P. v. P.

Court of Appeal
Forbes, P., Hogan and Unsworth, J.J.A.,
7, 8, 9 November 1979

Precedent — authority of English decisions in Gibraltar
Appeal — appeal from exercise of discretion
Child — custody — taking child out of the jurisdiction

A husband and wife were living apart, the wife having by consent the custody of the children of the marriage, giving access to the father. The wife decided that she wished to start a new life in Scotland, with her children.

The husband took out a summons for an order that the children be made wards of court. The wife then applied for an order that she be given custody of the children, with leave to remove them from the jurisdiction. This was refused by the Registrar, acting under s.11 of the Supreme Court Ordinance (Cap. 148, 1978 Reprint). The wife appealed.

HELD: (i) Where a Gibraltar ordinance is in the same terms as an English statute, decisions of the English Court of Appeal should be treated as highly persuasive authority.

(ii) An appellate court will not interfere with the exercise by a trial court of its discretion in questions of custody and access unless satisfied that the judge exercised his discretion on a wrong principle or that, his decision being so plainly wrong, he must have exercised his discretion wrongly.

(iii) Where custody has been given to one parent and is working well, the court should not lightly interfere with such reasonable way of life as is selected by that parent, even where it involves taking the child out of the jurisdiction.

(iv) There was no evidence that the move to Scotland proposed by the mother would, or was likely to, have a deleterious effect on the children.

Cases referred to in the reasons.

P. (L.M.) (otherwise E.) v. P. (G.E.) [1970] 3 All E.R. 659
Nash v. Nash [1973] 2 All E.R. 704
de Lasala v. de Lasala [1979] 2 All E.R. 1146
J. v. C. [1969] 1 All E.R. 788
S. (B.D.) v. S. (D.J.) [1977] 1 All E.R. 656
Re F. (a minor) [1976] 1 All E.R. 417
Re K. (minors) [1977] 1 All E.R. 647
B. v. W. [1979] 3 All E.R. 83
Charles Osenton & Co. v. Johnston [1941] 2 All E.R. 245

Appeal

This was an appeal from an order made by the Registrar of the Supreme Court in exercise of the powers conferred on him by s.11 of the Supreme Court Ordinance.

J. E. Triay for the appellant.
P. J. Isola for the respondent.

25 January 1980: The following reasons for judgment were read by direction of the President —

This is an appeal from an order dated 13 August 1979, made by the registrar of the Supreme Court acting under s.11 of the Supreme Court Ordinance. The appeal is against that part of the order which directs that:—

(a) the minors remain wards of court during their infancy or until further order; and

(b) it will be for the benefit of the children that the defendant do not have leave to take the children out of the jurisdiction.

The grounds of appeal are as follows:—

1. That in arriving at his decision, the learned registrar erred in law in failing to give due importance to the considerations laid down in *P. (L.M.) v. P. (G.E.)* (1) and *Nash v. Nash* (2).

(1) [1970] 3 All E.R. 659.
(2) [1973] 2 All E.R. 704.

2. That the registrar erred in law in holding that the considerations aforesaid in paragraph 1 did not apply to the facts in this case.

3. That the registrar erred in finding that the appellant had ill considered her plans to reside in Scotland and that such finding was against the weight of evidence.

4. That the registrar erred in doubting the reasonableness of the appellant's proposals to move to Scotland and that such finding was against the weight of evidence.

After hearing counsel for the appellant, Mr J. E. Triay, and counsel for the respondent, Mr Peter Isola, the court for reasons to be given later made the order set out in the annexe hereto. We now give our reasons.

This is a very sad case and the court's decision, whatever it might be, was bound to cause distress to one or other of the parties.

The appellant married the respondent in 1970. The marriage appears to have been a happy one initially. and two children, both girls, were born to the marriage. They are now aged 6 and 4 years.

