

**IN THE FAMILY DIVISION OF THE HIGH COURT
OF FIJI AT LAUTOKA**

APPELLATE JURISDICTION

APPEAL NUMBER:	Family Appeal No. 13 of 2018
BETWEEN:	Simon Sundar [Appellant]
AND:	Sushil Kaur [Respondent]
Appearances:	(Ms.) Jowen Singh for the appellant Mr. Anil Singh for the respondent
Date of judgment:	Friday, 15th May, 2020
Judgment of:	Jude Nanayakkara
Category:	<i>All identifying information in this Judgement have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Case Citation:	SS V SK; Fiji Family High Court case No. 13/18.

JUDGMENT OF THE COURT

J U D G M E N T

[A] Introduction

- (01) This is an appeal and a cross appeal from the orders made by the Resident Magistrate at Lautoka on 12-11-2018 on the hearing of **an amended Form 9 application filed by the appellant in the cross appeal (the wife) for altering interests of parties in the property – property distribution.**
- (02) In this judgment, I will refer to the parties as “the husband” and “the wife” respectively.
- (03) The parties were married in 2000, the age of the husband being in his forties and the wife being -in her twenties. They separated after 13 years of marriage in 2014. There are no children of the parties’ marriage.
- (04) There are three (03) grounds of appeal set out in the appeal filed on 10-12-2018. The grounds of appeal are:
 - (01) *That the learned Magistrate erred in law and in fact when he failed to consider that the respondent had contributed towards the education of the applicant.*

- (02) *That the learned Magistrate erred in law and in fact when he considered that both parties had equally contributed towards the matrimonial property.*
- (03) *That the learned Magistrate erred in law when he stated that the “Gold Patta” be returned to the applicant or the respondent to pay \$7,000.00.*
- (05) On the hearing of the appeal, counsel for the appellant abandoned the first and the second grounds of appeal and confined the appeal to the third ground of appeal.
- (06) There are six grounds (06) set out in the cross-appeal filed on 03-07-2019. They are:
- (01) *The learned Magistrate erred in law and in fact by not distribution the property equally, as the applicant lady was the main home maker and financial contributor because of permanent employment.*
- (02) *The learned Magistrate erred in law and in fact when he failed to consider the occupation of the property and its rental potential in assessing the appropriate share that each party should receive.*
- (03) *The learned Magistrate erred in law and in fact failed to consider the value of the furniture, fitting and appliances in making his assessment to the contribution of the party.*
- (04) *The learned Magistrate erred in law and in act by giving too much weight to the fact that the applicant lady had remarried thereby falling into error.*
- (05) *The learned Magistrate erred in law and in fact by not distributing the value of the motor vehicles equally.*
- (06) *That the decision is erroneous as each party should have been given equal share to the matrimonial property.*
- (07) The issues between the parties were stated by the learned Magistrate as follows;
1. *The Applicant filed amended Form 9 application on the 11th November, 2016 seeking the following orders;*
- (1) *50% share of all matrimonial properties detailed below:*
- (a) *The Residential House (“the matrimonial property”);*
- (b) *Vehicle 1;*
- (c) *Vehicle 2;*

- (d) *Furniture including one king size bed, one double bed and one ¾ bed lounge set, double mirror wardrobe, wooden TV cabinet.*
 - (e) *Electrical appliances and tools including refrigerator, iron, rice cooker, electric frying pan, water heater jug, halogen oven, sewing machine, sewing machine, sandwich maker, washing machine, desktop computer, printer and scanner, 4 piece blender and grinder set, water blaster, welding plant, gardening tools, 3 piece silver outdoor table and chairs, 2 by 4 gas stove with over, cutleries.*
- (2) *100% of the current value of personal jewelries including a gold patta, gold chain, clothing including sari's and formal wear belonging to the Applicant.*
 - (3) *The Respondent to urgently pay the full amount of the monthly repayment of the matrimonial home to –the bank in view of the fact that the Respondent has had full occupancy and possession of the matrimonial house since date of separation. This is to continue until the determination of this matter.*
 - (4) *The Respondent to fully upkeep the maintenance and payments of the Lautoka City Rates, Water Authority, FEA, Housing Levy and Housing Insurance till the determination of this matter.*
 - (5) *An independent Valuer to be commissioned urgently to value the matrimonial home at the current market prices whose fees will be equally borne by the Applicant and the Respondent.*
2. *The Respondent filed his Form 10 response on the 14th December, 2016 stating that he disagrees with the orders sought by the Applicant. Further he has sought the following orders;*
- (1) *I seek the application filed by the Applicant Lady to be dismissed.*
 - (2) *Applicant Lady to cease payments on my mortgaged property.*
 - (3) *100% of the current value of a Projector, Apple iPod, gold necklace, gold earrings and travelling bag belonging to the Respondent.*

