IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
CIVIL APPEAL NO. 5 OF 1981

Between:

SURESH BABULAL s/o Babulal — APPELLANT

- and -

1. MADHUKA DEVI d/o Jagessar Chaudhary
2. VIJAY CHAND — RESPONDENTS

H.K. Nagin for the Appellant.
D.C. Maharaj for the Respondents.

Date of Hearing: 21st July, 1981.
Delivery of Judgment: 31 JUL 1981

JUDGMENT OF THE COURT

SPRING J.A.

This is an appeal by the husband Suresh Babulal against the order of the Supreme Court dismissing his petition for divorce on the ground of the adultery of his wife Madhuka Devi with the co-respondent Vijay Chand. It is convenient to call the parties "the husband", "the wife" and "the co-respondent". The husband alleged that his wife had committed adultery with the co-respondent and persons unknown at the wife's house on numerous occasions between the years 1978 and 1979 and in particular around early 1979. The wife denied that she had committed adultery with the co-respondent. There is no pleading on the record on behalf of the co-respondent. At the several hearings before the Magistrate there was no appearance of the co-respondent. He was not present at the hearing of this appeal. An application was made by Counsel for the wife that as the husband had not provided security for appeal as required by Rule 17, Court of Appeal Rules,

the appeal be stayed. Counsel for the husband stated that the matter had been overlooked but undertook to pay the sum of $100 into Court forthwith as security for costs. Counsel for the wife accepted the undertaking and the hearing of the appeal proceeded by consent.

A petition in divorce was issued out of the Magistrate's Court at Suva under the provisions of Part II of the Matrimonial Causes Act 1968. A Magistrate conducted the hearing pursuant to sections 68 and 69 of the above Act. A certified copy of the proceedings was forwarded to the Supreme Court. In accordance with section 70(a) of the above Act, the learned Magistrate gave an opinion that the petitioner had "failed to establish the allegation of adultery" and recommended that the petition be dismissed.

The learned Magistrate in dealing with the application by the husband for custody of the children of the marriage and the prayer that maintenance orders previously made be rescinded said :

> "The respondent has already been awarded the custody of the children with an order for maintenance for herself and the children. I do not propose to make any recommendation on this issue."

The proceedings then came before the Supreme Court where an order was made on 17th December,1980, which reads :

> "Upon reading the petition of Suresh Babulal the petitioner of Suva filed the 16th day of October 1979 and on considering the recommendation of K.P. Sharma Esq., Magistrate Suva it is ordered that the petition be dismissed."

This order was pronounced on 8th January, 1981. In the record before us there was no written judgment by the learned Judge in the Supreme Court giving reasons for the making of the above order. However, at the hearing of this appeal Counsel for appellant placed before this Court a minute taken from the Supreme Court

file signed by the presiding Judge which reads :

"Deputy Registrar,

Record read and considered. I accept the findings and opinion of the Magistrate and order that the petition be dismissed.

(sgd) T. Madhoji
Judge

17th December, 1980."

The facts may be briefly summarised.

The husband and wife were married on 26th October, 1966, and have 3 children now aged 13; 12 and 8 years respectively. The wife's sister Manjula Devi returned from Australia early in 1975 and lived at the home of the husband and wife. On 13th December, 1975, the husband left the matrimonial home; respondent brought proceedings in the Magistrate's Court at Lautoka for maintenance and custody of the children; orders were made in favour of the wife granting custody of the children and maintenance for herself in the sum of $60 a month and $28 per month for each of the 3 children. The husband formed an association with the wife's sister Manjula Devi and they have had issue of this union namely 2 children born on 22nd May, 1975, and 22nd July, 1978. The husband in his petition states that he has been living in adultery with Manjula Devi "since around January 1976" and seeks the exercise of the Court's discretion to the issue of a decree in divorce based on the adultery of his wife with the co-respondent. The husband stated that after 13th December, 1975, he had not had intercourse with his wife. Proof of the wife's adultery depended upon firstly, the evidence of the daughter, aged 12 years, who stated that she knew the co-respondent and that she had seen him in bed with her mother - the wife - and neither was wearing any clothes. Secondly, the evidence of Dr. Mary Schramm a gynaecologist at the C.W.M. Hospital Suva who stated that she had seen a report on Madhuka Devi to the effect that she was

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admitted to the hospital on 20th July, 1979, with an incomplete abortion or miscarriage. The doctor stated that the time of conception "was sometime last week in May or early June in 1979. She must have had sexual intercourse". Dr. Schramm did not carry out the analysis personally - it was performed by two experienced members of the staff one of whom was in New Zealand and one was in Suva.