In February 1975, the respondent suffered a mental break-down, an "acute psychotic disturbance," and was admitted to the K.G.V. Psychiatric Unit. After treatment he was discharged, greatly improved, in April 1975, but continued under outpatient supervision and treatment. He returned to live with the appellant and the children, and was able to resume his work in September of that year. However, he found the stress difficult, and obtained a transfer to another post. In April 1977, the respondent suffered a relapse and spent a further seven weeks as an inpatient at the hospital. He was, after this, retired from his post on medical grounds but hopes to open a small business with financial assistance provided by his mother.

During the interval between the first and second break-down, relations between the appellant and the respondent began to deteriorate and, following the second break-down, the appellant found the situation was affecting her health and she moved to live with her parents after informing the respondent of her intention to do so, taking the children with her. She had been

following her vocation and continued to do so to support herself and the children.

Thereafter, in August 1978, the appellant's legal representatives wrote to the respondent inviting him to enter into a separation deed. Further unsuccessful negotiations followed. During this period the respondent was seeing his children regularly.

However, the appellant claimed that, in the circumstances of Gibraltar, she was finding the stress of living in close proximity to the respondent impossible to bear, and she formed the intention of going to Scotland to live with her twin sister. Her sister was married and living there in comfortable circumstances. She had a family of five children aged from a few months to six years, and it was accepted by both parties that she was and is willing to have the appellant and her daughters living with her. It was the appellant's intention to try and find employment in Scotland, preferably in the occupation in which she was trained. She informed the respondent of her plans.

The respondent thereupon took out a summons in the Supreme Court seeking an order that the two children be made wards of court. In February or March 1979 the respondent began to show signs of a further relapse of his mental condition, and he was, in fact, readmitted to hospital in March, where he remained until July, though he began going out on leave from the hospital in June. While in hospital an incident occurred when the appellant was visiting the hospital to inquire after the respondent. The respondent, who had evaded the medical attendants, happened to see the appellant and seized her by the wrist, took her to the garden and defied all who tried to intervene. The superintendent, Dr Montegriffo, formed the opinion that the appellant was in no danger during the incident, but it was agreed on all sides that the appellant was not to know that and that it must have been a terrifying experience for her. Not unnaturally, this made her all the more determined to move to Scotland, claiming she was now in physical fear of the respondent, both on her own behalf and on account of the children. It must, however, be said that the respondent has apparently never shown the slightest inclination to be violent to his children.

In the event the respondent's summons came before the Supreme Court in July 1979. The learned Chief Justice then made the following order:

"Mr Triay has put forward a very persuasive argument why the defendant should be allowed to take her children to Scotland and I accept that a court in Gibraltar should be more ready to allow children to leave the jurisdiction than would be a court in England, because it is difficult if not impossible to start a new life here, because the City and its population are so small and the community so closely knit. But the plain answer is that I do not have enough information before me to decide what is best for the children. I think a report (and a very full and detailed report) from a Family Care Officer is essential. I should like also a much more factual report from Dr Montegriffo. It is unfortunate that these are not available when the proceedings have been pending for six months. As it is, I order that the children remain wards of court, that they remain in the care and custody of their mother and that reports be obtained as soon as possible. Liberty to either party to apply."

[*Their Lordships then set out the formal order.*]

In July 1979, the appellant applied to the Supreme Court for an order that she should have:—

"1. Custody of the minor children.

2. Leave to remove them from the jurisdiction of this Honourable Court for the purpose of taking up residence in Scotland as soon as the court may allow."

The application, after an adjournment for the purpose of obtaining reports from the Family Care Officer and Dr Montegriffo, was heard by the registrar, who refused leave to take the children out of the jurisdiction and ordered that the minors remain wards of court during their infancy or until further order and that the custody of the children be committed to the care and control of the appellant. It is against that part of the order continuing the wardship and refusing leave to take the children out of the jurisdiction that the appellant appealed to this court.

The first matter for consideration is the law applicable to this case. Mr Triay submitted that the English authorities should be applied as the court is dealing with statutory provisions which are in the same terms as the statutory provisions in England.

