CASE NOTE

PUBLIC PROSECUTOR v. WILLIE BENSON

Case Reference: Unreported Supreme Court, Republic of Vanuatu, CR 21/02, 16 July 2002

Court: Supreme Court o f the Republic of Vanuatu

Coram: Judge Roger J. Coventry

Introduction

This is an unreported judgement of the Supreme Court of the Republic of Vanuatu by Coventry J. Although it is quite recent, it is worth mentioning in a case note as it is probably the most comprehensive authority, so far on child maintenance in Vanuatu and could possibly be a benchmark for other decisions to come in this area of the law.

The Facts

Lydia Benson, the complainant and the respondent Willie Benson were married on 21st August 1989. They have two children, Mackenzie aged 14 and Julie aged 9. In January 2000 they split up and the children lived with their mother Lydia. Both Lydia and Willie were employed but in March 2000, through some personal circumstances, Willie was suspended from his employment as a police officer. He was reinstated in January 2002 to his normal position as a corporal in the Vanuatu Police Force.

Lydia Benson, through the Public Prosecutor, brought proceedings under the Maintenance of Family Act [CAP. 42] alleging Willie Benson had failed to make adequate provision for the maintenance of herself and the two children. The Public Prosecutor commenced this action in March 2000, which again displays a difficulty in case management by the prosecution in Vanuatu due to lack of staff and resources. This does have a bearing on the question of whether or not a trial was held within a reasonable time. However, the Court did not consider this issue for some reason.

As for their respective incomes, Willie Benson received 43,000 vatu per month. Lydia Benson received 46,000 vatu per month in her employment as a dealer at the Palms Casino at Le Meridien Hotel. These amounts are before any deductions or charges.

On 23rd April 2002 Willie Benson was convicted before the Senior Magistrate and ordered to pay a fine of VT. 5,000 and maintenance of VT. 2,000 per month for each child and VT. 1,000 per month for Lydia Benson.

The Public Prosecutor then appealed on the following grounds:

(i) that the sentence was manifestly inadequate; and
(ii) the maintenance orders were grossly insufficient in all the circumstances, particularly the defendant's means and his receipt of VT. 1,380 per fortnight in his pay in child (family) allowance.

On appeal, both parties provided written submissions to the Court.

The Law

Section 1 of the Maintenance of Family Act [CAP. 42] provides the avenue for seeking any maintenance order in Vanuatu, and the prosecution, at first instance, brought proceedings against the Respondent under that section. The section makes it an offence for any "man who fails to make adequate provision for the maintenance of the woman to whom he is legally married or his legitimate children under the age of 18 years." Any man found guilty of that offence, is liable to both a fine and an order to pay maintenance in order to make adequate provision.

Coventry J, candidly described proceedings under the Maintenance of Family Act as a "hybrid". The Act provides for a fine and/or imprisonment on proof of failure to maintain, which denotes a criminal aspect of the proceedings, but also the Court has a power to order maintenance for the wife and children, which is characteristically civil in nature. He admits early in his judgement that he would be mindful of these differences when applying the necessary tests in determining the appeal. In my view, this admission by the judge of the nature of the proceedings is not a warning that he will find the case difficult to deal with, but rather he is making it clear that some novel approach may be adopted in order to have a realistic outcome of the matter.

After noting that there are no Vanuatu authorities under the Act, the judge also goes further to show the limitations of the Act when comparing it with another similar law, which is the Maintenance of Children Act [CAP. 46]. He refers also to sections 14 and 15 of the Matrimonial Causes Act [CAP. 192]. In summary, it indicates that the current law on maintenance is both archaic and not responsive to social and economic factors.

The "Four Case" scenario

After outlining the facts and submissions of the parties, Coventry J immediately presents the method that he intends to adopt in order to assist him in analysing the facts of this case. I like to call the method, the "Four case" scenario. In his view, there can be four possible circumstances in any child maintenance case. The first case involves a situation where neither party is earning. The second case is where the man only is earning, and the third case is where the woman only is earning. The fourth case is where both parties are earning.

One might ponder as to why the judge chose to create this method, as it has no legislative basis and neither was it based on any local precedent. An idealistic answer could be "judicial activism" and the example of how courts can set legal standards where the legislature falls short. My answer is "judicial expertise and experience". The familiarity and knowledge shown by the judge in this matter clearly indicates that he has extensive experience in this area of family law in other jurisdictions and takes this opportunity to provide a possible method on how future maintenance cases can be dealt with. Simply speaking, Coventry J probably intends to set a precedent on the question of determining the level of child maintenance.

Judicial discussion of income percentages

Because of lack of Vanuatu authorities, both counsels in this matter had to assist the Court by providing certain formulae used in jurisdictions such as Australia, to calculate child maintenance. It also indicated that the judge wanted to be seen as canvassing the full extent of the issues raised and not merely taking a simplistic and cursory approach. Although the figures submitted may be fairly abstract, it is still useful to mention in such a case note, in order to stimulate possible academic discussion in this area. There were two respective tables submitted to the Court. The first contains a table of percentages of the income payable depending upon the number of children. This is shown as follows:

No. of children	Percentage of income payable (%)
1	18

2 27
3 32
4 34
5 or more 36

The second table was suggested by the judge, and in his view would be suitable for the second case where the man only is earning. The judge suggested that if a Magistrate found that a man was earning alone, then he should be ordered to pay a percentage in respect of each child:

No. of children Percentage of income payable (%)
1 15 - 20
2 20 - 25
3 25 - 30
4 30 - 35
5 35 - 40

These tables are the mechanics of the "Four case" method suggested earlier, because it would seem that depending on which of the four cases, the percentage of income will be determined by a table such as those outlined above.