- (4) *The Applicant Lady to return the lease documents in relation to the house and other documents in her possession.*
- (5) *Any other orders that this honourable court deems just and equitable.*

(08) The relevant orders made by the learned Magistrate may be stated as follows;

- (a) *I decided that the value of the residential property to be \$155,000 after excluding the liability on the property.*
- (b) *I order that the Applicant is entitled to 35% of the value of the residential property and I order the Respondent to pay the said amount, which is \$54,250 to the Applicant within six months from this date.*
- (c) *If the Respondent fails to pay the said amount within six months, the Registrar of the Family Court is ordered to sell the said property at the market value and to award 35% of the proceeds to the Applicant and 65% to the Respondent.*
- (d) *The distribution of proceeds to be done after settling all the liabilities on the property including the home loan and deducting incidental expenses incurred for the sale of the property.*
- (e) *I order the Respondent to return the gold bangle “Gold Patta” to the Applicant or to pay \$7,000.00 to the Applicant within 28 days from this order.*

(09) His Worship referred to Sections 161 and 162 of the Family Law Act, 2003 which set out the procedure and process for distribution of property between the parties to a marriage.

(10) Thereafter, his Worship referred to the “four step process” set out by Hon. Justice (Ms.) Anjala Wati in “Kesaia v Mukhtar”¹, which is the authority in Fiji on property distribution.

(11) **Having looked at all the factors and the evidence before him, his Worship came to a conclusion that the parties were equal contributors to the acquisition, maintenance and improvement of the property in question in this case, the matrimonial home.**

(12) **None of the parties have challenged the court’s assessment of each parties’ contribution to the acquisition, maintenance and improvement of the property in question in this case, the matrimonial home at Natabua, Lautoka.**

(13) **His Worship ultimately considered the relevant matters referred to in Section 162(3) of the Family Law Act, 2003 and made a modest adjustment in the husband’s favour,**

¹ Fiji Family High Court case No. 08/Ba/0043

largely because of his ill-health, old age and limited earning capacity. His Worship ultimately apportioned the property as to 65% to the husband and 35% to the wife.

- (14) The assessment of the parties' entitlements before making of an order is another question, quite distinct from the assessment of their contributions. As noted above, none of the parties have challenged the court's assessment of each parties' contributions to the acquisition, maintenance and improvement of the property in question in this case, the matrimonial home at Natabua, Lautoka.
- (15) On the hearing of the appeal, none of the parties argued and addressed the court on grounds of appeal. They consented to dispose the matter by way of written submissions. Counsel for both parties has tendered written submissions in support of their case. I am grateful to Counsel for those lucid and relevant submissions.
- (16) In the written submissions filed on behalf of the husband, the Resident Magistrate's order to return the "Gold Patta" (the gold bangle) to the wife was criticized.
- (17) In the written submissions filed on behalf of the wife, Counsel for the wife made a scathing attack on the 15% adjustment made in the husband's favour and on the order for settlement of property. Counsel seeks to discharge the 15% adjustment made by his Worship pursuant to Section 162(3) of the Family Law Act, 2003 and the orders for settlement of property and to substitute that the net proceeds of sale be divided equally between the parties.