In support of this he referred to the case of *de Lasala v. de Lasala* (1) where it was held that the decisions of the English Court of Appeal on matters of English law applied to the Colony of Hong Kong were of persuasive authority only but decisions of the House of Lords on the interpretation of legislation common to the Colony and England, although in juristic theory persuasive only should be treated as binding. The case was dealing with applied legislation but Mr Triay submitted that the same principle applies in a case where the law of a colony is in the same terms as an English statute. Both counsel referred to English cases and we have treated them as highly persuasive authority from which we see no reason to depart in the present case.

Mr Triay submitted that in this case the Court in Gibraltar should follow the principles established in the cases of *P.(L.M.) v. P.(G.E.)* and *Nash v. Nash*.

In *P. v. P.* the parties had been divorced and custody of the child of the marriage had been given to the mother. The mother remarried and wished to take the child with her to New Zealand where the husband by her second marriage had been offered employment. Leave was refused by the judge but the Court of Appeal allowed the appeal and gave the mother leave to take the child to New Zealand. In his judgment Sachs, L.J., said this: —

> "When a marriage breaks up, then a situation normally arises when the child of that marriage, instead of being in the joint custody of both parents, must of necessity become one who is in the custody of a single parent. Once that position has arisen and the custody is working well, this court should not lightly interfere with such reasonable way of life as is selected by that parent to whom custody has been rightly given. Any such interference may, as Winn, L.J., has pointed out, produce considerable strains which would be unfair not only to the parent whose way of life is interfered with but also to any new marriage of that parent. In that way it might well in due course reflect on the welfare of the child.".

In *Nash v. Nash* the parties had separated and custody of the child of the marriage had been given to the mother who later filed a petition for divorce. She was offered an appointment in

(1) [1979] 2 All E.R. 1146.

South Africa and obtained leave from a judge to take the child out of the jurisdiction. On appeal the decision of the judge was upheld and the approach adopted by Sachs, L.J., in *P.(L.M.)* v. *P. (G.E.)* mentioned above was followed.

Mr Isola submitted that each case should be decided on its own facts in accordance with the principles contained in s.5 of the Infants Ordinance (Cap. 78) (as replaced by s.2 of the Infants (Amendment) Ordinance, 1976) which is in the same terms as s.1 of the English Guardianship of Infants Act, 1925, and provides that the first and paramount consideration in custody matters is the welfare of the child. In support of this he referred to the cases of *J. v. C.* (1) and *S.(B.D.) v. S.(D.J,)* (2).

In *J. v. C.* an infant born in England in 1958 to Spanish parents was taken shortly after birth into the home of foster parents in England and (apart from a comparatively short period when the child had been handed back to the natural parents) the child was looked after by the foster parents until 1967. In that year the natural parents, who were then well established in Spain. applied for the care and control of the child. The application was refused by the judge on the ground that it would not be in the best interest of the child to grant the application as the child had become settled in England and might find it difficult to adjust to a new life in Spain. The natural parents appealed to the Court of Appeal and then to the House of Lords but the appeals were dismissed as the judge in the exercise of his discretion had correctly applied the right principle, namely, that the paramount consideration in custody matters was the welfare of the child even as against a claim by the natural parents.

The decision in *J. v. C.* was followed in *S.(B.D.) v. S.(D.J,)*. In that case parents had separated and the father applied for the custody of the two children. The judge granted the application and in determining the case said that the welfare of the two children was the paramount but not the only consideration. He was also bound to have regard to the views of the unimpeachable, or comparatively unimpeachable, parent and to the essential justice of the case. The decision of the judge was set aside by the Court of Appeal and Ormrod, L.J., said that:

(1) [1969] All E.R. 788.
(2) [1977] 1 All E.R. 656.

> "The question is not what the essential justice of the case requires but what the best interest of the child requires. It is clear from *J. v. C.* that if the interests of the children requires a decision in favour of one parent, the perfectly proper interests and wishes of the other parent, unimpeachable or impeachable must yield to the interests of the children."

