SC 624

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

CORAM: KELLY, J.
Thursday,
3rd June, 1971.

THE QUEEN v. JOHN KAUPA

1971

June 1, 2 and 3.

PORT MORESBY

Kelly, J.

The applicant Forova Mahau seeks an order that a writ of habeas corpus should issue directed to John Kaupa to have the body of Michael Mahau before the Court at Port Moresby. An order having been made that John Kaupa show cause why Michael Mahau should not be produced to the Court the matter now comes before me on the return of the order nisi.

Michael Mahau is a native child aged about two years. The applicant is its mother. The respondent claims to be the father of the child and whilst the applicant originally herself asserted that this was so she now says that it is not so. The respondent at present has possession of the child.

The first matter for consideration is whether the applicant and the respondent are married according to native custom. It is common ground that they lived together from some date in 1968 until the end of April, 1971. In their respective affidavits both the applicant and the respondent state that they were not married at the time of the birth of the child and that they have not since been married. However, in their oral evidence each asserts that they are married and that, notwithstanding that no bride price was paid, the marriage is one which is recognised by the custom of their people in each case. The applicant is from the Gulf District whilst the respondent is from the Chimbu District. Two witnesses, one from each of these districts and each claiming to be familiar with the native custom of that district, say that in each case by native custom a woman from that area is not validly married until bride price has been paid for her to her clan. In this state of the evidence it seems to me to be a matter of real doubt if the applicant and the respondent are married by native custom and even on the balance of probabilities I could not be satisfied that they are. Regard must also be had to the fact that the parties belong to completely unrelated native groups, so that on the

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evidence it is by no means certain that there is a community of native people recognising the notion of customary marriage whose customs could extend to both parties (see Hevago-Koto v. Sui-Sibi (1)). I am therefore compelled to proceed on the basis that at no relevant time have the applicant and the respondent been married.

The next question is that of the paternity of the child, as obviously unless the respondent is the father there would be no possible basis on which he could successfully resist the present application. There is a clear conflict of evidence on all relevant dates and in particular as to whether or not the applicant was already pregnant when she came to live with the respondent. I do not propose to set out all the evidence on this matter. I merely say that I do not regard the applicant as a reliable witness either as to dates or as to other matters of fact and that where her evidence and that of the respondent are in conflict I accept the evidence of the respondent. On the evidence which I thus accept the position is that about the middle of 1968 the applicant ceased to live with a man named Kira whom she says was her husband and commenced to live with the respondent. The child Michael was born on or about 14th May, 1969. To the knowledge of the respondent, the applicant was not already pregnant when he first had intercourse with her and it appears that the first time the suggestion was made that the respondent was not Michael's father was in evidence on Tuesday last when the applicant was recalled to the witness box; prior to that time she had asserted that the respondent was the father. I do not find the applicant's change of face on this matter at all convincing and I am satisfied that the respondent is the father of the child. If there is any presumption of legitimacy in this case (which I very much doubt as it is not established that the applicant was in fact married to Kira) it is rebutted by the evidence, and the position then is that this matter falls to be determined on the basis that Michael is the child of the applicant and of the respondent and is illegitimate.

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(1) (1965-66) P. & N.G.L.R. 59 at p. 61

Whilst the present application is not in its form an application for custody, it partakes of the nature of such an application and has to be determined on the same principles as those upon which a court ought to act on an application for the custody of an illegitimate child. These principles are laid down in Barnardo v. McHugh (2) in particular at pp. 398-9 where after referring to the case of Reg. v. Nash (3), Lord Herschell said: "I think this case determines (and I concur in the decision) that the desire of the mother of an illegitimate child as to its custody is primarily to be considered. Of course, if it can be shewn that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother or of any person in whose custody she desires it to be, the Court, exercising its jurisdiction, as it always does in such a case, with a view to the benefit of the child, would not feel bound to accede to the wishes of the mother."

Quite apart from this there is also the consideration that, whilst not a proposition of law, is certainly a principle of common sense and ordinary humanity that, all things being equal, the best place for any small child is with its mother (see, for example, Lovell v. Lovell (4); H. v. H. and C. (5)); and in the case of such a child the circumstances must be very strong indeed to induce a court to take a child from the guardianship and custody of the mother; see, for example, Storie v. Storie (6) which was not a case of illegitimacy but where the importance attaching to the element of maternal relationship as an ingredient in the welfare of the child is considered, particularly by Williams, J. at p. 620.