[B] Appeal

- (18) Let me now turn to the appeal. As noted in the paragraph (5) above, the appeal is confined to only one ground of appeal which is in the following terms;
 - (3) *That the learned Magistrate erred in law when he stated that the "Gold Patta" be returned to the applicant or the respondent to pay \$7,000.00.*
- (19) **The wife's evidence was that the "Gold Patta" (the bangle) was a gift from the husband's mother on her (wife's) birthday.** (See; page 19 of the Transcript of hearing). The wife was available to test the truth and accuracy by cross-examination on that evidence. But it was left unchallenged. By itself it does prove that the gold patta was a gift from the husband's mother on the wife's birthday. I say, by the absence of cross-examination, the husband does admit that the gold patta was a gift to his wife by his mother on her birthday. There was no suggestion made to the wife in the cross-examination that this was not the case and had been let go unchallenged so far as the conduct of the husband's case is concerned. The absence of any grounds for suspicion having being provided by the husband and it must be accorded weight.
- (20) The husband testified under oath. The following exchanges took place in the course of the cross-examination of the husband by Mr. Singh (Reference is made to page 81 of the Transcript of Hearing).

Q: You also refused to return jewelry to the Applicant. Correct?

A: Yes.

Q: That includes 7 to 11 gold bangles?

A: No.

Q: How many? There is one gold bangle you refused to return in particular. Correct?

A: Yes.

Q: Why?

A: ***I bought that bangle. It is my money and I gave it to her.***

Q: Is it correct that you refused to give back one gold bangle that belongs to her?

A: Yes.

Q: What is the value of that?

A: To date it may be about \$6000 to \$7000.

Q: And why are you refusing to give it back?

A: It is mine. I bought it for my wife.

Q: ***Bought it for whom?***

A: ***I bought it for my wife.***

(Emphasis added)

- (21) The learned Magistrate very correctly attached no weight to the husband's version that he bought the bangle and it was a gift from him to his wife. His Worship very correctly made the finding that the "Gold Patta" (the bangle) was a gift from the husband's mother to the wife on her birthday.
- (22) The husband's version that he bought the bangle and it was a gift from him to his wife was not put to the wife when she was under cross-examination.
- (23) No witness should be stabbed from behind. The wife should have a fair opportunity of meeting whatever challenge is offered to her evidence and the substance of any testimony that is to be adduced to contradict it. There is nothing more frustrating to a tribunal of fact than to be presented with two important bodies of evidence which are inherently opposed in substance but which, because **Browne v Dunn**² has not been observed, have not been brought into direct opposition, and serenely pass one another by like two trains in the night.

The established practice is stated briefly by **Odgers, Pleading and Practice**³

Cross-examination

² (1894) 6. R. 67 (H.L.)

³ 7th ed. (1912), page 312:

*“This much counsel is bound to do, when cross-examining: **he must put to each of his opponent’s witnesses, in turn, so much of his own case as concerns that particular witness or in which that witness had any share.** Thus, if the plaintiff has deposed to a conversation with the defendant, it is the duty of the counsel for the defendant to indicate by his cross-examination how much of the plaintiff’s version of the conversation he accepts, and how much he disputes, **and to suggest what the defendant’s version will be.** If he asks no question as to it, he will be taken to accept the plaintiff’s account in its entirety.”*

(Emphasis added)

It should be firmly stated that if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, that circumstance would often be a very good reason for accepting the evidence of that witness upon that matter. For example, in **Cross on evidence**⁴ the authors state (at para 10.50).

“Any matter upon which it is proposed to contradict the evidence in chief given by the witness must normally be put to him so that he may have an opportunity of explaining the contradiction, a failure to do this be held to imply acceptance of the evidence in chief”.

See; **Phipson On Evidence**⁵

To my mind nothing would be more absolutely unjust than not to cross-examine a witness upon evidence which he or she has given, so as to give him or her notice, and to give him or her an opportunity of explanation, and an opportunity very often to defend his or her evidence on that point, and, not having given him or her such an opportunity, to ask the court afterwards to disbelieve what he or she said, although not one question has been directed either to their credit or to the accuracy of the facts he or she deposed to.

- (24) The Resident Magistrate made the finding that the gold patta is a gift from the mother-in-law to the daughter-in-law on account of the special relationship. **The spouse to whom a gift is made is regarded as having “contributed” to the gift alone.** In those circumstances, the gold patta should be seen as a contribution by the wife alone and it was just and equitable to return the gold patta to the wife. See the decision of Nygh J in **Mathews and Mathews**⁶.