Mr Isola submitted that the court below had correctly applied this principle to the facts of the instant case, but, without detracting from his insistence on that contention, he also submitted that, since the registrar was exercising a discretionary power, this court should not interfere merely because it thought that it would have come to a different decision, and should do so only if the judge had failed to take into account something which he should have taken into account or took into account something which he ought not to have taken into account or was wrong.

Mr Isola supported this submission by reference to the cases of *Re F.* (*a minor*) (1), *Re K.* (*minors*) (2) and *B. v. W.* (3).

In *Re F.*, Stamp, L.J., in his judgment said that:

> "...in infant cases you cannot say that the decision of the judge is wrong, improper or unjust unless he has erred in law or has taken into account some matter which he ought not to have taken into account, or failed to take into account a matter which he ought to have taken into account."

But the other two judges of appeal did not agree with the view that special rules apply in infant cases. Browne, L.J., said that:

> "Apart from the effect of seeing and hearing witnesses, I cannot see why the general principle applicable to the exercise of the discretion in respect of infants should be any different from the general principle applicable to any other form of discretion."

---

(1) [1976] 1 All E.R. 417.
(2) [1977] 1 All E.R. 647.
(3) [1979] 3 All E.R. 83.

He reviewed the authorities relating to the general principles applicable to appeals against the exercise of a discretion from which it appears, as stated in the head note, that an appellate court is entitled to set aside the decision of a trial judge if it is satisfied that, although he had taken all relevant factors into consideration, his decision was wrong in that he had given insufficient, or too much, weight to some of those factors.

In the case of *Re K.*, the Court of Appeal appears to have dismissed the appeal simply because it was satisfied that the judge had acted on the right principles and correctly applied the law.

In *B. v. W.* the judge (in a difficult case where the father was a patient at a psychiatric clinic and the mother in prison awaiting trial) ordered that the children of the marriage should remain wards of court in the care and protection of the local authority, that if possible they should become weekly boarders at a special school and that the grandfather should have staying access during weekends and school holidays. The grandfather appealed seeking an order granting himself care and control. The Court of Appeal dismissed the appeal but on its own initiative varied the judge's order by deleting provisions relating to the children's education and also the provisions giving the grandfather weekend and school holiday access. The grandfather appealed to the House of Lords and the appeal was allowed and the judge's order restored pending a further application to the court. The House of Lords thought that the Court of Appeal had acted irregularly in relying on a social worker's letter when it had not been placed before the judge or disclosed to the grandfather or his advisors before the Court of Appeal hearing. In the House of Lords preference was made to the powers of an appellate court on an appeal against discretion. Viscount Dilhorne referred to the dictum of Viscount Simon in *Charles Osenton & Co. v. Johnston* (1) where he said: —

> "appellate authorities ought not reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a

(1) [1941] 2 All E.R. 245, at p. 250.

wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations ..... then the reversal of the order on appeal may be justified.".

Lord Edmund-Davies said:—

"Questions of access are pre-eminently matters of discretion, to be exercised in the light of the relevant, and admissible, facts. As to matters of fact, a body of case law establishes that the findings of a trial judge who has had the inestimable advantage of seeing and hearing the witnesses should only in exceptional circumstances be upset by an appellate court.".

Lord Scarman said: —

"The temptation to substitute one's own opinion for that of the trial judge (or to state an opinion where the judge has preferred silence) is well known to all who have exercise appellate jurisdiction in custody cases. I would not be so bold as to claim I have always successfully resisted it. But it must be resisted, if error and injustice are to be avoided. The Court of Appeal has, broadly speaking, three courses open to it, if it be minded to reverse or vary a custody order. First, if the evidence is such that it is able to demonstrate that the order was wrong, it will allow the appeal and make the appropriate order. Secondly, if satisfied that the order was wrong but unsure on the evidence what order ought to be made, the court can remit the case to the judge (or to another judge) with such directions for the care and control of the child in the meantime as it thinks best in the child's interest. Thirdly, and exceptionally, the court may hear evidence in order to resolve its doubts. But at the end of the day the court may not intervene unless it is satisfied either that the judge exercised his discretion on a wrong principle or that, the judge's decision being so plainly wrong, he must have exercised his discretion wrongly.".