As lawyers are often afraid of reducing legal arguments and reasoning to a simple mathematical formula, Coventry J does give some warning as to the total application of this method, and states that any magistrate dealing with such cases "may go outside these limits". Also to consider non-monetary modes of maintenance such as food and clothing or specific expenses such as school fees.

Factors in determining Maintenance

There are numerous principles that the Court took into account in deciding this case. It would be difficult to mention each of them, but there are few that are worth noting as they reflect very much the attitude of this particular Court in a maintenance case and therefore may be noted by magistrates, judges and practitioners in cases to come.

The legal duty to support children

The most explicit of those principles is when the judge stated that "Parents must support their children". This statement was made right at the beginning of the judgement and I believe was made to emphasise the need for parents to be responsible and for courts to enforce this duty despite the facts of each case. The Respondent in this matter was seen by the Court as neglecting his parental duty as a father and therefore was now required to take account of his "central" duty.

Responsibility of the man to maintain his family
One can find a resounding approval by the judge that in his view, it is the man that must take responsibility. In one passage of the judgement, Coventry J, states that:

"The Court accepts that in Port Vila and in Vanuatu it is often very difficult to get a paid job. Nevertheless, a man should do his utmost to earn money to support his children or make other provision for them."

It seems that the judge is reiterating section 1 of the Maintenance of Children Act [CAP. 42], by showing that if a man fails to adequately provide for his family, he can be guilty of committing an offence. However, this of course does not have regard for section 1(b)(iii) of the same Act which outlines three exceptions or defences to this offence, and (iii) being "any other circumstances beyond his control". The question arising here is should the court punish a man because he is unfortunate in seeking employment? An interview and selection process being a matter that is outside of his control.

Assets can form part of maintenance orders

It was discovered by the Court that Willie Benson may have owned a motor vehicle that was used as a taxi. The Court not making specific reference to Willie Benson did mention that:

"[I] f an asset produces an income, such as a car used as a taxi, that should be taken into account when calculating the man's total income. If it produces no income .... then consideration should be given to its sale for the purposes of making provision for the children and wife."

Even if the court sees this as an appropriate avenue to cause a man to pay child maintenance, it could also be burdensome and cause hardship. The reality in Vanuatu is that most vehicles used as a taxi are acquired on hire purchase or through loan financing. A maintenance order causing them to contribution the taxi income to maintenance, can affect the commercial viability of a taxi operation thus affecting the borrower's obligations to the bank and could cause the man to lose his taxi completely. This would apply equally to real property, which is used for rented accommodation.

Although the Court is willing to extend its reach in maintenance cases to income-generating assets, other financial and practical issues must be given consideration.

Making practicable and workable orders

"Practicable and workable orders should be made. The Court should not just make an Order, but look to including the means by which the Order can be made to work..."

These are statements made by Coventry J at the end of the judgement. Overall, it is possible to comment that Coventry J has attempted to make his judgement practical and workable for conditions in Vanuatu. He has noted the difficulty of finding employment. He has looked at alternative sources of income, instead of concentrating on wages and has suggested non-monetary forms of provision to children. These are all matters outside of the actual black letter of the law. But they are realistic and also workable for parents in a place like Vanuatu where cost of living is high and wages are insufficient to meet the entire needs of the family.

The End Result

The appeal was accepted and the outcome of the matter delivered by the Supreme Court showed the following:

The fine of 5,000 vatu given by the Senior Magistrate was not varied even though the Supreme Court on appeal agreed that he had failed to give adequate provision to his children and wife.

In applying the tables for percentages of income earned, the Supreme Court ordered the Respondent to pay an amount of 6,240 vatu per fortnight be paid in total for the two children. As far as the wife is concerned, 500 vatu was ordered by the Court to be paid per fortnight by the Respondent.

The Respondent must also pay the school fees of both children until they reach 18 years.

The judge does not disclose the actual calculation that was used and so it is difficult to correctly say which of the tables were relied upon. But in comparison with the judgement at first instance, the Respondent is only paying an increase of 4,240 vatu in child maintenance.

Conclusion

Vanuatu's maintenance legislation is described by Imrana Jalal in her book "Law for Pacific Women" as being "most restrictive" compared to those of Tonga, Fiji and Solomon Islands and also criminalizes child

maintenance. This causes practical difficulties because if a man is found guilty and has no money to pay a fine, he can be imprisoned and then cause his family to be deprived of any maintenance. My view is that CAP. 42, which was passed as Joint Regulation No. 5 of 1966 and commenced on 15 April 1966, has been overdue for necessary reforms. It is bad legal policy to criminalise family maintenance. In the same respect, it is difficult to see the Public Prosecutor becoming a child welfare institution. For these and obvious reasons, much work is needed in the area of family and child maintenance in Vanuatu, despite the well-structured judgement in Public Prosecutor v. Willie Benson.

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