See also; **In the Marriage of Freeman**⁷; **In the Marriage of White**⁸; **In the Marriage of Rainbird**⁹; **In the Marriage of Freeman**¹⁰; **In the Marriage of Antman**¹¹;

⁴ (2nd Australian edition 1979)

⁵ (12th edition, 1976) at para 1593

⁶ 1980 FLC 90

⁷ [1979] F.L.C. 90-697 at 78, 718-78, 719

⁸ [1982] F.L.C. at 77, 365

⁹ [1977] F.L.C. 90-256 at 76, 376

¹⁰ [1979] F.L.C. 90-697 at 78, 718

¹¹ [1980] F.L.C. 90-908 at 75, 745

**In the Marriage of Read¹²; In the Marriage of Gosper¹³; In the Marriage of Kessey¹⁴;
In the Marriage of Kessey¹⁵; Hinchens v. Hinchens¹⁶; Simpson v. Simpson¹⁷; In the
Marriage of Gosper¹⁸; In the Marriage of Jackson¹⁹.**

I am reasonably satisfied that there is no any error in principle or mistake of fact on the part of the Resident Magistrate in ordering that the “Gold Patta” be returned to the wife.

The appeal has no merits and is dismissed.

[C] Cross- Appeal

- (25) As noted above, the assessment of the parties’ entitlements before the making of an order is another question, quite distinct from the assessment of their contributions.
- (26) None of the parties challenge the learned Magistrate’s conclusion about the contribution made by each of the parties to the acquisition, conservation and improvement of the main asset, the residential home. No issue arises as to his Worships’ findings as to contribution. His Worship comfortably found that the contributions during the cohabitation were equal.

[D] The Future Needs of the Parties’ – Section 162(3) of FLA

The primary issue that remains to be determined in the cross-appeal is an issue as to whether his Worship was correct in making an adjustment of 15% in favour of the husband pursuant to Section 162(3) of the Family Law Act, 2003 in relation to future needs of the husband. His Worship ultimately apportioned the property as to 65% to the husband and 35% to the wife. The wife seeks to discharge the orders for settlement of property and to substitute that an order be made that the net proceeds of sale of matrimonial home be divided equally between the parties.

- (27) The grounds of cross-appeal are numerous but in essence they allege that the result is plainly unjust and inequitable having regard to in particular to the financial and non-financial contributions by the wife to the acquisition, maintenance and improvement of the property.

Counsel for the wife argues in the written submissions that the decision failed to give proper weight to the fact that; (1) “.....*lady was the main home maker and financial contributor because of her permanent employment*”. (2) “*the occupation of the property and its rental potential*”

¹² [1984] F.L.C. 91-527 at 79, 279

¹³ (1987) 90 F.L.R. 1 at 12

¹⁴ [1994]F.L.C. 92-495 at 81, 149, 81, 150

¹⁵ [1994] F.L.C. 92-495 at 81, 149-81, 150

¹⁶ [1945] P.23 at 26

¹⁷ [1952] N.Z.L.R. 278 at 284

¹⁸ (1987) 90 F.L.R. 1 at 12

¹⁹ (1987) 88 F.L.R. 294 at 302

Counsel for the wife further argues in the written submissions that his Worship gave too much weight to the fact that the lady had re-married.

The grounds were summarized in ground (6) which is in these terms;

“The decision is erroneous as each party should have been given equal shares to the matrimonial property”.

(28) It is critical to note Section 162(3) of the Family Law Act, 2003 which provides;

(3) *The Court must also take into account:-*

- (a) *the age and state of health of the parties;*
- (b) *the income, property and financial resources, including any interest in capacity of each of them for appropriate gainful employment;*
- (c) *whether either party has the care and control of a child of the marriage who has not attained the age of 18 years;*
- (d) *the commitments of each of the parties that are necessary to enable the party to support –*
 - (i) *himself or herself; and*
 - (ii) *a child to another person that the party has a legal or customary duty to support.*
- (e) *a standard of living that in all circumstances is reasonable.*
- (f) *the financial resources available to a person if cohabiting with another person;*
- (g) *the duration of the marriage;*
- (h) *the terms of any order for spousal or child maintenance made in favour of or against a party;*
- (i) *any other fact or circumstances which in the opinion of the court, the justice of the case requires to be taken into account.*

(29) A Resident Magistrate has the very wide discretion in the approach that he may adopt under Section 162(3).