We are indebted to counsel for the cogency of their arguments in this case, and the diligence which has resulted in the production and careful analysis of the relevant cases. Having consi-

dered them, we are satisfied that the approach adopted by Sachs, L.J., in *P.(L.M.) v. P.(G.E.)* (supra), and followed in *Nash v. Nash* (supra), is a correct principle and is applicable to the circumstances of the instant case.

The registrar dealt with this issue in the following way. He said:

> "Counsel for the defendant has referred this court to the dicta of Sachs, L.J., in *P.(L.M.)* v. *P.(G.E.)* which was applied in *Nash v Nash* and rather forcefully suggested that the principle stated therein should be followed in the present case. Although highly persuasive this court is not bound by these decisions and furthermore the facts in both cases were very different to the present one."

From this it would appear that the registrar gave insufficient weight to a principle from which we think he should have derived guidance. Neither of the reasons mentioned by him would appear to justify this course. Even if the authorities were only persuasive there was no sufficient reason for resisting the persuasion and the difference on facts did not alter the principle or render it less applicable to the circumstances of the instant case. A similar point was made in *Nash v. Nash* where Davies, L.J., had this to say:

> "Counsel for the father has rightly pointed out that the facts in *P.(L.M.) v. P.(G.E.)* were vastly different from those in the present case. I entirely agree. One does not, I think, need to make comparisons between the facts of the two cases. But I emphasise once more that when one parent has been given custody it is a very strong thing for this court to make an order which will prevent the following of a chosen career by the parent who has custody."

Had there been evidence in this case that the move to Scotland would, or was likely to, have a deleterious effect on the children, then, notwithstanding the mother's wishes, the registrar would, we think, have been right to refuse permission. But since it did not appear that the children would be adversely affected, we think there was no sufficient justification for interfering with the way of life she wishes to adopt, and which

appeared not to be unreasonable. Whilst the registrar's anxiety as to the range of considerations which she had taken into account in making her choice was undoubtedly relevant,we think that, in itself, it was insufficient to warrant an interference which, as Sachs, L.J., said, should not be lightly undertaken, and Davies, L.J., indicated would require strong justification. Nor should it be overlooked that if the reasonable wishes of the parent having custody are denied, this may, in itself, have unfortunate repercussions on the children.

Having found that the registrar gave insufficient weight to a relevant principle, and consequently reached an erroneous decision, we came to the conclusion that his decision, even though made in the exercise of a discretion, should be altered.

For these reasons we allowed the appeal, and made the order set out in the annexe thereto.

ANNEXE
ORDER

1) The appellant shall have permission to take the children to the United Kingdom for an experimental period of 18 months beginning on 1.1.80, or such later date as she may leave Gibraltar.

2) Permission to continue thereafter unless the Supreme Court otherwise orders.

3) During the experimental period, if requested by the respondent, the children will return to Gibraltar, at his expense for not less than four weeks in the summer of 1980 and not less than two weeks at Christmas 1980 or such other periods the parties may agree.

4) If accompanied by the appellant on return the present arrangements for access, will be reinstated for five days a week.

5) If children return on their own they will reside at such place as may be agreed by the parties or, failing agreement, as the Supreme Court may direct.

6) Arrangements for access in the United Kingdom to be agreed between the parties, or failing agreement, to be determined by the Supreme Court.

7) Both parties to have liberty to apply to the Supreme Court for variation of this order if circumstances require it.

8) The children will remain wards of court until further order and there will be an undertaking to return the children if so required.

9) No order as to costs.