such party occupied before the offence was committed. Forgiveness by itself is not sufficient to constitute condonation. The crucial question is whether the conduct of the injured spouse amounted to reinstatement of the guilty spouse to his or her former position. Whether or not there has been condonation is a question of fact in every case to be determined on the balance of probabilities: Halsbury's Laws of England, 4th ed vol 13, para 1304. The Court looks to acts rather than words: *Cramp v Cramp* [1920] P 158 at 166, so an intention to forgive must be carried into effect. A mere condonation in words without any actual reinstatement has never been held sufficient. Thus, where a husband wrote to his wife offering to forgive her upon certain conditions which she accepted, and he subsequently changed his mind before anything further was done, this did not restore the wife to her former position: *Crocker v Crocker* [1921] P 25, *Keats v Keats* (1859) 1 Sw and Tr 334 (164 ER 754), *Fearn v Fearn* [1948] 1 All ER 459.

51 In the present case the proposal that the parties spend the night together at Hideaway Island never eventuated and cannot amount to condonation. Neither can the fact that Mrs Kong returned to the house in early December 1998 and lived under the same roof for a period with the appellant. At that time the petition for the dissolution of marriage had been issued. The evidence about the relationship of the parties at that time is not suggestive of forgiveness by Mrs Kong – rather it was a short term expedient because she had no alternative means of support or place of residence.

52 The Christmas card and letter fall short of an offer of forgiveness and the evidence fails to show any response by the appellant in the nature of an acceptance. The letter reflects sadness on the part of Mrs Kong that the appellant could not accommodate her and her

children in a way that would allow them to live together, and a desire on her part to get away from the appellant because she could not leave her children so as to meet his wishes. The Christmas card is no more than an act of goodwill in keeping with the Christian spirit of the occasion, and it is surprising that any attempt has been made to rely on it.

The custody issue:

53 The judgment contained an order that Mrs Kong have custody of the two children of the marriage. The notice of appeal alleges that this order was made in error and that a serious lack of procedural fairness has occurred because at the outset of the hearing Lunabek ACJ said that he would restrict the issue at trial to whether or not a dissolution of the marriage would be granted, and only if the dissolution were granted would there be hearings on issues which only then arose.

54 In argument before this Court counsel for Mr Kong asserted that the Acting Chief Justice made this statement on the first or second day of the trial. Counsel for Mrs Kong disputed the assertion in the notice of appeal and said that the issue which was to be stood over concerned only the assessment of maintenance. The judge's notes tend to confirm the version of counsel for Mrs Kong. The judge's notes read:

> *"Sugden.*
>
> *The petition – no affidavit about maintenance and affidavit material filed. No suggestion about any. I do adjourn to this."*

55 Counsel for Mr Kong argues that there are many matters that he would wish to raise on the custody question regarding the unsuitability of Mrs Kong to have custody of the two young children, and as to the superior position of Mr Kong to fulfil that role. Counsel contends that the comparative abilities and capacities of each party to be the custodial parent were not canvassed in evidence or in submissions. Counsel points out that there is no detailed discussion of the comparative positions of the two parties in relation to custody in the judgment.

56 Certainly there is no discussion about the comparative positions of the parties in the judgment. Nor do we find reference to that topic in the written submissions of the parties at trial. It is not so clear that the issue was not canvassed in evidence. As we have earlier

observed Mrs Kong was cross-examined at great length and parts of the cross-examination appear relevant only to the question of custody.

57 If these were the only matters relevant to the submission, we would have a concern that there may have been a miscarriage of justice in relation to the custody issue. However there is other information as well to be brought to account.

58 The petition claimed custody. That claim was disputed. Custody was an issue from the outset. The parties were directed to file their evidence in affidavit form. This was done, and counsel for Mr Kong acknowledges that up until the point of discussion noted by the Acting Chief Justice, which occurred on the second day of the trial, the parties had prepared for a trial on all issues. It is of considerable significance therefore that Mr Kong's affidavits fail to raise the issues which he now says he wishes to place before the Court on the custody issue. It seems that the appellant up to and including the first day of the trial had put forward the evidence that he intended to rely upon.

59 We are left with the clear impression that the case was conducted by the parties up to that time, and thereafter, on the footing that the determinative issue on which the claims for relief would turn was that of persistent cruelty. The case appears to have been conducted on the assumption that if persistent cruelty were established the other remedies would follow as a matter of course with Mrs Kong obtaining custody and an ancillary maintenance order. That the parties would proceed on this assumption is hardly surprising as Ellese was less than three years of age, and David about five years of age at trial. It would have to be an exceptional case for a mother to be deprived of the custody of such a young girl, and for a court to separate siblings of those ages. There was nothing about the allegations made by the parties, or the case generally, that would put it in the exceptional category where a court would be likely to award custody of one or both children to Mr Kong.