Thirdly the sister of the wife gave evidence that she was living with the petitioner and that on one occasion when visiting the wife at 10 Armstrong Street, Suva, she had seen co-respondent there drinking beer.

The wife denied that she had committed adultery with the co-respondent; but admitted she was in hospital "sometime in July 1979" for treatment of internal bleeding. She said she had a number of friends but did not have sex with them. She stated that her sister Manjula Devi came to Fiji to get married and then return to Australia; however, she had an affair with the husband; the sister and the husband are now living together as man and wife.

The evidence was taken - reduced to writing and duly authenticated before a Magistrate pursuant to the powers contained in Part XI of the Matrimonial Causes Act 1968. The hearing was then adjourned so that the record could be considered by the Supreme Court to which it was sent together with the opinion of the Magistrate.

The opinion of the learned Magistrate was expressed in the following terms :

> "The petition is based on the ground of adultery on the part of the Respondent with the Co-respondent. I have very carefully considered the evidence of the Petitioner and the witnesses called on his behalf. I have also considered the evidence of the Respondent and her witness. I am not satisfied that the Petitioner has told the truth and the witness, his daughter has not impressed me as a witness of truth. I find she has been tutored to support the evidence of the Petitioner.

The evidence of Dr. Schramm in my view is not conclusive. Her evidence was of a technical nature and no author has been called to establish the entries in the register maintained at the Gynaecology Department. The evidence falls short.

I find Petitioner has failed to establish the allegation of adultery and I respectfully recommend that the petition be dismissed.

As to the application for custody and maintenance, the Respondent has already been awarded the custody of the children with an order for maintenance for herself and the children, I do not propose to make any recommendation on this issue."

Section 70 then comes into operation and the Supreme Court must consider the case and may either accept, reject or modify the opinion of the Magistrate. The Supreme Court also has power to make other orders. Section 70 reads :

"70(a) As soon as possible after the termination of the hearing, the magistrate shall forward to the Court a certified copy of the evidence taken, together with copies of all process and other documents in the proceedings and a statement of his opinion as to the decree, if any, to which the petitioner is entitled, and the Court may, upon consideration thereof, either accept, reject or modify such opinion, or order -

(i) that further evidence be taken by the magistrate;

(ii) that the case be reheard by that or another magistrate; or

(iii) that the case be transferred to itself for hearing."

Section 70(b) goes on to provide :

"70(b) Unless the Court makes any of the orders specified in the last preceding paragraph, it shall decide the case and direct what decree shall be pronounced by the magistrate."

The important words in section 70(b) are "it (the Supreme Court) shall decide the case and direct what decree shall

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be pronounced by the Magistrate".

If the Supreme Court directs that a decree be granted then by section 71 the Magistrate must pronounce that decree. It is clear that it is the Supreme Court alone that decides what relief, if any, a petitioner shall obtain and that it is the function of the Supreme Court to consider and pronounce upon the opinion of the Magistrate.

Under the Act the Magistrate is not the final arbiter of the case. He gives no more than an opinion. Section 57 of the Act is explicit that the Supreme Court must determine the ground upon which the petition is based. Section 57 reads :

> "Except as provided by this Act, the Court, upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree."

In this section "the Court" means the Supreme Court. Section 70(b) (supra) clearly states that the Supreme Court shall decide the case.

The learned Magistrate in his opinion, recommended that the petition be dismissed.

The learned Magistrate after carefully considering the whole of the evidence made clear findings that he was not satisfied that the husband had told the truth, and, in respect of the young daughter, aged 12 years, he stated that she appeared to have been tutored by her father - the husband - and did not impress as a witness of truth.

Further the evidence of Dr. Schramm was inconclusi and fell short of establishing the allegations of adultery; further the author of the entries made in respect of "Madhuka - husband's name Suresh Babu" in the register maintained at the hospital were made by doctors other than Dr. Schramm who stated :

"I gave evidence for the finding of other members finding."

According to the minute of the learned Judge he read and considered the record; he accepted the findings and opinion of the learned Magistrate and ordered that the petition for divorce be dismissed.

The husband appealed to this Court and various questions of law have been raised concerning the validity or the order. The grounds of appeal are :

"1. That the learned Judge erred in law and in fact by not giving a considered judgment and merely following the recommendation of the learned trial Magistrate.

2. That the learned Judge erred in law and in fact in holding that the evidence in this case did not establish the Respondent's adultery.

3. That the learned Judge erred in law and in fact in not directing himself sufficiently or at all in respect of the evidence of Dr. Schramm".

