

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0002 OF 1995
(High Court Civil Action No. HBC0024 of 1995)

BETWEEN:

THE PUBLIC TRUSTEE OF FIJI

APPELLANT

-and-

SAGORE BIBI

RESPONDENT

Mr. Labo Agbejule for the Appellant
Mr. A. Khan for the Respondent

Date and Place of Hearing : 7 August 1997, Suva
Date of Delivery of Judgment : 14 August 1997

JUDGMENT OF THE COURT

This is an appeal from the judgment of Pathik J given in the High Court at Suva on the 25 January 1995. In the light of the view we take of the case it is not necessary to give the facts and history of the matter in any detail but a brief account is necessary.

On 14 January 1995 one Faizun Nisha died in the Colonial War Memorial Hospital at Suva. Shortly before she died she had apparently summoned her mother, the above named respondent, and according to the respondent had, in effect, told her she was

of Islam and had uttered the word "Allah" before she died. There were two other relatives of the deceased present. In result the respondent who was a Muslim wished to have her daughter buried according to the Islamic faith. However, a fellow employee and close friend of the deceased, Chandra Vinod, had been given a copy of her Will by her and in this Will she stated that it was her wish that "after my death my remains should be cremated according to Hindu customary rites". This Will was dated 3 August 1994 and thus was only a few months old. It may be noted that the deceased had been born a Muslim but had married a Hindu.

The day after Faizun Nisha died, Sunday 15 January, Mr. Vinod, being aware that the deceased's mother the respondent intended to have her buried that day, made an ex parte application to Pathik J for an order in the nature of an interim injunction restraining the respondent from burying the deceased. The learned judge made the order sought and directed that the body be kept in Police custody until further order of the Court. He further directed that the matter be brought before him on Tuesday 17 January 1997.

On 17 January Pathik J adjourned the matter to 20 January to enable the Public Trustee, who was the executor named in the Will, to determine his course of action. On 20 January the Public Trustee was, by consent, substituted for Mr. Vinod as the applicant and the matter was adjourned to 25 January for argument.

On 25 January Counsel made their submissions. It may be noted that neither Counsel made any submissions directed to the question of what cause of action or

principles of law were relied upon in asking the Court to make an order directing who should have the possession, custody or control of the deceased's body and how it should be disposed of. Both Counsel and, indeed His Lordship, appear to have taken it for granted that the Court had such a power though the main thrust of the arguments revolved around the Will – was it valid, had it been partially revoked, did the provision in it as to the disposal of the body stand and what was the effect of a "dying declaration" upon it? These were not issues that could properly be dealt with on proceedings such as those; they would require to be determined in a probate action, either an action for a grant of probate of the Will, in solemn form as it used to be called, or for the revocation of such a grant (See Order 76 of the High Court Rules 1988). His Lordship, however, faced with the practical urgency of the matter, dealt with it in the form in which it was before him.

His Lordship had no authorities cited to him and, as we have already stated, the parties appeared to accept that he had the power to deal with the matter in the proceedings before him, and that there was power in the Court to decide the question of possession, custody or control of the body and its ultimate disposal as the Court thought just, or, perhaps, as the Court determined was or would have been the wish of the deceased. Unfortunately we do not think that is the law. However, His Lordship dealt with the matter on that basis. He held, in effect, that the deceased had made a dying declaration and that effect should be given to it notwithstanding the provision in the Will. He accordingly ordered that the body be released to the mother immediately to make arrangements for its burial according to Muslim rites.

When the appeal was called before us it appeared clear that there were two reasons why we were unable to hear and determine the appeal. First, Mr. Khan, Counsel for the respondent, informed us that the respondent had died. He indicated that he had not in fact seen her for some time, his last contact with her having been with a son who had been at his office some time before. He had no further instructions. Order 15 rule 8 of the High Court Rules 1988 provides that when a party to an action dies but the cause of action survives, the action shall not abate by reason of the death. The rule goes on to make provision for what may be done in those cases. It is not necessary to consider that aspect of the matter further because the cause of action, if that be the appropriate way to describe it, though we think it might more properly be called the subject matter of the proceedings, had ceased to exist. And that is the second reason to which we refer.

The record showed that the day after His Lordship made his order the Public Trustee applied for a stay pending an appeal to the Fiji Court of Appeal. In the event that application was discontinued because during the course of the argument information was received that the deceased had been buried. It appeared that immediately after Pathik J's order was made the respondent took possession of the body and the burial took place the same day. Before us Counsel indicated that no question of seeking an exhumation arose and thus the body would be left in its grave. It follows that no issue between the parties remains for the Court to determine. Counsel for the Public Trustee informed the Court that notwithstanding the burial the Public Trustee asked the Court to hear its appeal in order that the position of the law on the relevant issues might be properly considered and

enunciated, as otherwise the judgment of Pathik J might be accepted as a precedent for the future.

We appreciate the Public Trustee's concerns but the Court does not have the power to give advisory opinions. If parties to a proceeding settle the matter between them the Courts will not carry on to decide what the position would have been if the case had not been settled; likewise if the subject matter of the proceeding ceases to exist so that no issue between the parties remains the Courts will not hear the matter as if something remained for determination. It becomes an academic question and the Courts will not embark upon an academic exercise.

In result the appeal cannot proceed. We record, however, that Counsel for the Public Trustee put before us a very thorough and cogent argument directed towards showing that an oral declaration of a dying wish was not binding in law so as to revoke or alter the deceased's Will and, further, that the right to possession of the body, notwithstanding that the law does not recognise any property in a dead body as such, is in the executor and he has the duty to dispose of it. See Halsbury's Laws of England 4th Edn Vol.10 para 1019; Theobald on Wills 15th Edn p.129; Williams on Executors and Administrators 12th Edn Vol.1 p.610; Williams v Williams (1882) 20 Ch. 659 at 664; Murdoch v Rhind & Murdoch [1945] NZLR 425 at 426. The essence of the Public Trustee's arguments is plainly expressed in the following extracts. First from Nevills Law of Trusts, Wills and Administration in New Zealand 8th Edition 407:-

"There is by the common law no property in a dead human body, but the executor of a deceased person is entitled to the custody of his body and has a duty to bury it. The manner of burial is in the discretion of the executor though in practice he will consider the wishes of the immediate family, and even leave them to make arrangements if they appear to be agreed among themselves."

Further, Halsbury's Laws of England 4th Edn Vol.10 page 485 para 1016:-

"A person cannot by will or otherwise legally dispose of his body after death, and directions on the matter that he may have given are not binding upon his personal representatives."

It follows that this appeal lapses or fails in the sense that, for the reasons given, the Court does not deal with it. No question of costs was raised.

I.R. Thompson

 Mr. Justice I. R. Thompson
Judge of Appeal

Savage

 Mr. Justice Savage
Judge of Appeal

J. D. Dillon

 Mr. Justice J. D. Dillon
Judge of Appeal