60 It is common ground that the trial continued on the petitioner's claim for a decree of dissolution of the marriage following the direction of the Acting Chief Justice. The ground of appeal acknowledges as much. By the provisions of s 16 of the *Matrimonial Causes Act* such a decree cannot be made until the Court is satisfied, with respect to every child who has not attained the age of sixteen, that arrangements have been made for the care and upbringing of the child and that these arrangements are satisfactory or are the best that can be devised in

circumstances. The Court could not be satisfied about such arrangements unless the question of custody is first resolved. Counsel for the parties should have appreciated this requirement, which also suggests that custody continued to be a live issue throughout the trial.

61 In these circumstances we are not satisfied that the order for custody was made in error, nor are we satisfied that any miscarriage of justice has occurred.

62 If the appellant now wishes to revisit the question of custody on evidence that he did not see fit to put forward in his affidavits at the time of trial, he will have to do so in due course in the context of an application to review the existing order. That is a course which is open at any time under s 15(1) but, in accordance with general principle, it would be necessary for the appellant to show a change in circumstances since the time of trial before the Court would be likely to entertain the application.

Order to vacate the matrimonial home:

63 First, it is contended that the order, being ancillary to the custody order, should be set aside because the custody order should not have been made. That argument we have dismissed. Secondly, it is said that the order should not have been made five months after the end of the hearing without inquiry into the current position. The short answer to that submission is that no evidence was put before the Acting Chief Justice in the intervening period, or at the time when judgment was delivered, to indicate a need to reopen the evidence given at trial. Again, the issue of the occupation of the matrimonial home, being a question associated with the custody, maintenance and education of the children could be revisited on an application under s 15(1). In any event, it is a matter that may be revisited when questions of spousal maintenance, maintenance of the children and the other remaining issues come back before the Court if there has been some significant change in circumstances since the trial.

Property settlement:

64 It is contended that his Lordship erred in ordering that the petitioner and the respondent have liberty to apply in respect of a property settlement. Counsel points out that the *Matrimonial Causes Act* does not vest jurisdiction in the Supreme Court to make orders

for the settlement of matrimonial property – at least otherwise than as part of a maintenance order. That is so. The jurisdiction of the Court to deal with matrimonial property arises under the application in Vanuatu of the *Married Women's Property Act 1898* (UK). The Court also has in its general original jurisdiction power to make orders regarding legal or equitable interests which the parties may have in property. These are not jurisdictions invoked by a petition under the *Matrimonial Causes Act*. Counsel for Mrs Kong accepts that these submissions as to jurisdiction are correct. However that does not invalidate the order made by his Lordship. In a matrimonial cause where there is an associated property claim it is common practice to issue separate proceedings in the general jurisdiction of the Court, and for the two matters then to be heard together. We understand his Lordship's reservation of liberty to apply to mean no more than that the parties can bring on whatever proceedings are necessary at short notice to resolve the property dispute. It is in that sense merely an enabling order to ensure that the parties can obtain a hearing at short notice to resolve all matters between them that remain outstanding.

65 For these reasons we consider that the appeal should be dismissed and that the appellant should pay the costs of Mrs Kong.

COVENTRY J:

66 I have read and agree with the judgment of my brother judges save in one respect, "the custody issue".

67 The notice of appeal alleges that the custody order in respect of the two children of the marriage lacked procedural fairness. The grounds go on to say that the whole of the appellant's case was directed to the issue of the dissolution of the marriage. There was no proper enquiry by the judge into the interests of the children and no consideration of the issue or findings thereon in the judgment.

68 Both parties claimed custody. The affidavits of both parties dealt in detail with the history of the marriage and included their financial circumstances. However, they all lack reference to the matters one would expect to be covered when custody was in issue, e.g. the comparative capabilities and position of the parties to look after the children, the home offered, schooling, etc.

69 At the trial parts of the cross-examination of Mrs Kong appear relevant only to the question of custody. However, overall the evidence fell well short of an examination of the matters upon which findings of fact and decisions could be made concerning custody. The appellant's counsel argued, with some force in these circumstances, that such evidence was equally referable to the dissolution of the marriage itself.

70 There was no mention of custody in the final written submissions of the petitioner to the trial judge. There is no discussion in the judgment of evidence relating to custody. Indeed, custody is not mentioned in the judgment save for the order itself.

71 In a matter as important as custody of children there should be evidence and submissions clearly directed to the issues concerned. The judgment itself should clearly address those issues and set out the basis upon which the order is made. Unless this occurs then it might well be difficult to ascertain on what basis custody is ordered, and one party can easily be left with a sense of unfairness.

72 It is highly unlikely that a different order would be made if this case were returned to the Supreme Court for rehearing. Such a course would reintroduce feelings of uncertainty and insecurity. Further, by s 16 of the *Matrimonial Causes Act* the decree itself would have to be set aside, as set out above. However, in my judgment, despite these consequences, this appeal should be allowed and the case returned to the Supreme Court for rehearing of the custody issue.

ORDERS:

1. That the appeal be dismissed.
2. That the appellant pay to the respondent the costs of the appeal to be taxed in default of agreement.

DATED the 6 day of December 2000.

BY THE COURT

..... **von Doussa J**

..... **Coventry J**

REPUBLIC OF VANUATU COUR D'APPEL — COURT OF APPEAL REPUBLIQUE DE VANUATU