At the hearing of this appeal counsel for the husband applied for leave to file and argue an additional ground of appeal which reads as follows :

"That the learned Judge erred in law and in fact in not properly directing himself on the issue of the custody of the children or at all."

Counsel for the wife raised no objection; leave was accordingly granted for this ground to be added.

Upon an appeal the powers of the Court are defined in section 92(1) and (2) :

"92 (1) A person aggrieved by a decree of the Court exercising its jurisdiction under this Ordinance may, within such time as is prescribed by the rules, appeal from the decree to the Court of Appeal.

(2) Upon such an appeal the Court of Appeal may affirm, reverse or vary the decree, the subject of the appeal, and may make such decree as, in the opinion of that court, ought to have been made in the first instance, or may, if it thinks fit, order a rehearing on such terms and conditions, if any, as it thinks just."

In arguing the appeal all grounds can convenientl be grouped together.

Mr. Nagin submitted that there was no considered judgment of the learned trial Judge; that he had merely accepted the findings and opinions of the learned Magistrat without evaluating the evidence and findings of the Magistrate. Mr. Nagin also relied on a decision of this Court in Singh v. Prasad F.C.A. No. 62 of 1980 where this Court said :

> "In our opinion the learned Judge was in error when he accepted the opinion of the Magistrate. He should have carefully considered the evidence itself for the purpose of deciding the case. In that event findings should be made in respect of the matters in which the Magistrate is either in error or where he has failed to make sufficient findings."

Mr. Maharaj for the wife submitted that Prasad's case (supra) was distinguishable from the facts of the instant case; that the learned Magistrate in this instant case made a specific finding as to the credibility of the petitioner and his daughter and that an appellate court should not lightly differ from the finding of a trial judge on a question of fact and that it would be difficult for "it to do so where the finding turned solely on the credibility of a witness" Benmax v. Austin Motor Co. Ltd. /1955/ A.C. 370 at 373.

In Prasad's case (supra) there was a petition for divorce by the wife petitioner on the grounds of persistent cruelty and habitual drunkeness and the respondent filed an answer seeking a decree in divorce on the grounds of adultery.

It was held by this Court that the Magistrate was in error as he had not on the evidence made any proper or sufficient findings.

The instant case differs substantially from Prasad's Case (supra); here the facts are relatively uncomplicated; further the Magistrate who saw and heard the witnesses made a finding as to the credibility of the petitioner and his daughter. This Court said in Behari v. Siukuar alias Shiukumari 14 F.L.R. 101 at 105-6 :

> "The position of this court as an appellate tribunal in this case is an unusual one. It has not had the advantage of seeing and hearing the witnesses, but neither has the Supreme Court as such.....On the other hand, the magistrate did see and hear the witnesses, and was therefore in a better position then either the Supreme Court or this Court, to make an assessment of their credibility."

In coming to a conclusion as to the credibility of witnesses whom this Court has not seen, heard or questioned, we must of necessity pay respect to the opinion of the learned Magistrate whose findings are under review. This Court in the absence of any apparent misdirection or error on the part of the Magistrate, in our opinion, should hesitate long before it disturbs a finding of credibility made by a magistrate experienced in disputes such as the present one.

Mr. Nagin suggested that the learned trial Judge not having given a considered judgment had not properly considered the evidence and findings of the learned Magistrate and that a serious miscarriage of justice had occurred.

We turn now to consider the evidence given by Dr. Schramm in support of the allegations of adultery. Dr. Schramm's evidence, in our view, was clearly hearsay evidence and not admissible as she had not personally attended the patient in the hospital. Mr. Maharaj claims

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objection was taken to its reception, but nothing appears within the record to confirm this fact. However, if the husband was relying on the fact that his wife had been to hospital in July 1979 suffering from a miscarriage then it was open to him, or his counsel, to have called the doctor who, at the date of the hearing was living in Suva, and who personally attended to the wife and made the entries in the medical register. The provisions of section 3 of the Evidence Act (Cap.31) cannot be called in aid to permit the admission of Dr. Schramm's evidence as one of the author's of the report referred by by Dr. Schramm was at the time residing in Suva and available to give evidence.

The evidence of the wife's sister did not assist in proving the allegations of adultery alleged in the petition.

The question is whether the Supreme Court did decide the case or merely "rubber stamp" the learned Magistrate's opinion.