The assessment of the availability of an adjustment under Section 162(3) in relation to future needs of the parties is largely a matter for the Magistrate to determine in the exercise of his

discretion. **Therefore, the decision of the court of first instance is founded upon the exercise of a judicial discretion.** The true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that **there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong.** A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

(30) The Resident Magistrate made a 15% adjustment to the husband in relation to his future needs pursuant to Section 162(3) of the Family Law Act based upon the followings;

- (*) The husband is in poor health.
- (*) The husband needs money for medical expenses.
- (*) The husband is unable to obtain employment.
- (*) The superior financial position of the wife.
- (*) The limited income of the husband.
- (*) The husband is in old age.

(31) The husband is now in his 60s and the wife is her 40s in terms of age. His Worship referred to the husband's poor health, limited income, medical expenses, his inability to obtain employment and the wife's superior financial position, the factors which tipped the balance in favour of the husband. His Worship comfortably found the following circumstances as relevant for an adjustment relating to the future needs of the husband pursuant to Section 162 (3) of the Family Law Act, 2003.

(35) *The Respondent said that he is about 60 years old now and currently working in the transport sector. He said that he has to pay about \$450 a month as loan repayment. The Respondent tendered medical reports to confirm his medical conditions. I have perused the medical report tendered by the Respondent. In one report issued on the 18th September, 2014 he has been diagnosed with, "Spinal Stenosis of the Cervical Spine". The report further confirms that the Respondent has not improved on the current treatment and cannot engage in any form of employment. He has been recommended to rest from doing strenuous work to have zero stress circumstances.*

(36) *The Respondent tendered another medical report dated 12th March, 2016 issued by a Consultant Spine Surgeon in India recommending total cervical disc replacement. The Respondent further gave evidence on his health condition as follows;*

"I am not supposed to work Sir. Doctors have cleared it out. "Mr -Sundar don't take risk or your body from your shoulder to your toe will go to sleep" means that I will go paralyzed. It's a spinal but I have no choice. I have to do a living. I have to do the mortgage payment of my house. I don't have anybody to support me. My future is getting blank. The person I thought that would be there for me, she has moved on. So, I have to take that risk and work, Sir. Sir, I work every night because during the day I can't work. When I stay in the sun it gives problem. It starts painning. My both nerves get tight. So, I start work at 4.30 in the afternoon till 1.00am or 2.00am in night. Then only I collect money to do payment of my house and pay my boss".

- (37) *The Respondent has stated in his affidavit of evidence in chief that it could cost about \$38,000.00 for the cervical disc replacement.*
- (40) *The Respondent has adduced evidence to prove that from time to time renovations were done to the property. The Applicant has admitted that the Respondent made contributions for those improvements. However, the Applicant also said that when she was not at work she has also assisted those improvements in her capacity.*
- (43) *The Applicant is about 20 years younger than the Respondent. It appears that the Applicant has the potential to move on with her life as she has many years ahead to engage in gainful employment. There was no evidence submitted that the Applicant has any health issues. However, the Respondent is around 60 years old and he has established that he is suffering from a medical condition which has reduced his capacity to engage in gainful employment. Further, he has submitted medical reports to confirm that he has undergone treatments for conditions relating to mental health issues as well. Further, the medical report confirms that he is unable to engage in strenuous jobs.*
- (44) *The Applicant currently cohabits with another person in -overseas. She admitted that her husband is employed. She also said that although they do not have a house, her husband has a vehicle. However, it was not established that the Respondent is cohabiting with another person.*
- (32) I am confident that the above factors favor the husband warranting a substantial adjustment in his favor.
- I agree with his worship's conclusion on above matters and I am of the opinion that they were significant matters to be taken into account in the husband's future welfare are concerned.
- (33) The home that the wife seeks an interest is the only residence the husband has and in the event the husband is required to sell the property, he will not be able to purchase a comfortable

home due to his poor financial circumstances. Furthermore, he needs \$38,000.00 for the cervical disc replacement surgery.

