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

CORAM : MANN C.J.

No. M.P. 15 of 1966 (P)

THE QUEEN

v.

THE STIPENDIARY MAGISTRATE
OF PORT MORESBY

AND

EMILY MARGARET HUNNAM

EX PARTE: ERNEST DOUGLAS HUNNAM.

R E A S O N S

PORT MORESBY.
9th and 16th August,
and
9TH AUGUST. 1966.

This was an application for a Writ of Certiorari to call into question an Order made by the Stipendiary Magistrate at Port Moresby under which the applicant, Ernest Douglas Hunnam, was ordered to pay maintenance for his wife and child.

The part of the Order called into question is the last provision dealing with maintenance to the effect that the payments are to commence on and from the date of desertion, which goes back to a period prior to the hearing and prior to the issue of summons.

On the preliminary application, the wife, Emily Margaret Hunnam, was represented by Counsel, but the learned Magistrate was not. I made an Order Nisi on the first application in order that the proceedings might be brought appropriately to the notice of all parties concerned. On the return of that Order Nisi, only the applicant appeared and he was represented by Counsel.

I was referred to the little authority there appears to be as to the making of Retrospective Maintenance Orders. Some of these are collected in Litherland's textbook on "Maintenance of Deserted Wives and Children" - 2nd Edition, p.344, but the earlier reports are not available in the Territory.

There is one case, Nurmberg v. Reynolds 380 reported in 1931, Q.J.P. Reports, p.110, in which the headnote states that the Supreme Court held that

the Magistrate could not make a Retrospective Order. It appears that this point was conceded and was not argued. About as far as the authority goes is that Counsel of high standing and Henchman J. thought that the point was beyond argument. There are other cases, particularly from New Zealand, which would tend to support the same view, but they do not add a great deal of weight since they are concerned with affiliation proceedings in which there can hardly be any support for the natural father's liability until a Court, acting with statutory authority, arrives at a finding of fact which is the starting point of his liability to pay maintenance.

Although Nurmberg's case is by no means authoritative for the present purpose, I am in much the same position in the present case, having had no opposing argument addressed to me. There is much to be said, therefore, for the view that I should accept Nurmberg's case as sufficient authority to indicate an established view for the purposes of an uncontested case such as the present. Nevertheless, I am still bound to look into the matter since, if I decide to set aside the Order, I must still consider what proper Order should be put in its place.

Having made some investigation into the matter, I think that the position is that there is no authority clearly applicable to the legislation under which this Order was made. I think that the true position is that the jurisdiction to make this Order is entirely statutory and any Order made must, therefore, come within the terms of the Ordinance.

On the face of it, I can see nothing unreasonable about the provisions made by the learned Magistrate, who, in making the Retrospective Order was apparently following a practice which has been recognised in the Territory before. It may well be that if a similar Order were being pronounced in an unlimited jurisdiction, the Court would find itself with a much freer hand to make provision for the protection and maintenance of a deserted wife and child. But since the Ordinance makes no express provision for Retrospective Orders, a Maintenance

Order pronounced in the District Court must be limited to the special jurisdiction conferred.

One characteristic of this jurisdiction is that it enables a complainant to have provision made for her daily needs immediately and without prolonged investigation into questions of property, security or matrimonial troubles which may be involved. If a case involves complexities or special requirements going beyond this immediate jurisdiction, the better course is to bring appropriate proceedings in the Supreme Court and, if necessary pending the final determination of outstanding matters, seek some interim provision.

The Deserted Wives and Children Ordinance, 1951-1961, provides in Section 6 jurisdiction for a District Court in New Guinea, and for a Court of Petty Sessions in Papua, to make Orders, inter alia, for the use of the wife or for the support of a child, in each case for such allowance as the Court considers reasonable.

By virtue of Section 287 of the District Courts Ordinance, 1964, this jurisdiction becomes exercisable by the recently established District Courts.

In Sub-section 2 it is provided that an allowance ordered to be paid under the last preceding sub-section shall be paid weekly, fortnightly or monthly and to such person and in such manner as the Court orders.

Sub-section 3 refers to an Order for the support of a child as "continuing" in force. There are separate provisions dealing with such matters as security for payment of the allowance and for enforcement and for the variation of Orders from time to time.

Although the Ordinance confers a discretion on the Magistrate in deciding what is reasonable, it seems to me that the Ordinance contemplates a regular allowance to meet the daily needs of the parties for current expenses in the present tense. Whilst I

think it by no means unreasonable to make provision for past maintenance to reimburse a wife for what she has already and recently spent, I can find no indication in the Ordinance of any legislative intention to confer power upon the Magistrate to make a Retrospective Order. It seems to me, therefore, that this power could not be held to be conferred by the Ordinance upon the Magistrate.

I think that the paragraph of the Order which provides for the retrospective payment is severable from the rest of the Order, so that it should not be necessary for me to set aside the entire Order. I propose to direct that a Writ of Certiorari should now issue and be made absolute in the first instance and that the Order in question be called up and amended by striking out those parts of the Order which provide for payments to commence on the 7th February, 1966, and putting in their place provisions appropriate for the payments to commence as from the date of the learned Magistrate's Order.

It might well be proper for the Order to provide for payments to commence as from the date of the complaint - this being the date upon which the Court first becomes seised on the matter and the date from which Section 5 of the Ordinance operates. However, since no argument has been addressed to me on this question, I think it would not be an appropriate case in which to establish such a new practice.