I am in no doubt that it is in the best interests of this child that it should remain with the respondent, despite its tender years and if the test were simply what is best for the child I would have no hesitation in so deciding. At the present time its conditions of living will clearly be much better with the respondent than with the applicant. I am satisfied that its physical and material well-being will be better attended to by the respondent and his wife Ana than by the applicant. Likewise, in future it seems to me that it is likely to fare much better with the respondent than with the applicant despite the fact that as an illegitimate child it appears that it will inherit no rights to property through the respondent, but would inherit rights to land through its mother,

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(2) (1891) A.C. 388
(3) 10 Q.B.D. 454
(4) (1950) 81 C.L.R. 513 at p. 523 per Latham, C.J.
(5) (1969) 1 W.L.R. 208 at p. 209 per Salmon, L.J.
(6) (1945) 80 C.L.R. 597

the applicant. However, there is no evidence to suggest what would be the extent of such rights as it might inherit through its mother and, in any event, the evidence of custom does not go so far as to say that unless the child remains in the custody of the mother it will forfeit any rights to land which it would otherwise have through her.

Nevertheless, on the principles to which I have referred I am bound to go further than simply to decide that it would be in the best interests of the child that it should remain with its father, and I have to decide that it would be detrimental to the interest of the child that it should be delivered to the custody of the mother. After much anxious consideration of the evidence I have reached the conclusion that I should go this far. I accept the evidence that the applicant had previously stated that she did not want the child with her and that when she left the respondent, she handed the child over to the respondent and his wife Ana whom the respondent had married in December, 1970. I also accept that for some time she had failed to care for the child properly and that the responsibility for its proper care fell primarily on the respondent and, more recently, Ana. A matter of particular moment is that the applicant has already given in adoption to her sister and her husband two children who are the issue of her prior union with Kira. Whilst there is nothing alleged against the character of the applicant other than an apparent addiction to gambling, I could feel no real confidence regarding the future of this child if it were to remain with the applicant, so much so that I feel that it could be detrimental to its interest to be delivered to her custody.

I am also required to have regard to the provisions of the Native Customs (Recognition) Ordinance 1963 and in particular to Secs. 6(1)(d) and 9. The combined effect of these two sections is that whilst native custom must be taken into account in determining the question of custody, I am not obliged to enforce native custom if it would not in my opinion be in the best interests of the child to do so. The only evidence of the native custom said to be applicable is that referred to in the affidavit of Mahiro Kivovia, namely, that in the case of a child of a woman who is not married, the mother has an absolute right to the custody of the child irrespective of the wishes of the father. However, the situation under native custom where the mother had said she did not want the child is not clear as from what this witness said the situation is one quite foreign to the custom to which he was referring. In any event, having regard to the provisions of the Native

Customs (Recognition) Ordinance, even assuming the custom to be as the witness stated, I am not required to enforce it if I do not consider it to be in the best interests of the child. For the reasons which I have already indicated, I do not consider it to be in the best interests of the child that the mother should have its custody and indeed I consider that it would be detrimental to its interest that this should occur. It therefore follows that I am not obliged by the Native Customs (Recognition) Ordinance to come to any different conclusion in this case from that to which I would have come irrespective of the Ordinance.

Having regard to all the above matters I am not prepared to order that this child be delivered to the custody of the applicant. That being so, the rule nisi must be discharged. I have considered whether I should go any further and make an order for custody in favour of the respondent. There appears to be some doubt as to my power to make such an order. Dicta by Denning, L.J. (as he then was) in Re M. (an infant) (7) would seem to suggest that there is no such power, although in Edwards v. Hamment (8) Barry, J. held that the court has jurisdiction to order that the father may have custody of an illegitimate child. Likewise, the view appears to be held by some Queensland judges that the court in the exercise of its inherent jurisdiction in relation to illegitimate children would have such a power (see, for example, In re J. (Infants) (9) and Re Raffel, Infants (10)). Be that as it may, I am doubtful if I could properly exercise such a power on a habeas corpus application made by the mother and in which the rule nisi is being discharged so that the child is not within the control of the court. In The Queen v. Barnardo. Jones's Case (11) (which on appeal became Barnardo v. McHugh (12) (supra)) Lopes, L.J. pointed out at p. 214 that where there had been no discharge of an infant, as in that case where the rule nisi for habeas corpus had been made absolute, the infant was in the control of the court and the court can make what order it thinks fit with regard to its custody. However, that is not the case here, and whilst I would be most unwilling to create a situation in which this same matter would have to be litigated in some other proceeding, I have reached the conclusion that all I should do is to dis-

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(7) (1955) 2 All E.R. 911 at p. 912
(8) (1948) V.L.R. 110
(9) (1950) St. R. Qd. 72
(10) (1967) Q.W.N. 39
(11) (1891) 1 Q.B. 194
(12) (1891) A.C. 388

charge the rule nisi. In the circumstances, it is unnecessary to decide whether the Infants Ordinance 1956 applies to illegitimate children.

The order of the court is that the rule nisi is discharged.

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

Solicitor for the Respondent : P. Luke, Public Solicitor's Office