This circumstance is relevant and shows a need for an adjustment relating to “future needs” of the husband under Section 162 (3).

- (34) The wife has moved overseas and her new partner who has much to offer her is an Australian citizen. Her new partner who is caring for her and is able to offer her material comforts in Australia is employed as a Night Shift Manager at one of the Supermarkets in Australia and he owns a vehicle of substantial value. The wife is a graduate and she is able to obtain remunerative employment overseas. The standard of living is better in her country of current residence than in Fiji and the salary scale is also much better and therefore the wife will be in a better financial position in future opposed to the financial standing of the husband.

On the other hand, the husband’s sole income is \$180 - \$200 per week, the income generated from employment in the transport sector. The husband has nonexistent savings and nonexistent funds in FNPF. (Not in controversy). The husband is in a weaker financial position and he has less opportunity to earn. His future is bleak.

This circumstance is relevant and it shows a need for an adjustment relating to “future needs” of the husband under Section 162 (3).

- (35) It is common ground that a sum of \$50,000.00 is standing to the credit of the wife at FNPF. It is true that the wife will not be able to withdraw the money in the next 10 years. The wife was in paid employment continuously during the 13 years of marriage and it is disingenuous to minimize the husband’s contribution as a homemaker which enabled the wife to devote her energies to the remunerative employment. The wife acknowledged that there were certain instances where she received financial assistance from the husband while she was pursuing graduate studies. The wife owns an insurance policy which will mature in another two years (2022) and the cash value of the policy is \$20,000.00.

On the other hand, the husband’s sole income is \$180 - \$200 per week. The husband has nonexistent savings and nonexistent funds in FNPF.

This circumstance is relevant and shows a need for an adjustment relating to “future needs” of the husband under Section 162 (3).

- (36) His Worship correctly referred to the superior financial position of the wife and weaker financial position of the husband and his poor health and the money needed to look for a comfortable home for him in the event he is required to sell the house.

The husband’s evidence revealed his poor health condition and a sum of \$38,000.00 is needed for the cervical disc replacement surgery. The husband’s unchallenged medical reports establish that he has a cervical disc problem which has been getting worse over time. In one report issued on the 18th September, 2014 he has been diagnosed with, **“Spinal Stenosis of the Cervical Spine”**. **The report further confirms that the husband has not improved on**

the current treatment and cannot engage in any form of employment. He has been recommended to rest from doing strenuous work to have zero stress circumstances.

The first report in the bundle is the latest report and it recommends that “*Patient may benefit with total cervical disc replacement (TDR) surgery under general anesthesia*”.

Whilst the husband is in the box, he testified that;

*“I am not supposed to work Sir. Doctors have cleared it out. “Mr. -Sundar, don’t take risk or your body from your shoulder to your toe will go to sleep” means that I will go paralyzed. It’s a spinal but I have no choice. I have to do a living. I have to do the mortgage payment of my house. I don’t have anybody to support mw. My future is getting blank. The person I thought that would be there for me, she has moved on. So, I have to take that risk and work, Sir. Sir, I work every night because during the day I can’t work. When I stay in the sun it gives problem. It starts paining. My both nerves get tight. **So, I start work at 4.30 in the afternoon till 1.00am or 2.00am in night. Then only I collect money to do payment of my house and paymy boss**”.*

[Emphasis added]

There was no suggestion made to him in cross-examination that that was not the case. His evidence was taken.

The above circumstance is relevant and shows a need for an adjustment relating to “future needs” of the husband under Section 162 (3).

- (37) His Worship clearly referred to the husband’s earning capacity as “a limited one” that will always be “considerably below the wife’ and the superior financial position of the wife. His Worship also referred to the husband’s needs in respect of accommodation for himself and the money needed to ; (1) look for a comfortable home, and also (2) for the surgery for the cervical disc replacement.