The first duty of the Supreme Court was to consider the certified copy of the evidence; copies of all processes and other documents; and the statement of the opinion of the learned Magistrate as to the decree, if any, to which the petitioner was entitled. Upon a consideration of such material the Supreme Court is enjoined by the statute either to accept, reject or modify such opinion or make any one of the orders referred to in subsections (i), (ii) or (iii). The minute addressed to the Deputy Registrar makes it clear that the learned Judge accepted the opinion of the learned Magistrate; thereupon it became the duty of the learned Judge having accepted the opinion, to decide the case and dismiss the petition. In our judgment the minute of the learned Judge was clearly a decision reached by him after considering the record and accepting the opinion of the learned Magistrate and in so doing the learned Judge discharged the statutory duties cast upon him.

The order that the petition be dismissed was the decision made by the learned Judge followed up by the

pronouncement thereof by the learned Magistrate.

We reject the submission that the learned Judge merely followed the Magistrate's opinion and did not make any decision and, in so doing, repeat what this Court said in Anuradha v. Mata Prasad & Vijay Krishna Reddy F.C.A. No. 60 of 1978 at p. 17:

> "The form in which an individual judge minutes a decision or sets out in a formal judgment his particular findings is a matter for him according to the circumstances of each case. In a defended case it is generally advisable, when accepting the opinion of the magistrate, to give some reason or reasons for so accepting the opinion. It may be no more than an adoption and approval of the opinion after a full consideration of the case. Particular matters may arise which ought to be specifically dealt with. Circumstances vary so greatly that we do not feel it proper to take the matter any further except to say that, if the opinion is rejected or modified it will generally be proper to give full reasons. This, we understand, has been the practice. If the opinion is accepted, then according to the particular circumstances sufficient findings ought to be made."

We are satisfied, on the facts of this particular case, that the learned Judge in ordering that the petition be dismissed made a decision that he was satisfied that adultery had not been proved; further the learned Judge in our view carried out his statutory duties and gave proper consideration to the material before him in accepting the opinion of the learned Magistrate.

Therefore on a full consideration of the evidence in this case, no good and sufficient reason has been advanced why the opinion of the learned Magistrate ought either, to be rejected or modified, or that any other step or order envisaged by section 70(a) should have been taken or made. In coming to this conclusion we wish to repeat that we do not in any way dilute or detract from what we have already said about the desirability of having reasons given where appropriate and referred to by us in Anuradha's Case (supra).

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Turning now to the questions of custody counsel for the husband submitted that the learned Judge did not properly direct himself on the issue of custody of the children or at all.

The learned Magistrate in his opinion, stated :

> "As to the application for custody and maintenance, the Respondent has already been awarded the custody of the children with an order for maintenance for herself and the children, I do not propose to make any recommendation on this issue."

Evidence was given that the husband on 13th Februar 1979, was sentenced to 12 months imprisonment for driving while disqualified. After 2 months of the term had been served the husband was released from prison to serve the balance of his sentence extramurally. The wife took the children to the husband in May 1979 (no doubt because she was receiving no maintenance from the husband for their support) and he has had custody of them since. Little detailed evidence was given by the husband as to the housing accommodation which he provided for himself, his defacto wife and the children; nor was any evidence given as to the relationship existing between the children and the defacto wife.

Submissions were made as to the effect of section 90 of the Matrimonial Causes Act 1968 which reads :

> "90.(1) Except as provided by this section, the Court shall not make an order under this Part in favour of the petitioner where the petition for the principal relief has been dismissed.
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> (2) Where -
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> (a) the petition for the principal relief has been dismissed after a hearing on the merits; and
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> (b) the Court is satisfied that -
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> (i) the proceedings for the principal relief were instituted in good faith to obtain that relief;
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> and

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(ii) there is no reasonable likelihood of the parties becoming reconciled,

the Court may, if it considers that it is desirable to do so, make an order under th Part in favour of the petitioner, other than an order under section 87 of this Ordinance.

(3) The Court shall not make an orde_ by virtu of the last preceding subsection unless the proceedings for the order have been heard at the same time as, or immediately after, the proceedings for the principal relief.

(4) In this section "principal relief" means relief of a kind referred to in paragraph (a) or (b) of the definition of "matrimonial cause" in subsection (1) of section 3 of this Ordinance."

The above section provides (inter alia) that orders for custody may be made in favour of a petitioner where the petition has been dismissed in respect of the principal relief sought.

The petitioner in our view adduced insufficient evidence to warrant a reversal or amendment of the existing custody order and accordingly the learned Magistrate was not in error in coming to the conclusion he did on the custody issue having regard to the paucity of evidence placed before him.

In the circumstances of this case it was quite proper for the learned Judge to accept the opinion of the learned Magistrate that custody of the children remain with the wife.

Accordingly for the reasons we have given we dismiss the appeal and affirm the order made in the Court below; appellant to pay respondent's costs to be taxed if not agreed.

Judge of Appeal

Judge of Appeal

Judge of Appeal