I agree with his Worship’s conclusions on above matters and I am of the opinion that they were significant matters to be taken into account in the husband’s favor to increase his share and they tipped the balance in favor of the husband.

The following passage in the judgment of Majon J in **In the Marriage of Mallet**²⁰ is illuminating;

“It has been accepted, at least since the judgment of Gibbs J in *De Winter v. De Winter* (1979) 23 ALR 211; 4 Fam LR 583; [1979] FLC 90-605, that a judgment of the Family Court in determining what order should be made under S 79 of the Family Law Act 1975 (Cth), as amended, is exercising a judicial discretion and that the well settled principle governing an appeal from the exercise of that discretion applies to the Full Court of the Family Court when

²⁰ (1984) 156 CLR 605 at 621 -2; 52 ALR 193 at 206-7; 9 Fam LR 449 at 460-1

it hears and determines an appeal from the marking of an order under the section. The Full Court, in determining the appeal cannot substitute its opinion for that of the primary judge unless it is shown that he made some error in exercising the discretion, ie, (1) by acting on a wrong principle, (2) by allowing extraneous or irrelevant factors to influence him, (3) by failing to take into account some material consideration or by mistaking the facts: *House v R* (1936) 55 CLR 499 at 504-5; ; *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627. And in some cases the exercise of the discretion may be vitiated by the primary judge's failure to give sufficient weight to a relevant factor. However, an appellate court needs to view this ground of appeal with considerable caution, as Stephen J. noted in *Gronow v Gronow* (1979) 29 ALR 129 at 133; 5 Fam LR 719 at 822; (1979) 144 CLR 513 at 519-20:

"The constant emphasis of the cases is that before reversal an appellate court must be well satisfied that the primary judge was plainly wrong, his decision being no proper exercise of his judicial discretion. While authority teaches that error in the proper weight to be given to particular matters may justify reversal on appeal, it is also well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight: it follows that disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge. Because of this and because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the trial judge can do, an appellate court should be slow to overturn a primary judge's discretionary decision on grounds which only involved conflicting assessments of matters of weight".

(Emphasis added)

I cannot escape the conclusion that the result of his Worship's orders was clearly just and equitable and those factors favoring the husband are greater than the entitlement of the wife and the orders will stand.

- (38) It is a complete misstatement of the position to say that "*the learned Magistrate gave too much weight to the fact that the Applicant lady had remarried*". Counsel for the wife misses the point. The decision of the learned Magistrate is founded upon the exercise of a judicial discretion. **It is a mistake to suppose that** a conclusion that the trial Magistrate has given inadequate or excessive weight to some factors is in itself a sufficient basis for an appellate Court to substitute its own decision for that of the trial Magistrate.

As Kitto J said in *Lovell v Lovell*²¹ "*The proposition that the appeal court will consider whether 'no sufficient weight' has been given to relevant considerations is not inconsistent with the principle that the appeal court does not deal with the appeal as if it were exercising the original jurisdiction; even if it considers that insufficient weight has been given to some relevant consideration, it will still not substitute its judgment for that of the primary judge unless it comes clearly to the conclusion for that reason that the discretion has been exercised wrongfully.*"

²¹ (1950) 81 CLR 513 at 533

- (39) The decision of the learned Magistrate is founded upon the exercise of a judicial discretion. The constant emphasis of the cases is that before reversal, an appellate court must be well satisfied that the primary court was plainly wrong, its decision being no proper exercise of its judicial discretion.

In the present case, I cannot see exclusion of relevant considerations or the admission of irrelevant considerations. I am **not** well satisfied that the court of first instance was plainly wrong, its decision being no proper exercise of its judicial discretion. In those circumstances, there is no basis for this Court to disturb the outcome of a discretionary judgment, particularly when made after a most careful review at first instance of all relevant circumstances and made with that unique advantage which the primary Court alone possessed, that of seeing the parties and those associated with them and gaining at first hand some personal impression of their personalities. **The fundamental point which this court is concerned to underline is that disagreement only on matters of weight by no means necessarily justifies a reversal of the primary court. Because the assessment of weight is particularly liable to be affected by seeing and hearing the parties, which only the primary court can do, an appellate court should be slow to overturn a primary court's discretionary decision on grounds which only involve conflicting assessments of matters of weight.**

I consequently conclude that ground (1), (2) and (4) in the cross-appeal have no merits and is dismissed.

[E] Latest Valuation

- (40) It is the submission of Counsel for the wife that the learned Magistrate failed to have a proper regard to the true value of the property.

This argument is most unsatisfactory. There is no notice at all in the grounds of cross-appeal in relation to the wife's stance.

Be that as it may, his Worship had before him two valuations and out of the two he accepted the most recent one that was submitted by the husband. Having analyzed the two valuations his Worship found that the latest valuation to be the best one. The wife invites the Court to take judicial notice that the house prices are escalating. The Court cannot take judicial Notice of the value of the properties.

In **Manoa Sefanaia & Anor v Vishnu Deo**²², the High Court dealt with factors considering judicial notice and stated at para 16;

"Fiji Court of Appeal in Handyhard Marketing (Fiji) Ltd vs Chand [2015] FJCA 76; ABU71.2014 (28 May 2015); set out the principle relating to judicial notice. The Court of appeal at para 71 citing Mullen's case states:

²² Civil Appeal No. HBA 13 of 2015

*“[71] Archbold in Criminal Pleading, Evidence and Practice, 2011. (Sweet & Maxwell) cites with approval the principle relating to **judicial notice** as stated in Mullen v Hackney L.B.C. [1971] 1 WLR 1103, CA (Civ. Div.) thus:*

*“Courts may take **judicial notice** of matters which are so notorious, or clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary; and local courts are not merely permitted to use their local knowledge, but are to be regarded as fulfilling a constitution function if they do so.”*

[Archbold, at p.1365] (supra)

Further on, the Court stated;

“Hon. Justice Gates (as he then was) in *Prasad v Republic of Fiji* [2000] FJHC 121; HBC 0217.2000 (15 November 2000) cited a judgment of Haynes P in *Mitchell & Others v Director of Public Prosecutions & Another [1986] LRC (Const.) 35*, which said about **judicial notice** that;

“It is insufficient for a court to have to rely solely in deciding such an issue on the taking of **judicial notice** of notorious facts. Haynes P concluded at 73g:

“I do not think this Court can properly act on a bare statement of fact or opinion of popular support, however, credible and knowledgeable the source is and whatever is the basis of it. Proof of the fact by judicial notice may be admissible. But the weight to be given to it is another matter. I would hold that what is needed here is proof of particular facts or circumstances from which the court itself can infer popular support. In my view the proof here was insufficient.”

- (41) If the wife is of the view that the property was valued more than \$185,000.00 then it is her duty to submit a valuation contradicting the latest valuation. It was not called and the Court has been given no explanation as to why not. In accordance with the rule in Jones vs Dunkel²³, I infer that calling a valuation would not have assisted the wife’s case.

[F] Household Items

- (42) In respect of household items (third ground in the cross-appeal), the question is who bought them? Who contributed towards the acquisition of the household items? Regrettably, there is no scintilla of evidence in terms of specifics. Therefore, it seems to me that, as regards her case, there is this absolute dilemma. Thus, there is no room for any complaint.

Ground (3) has no merits and is dismissed.

²³ (1959) 101 CLR 298

[G] Vehicles

- (43) In respect of the two vehicles, (fifth ground in the cross-appeal), the wife did not produce a valuation report to the Magistrates Court to establish the current market value. Thus, there is no room for any complaint. In automobile valuation, report by an expert Valuer represents the correct resale value of a vehicle. The Court needs to focus on the real value of the two vehicles to avoid losses to the parties. A valuation report is paramount in such a scenario.

Ground (5) has no merits and is dismissed.

[H] ORDERS

- (01) The appeal is dismissed.
- (02) The cross-appeal is also dismissed.
- (03) All the orders of the lower court are affirmed and to be complied within one (01) month from the date of this judgment.
- (04) There will be no order as to costs.

.....
Jude Nanayakkara
[Judge]

At Lautoka
Friday, 15th May, 2020