IN THE FAMILY DIVISION OF THE HIGH COURT APPELLATE JURISDICTION	
CASE NUMBER:	Family High Court Appeal Case No.: 09 of 2020
BETWEEN:	HASEENA
AND:	SAAJID
Appearances:	(Ms) Jowen Singh with (Ms) Benazir Muhammed for the appellant Mr Mosese Naivalu for the respondent
Date/Place of Hearing:	Tuesday, 10th November, 2020 at 9.00am
Date/Place of judgment:	Wednesday, 17th February, 2021 at Lautoka.
Coram:	Hon. Justice Jude Nanayakkara.
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.*
Anonymised Case Citation:	HASEENA v. SAAJID – Fiji Family High Court Appeal Case Number: 09 of 2020.

JUDGMENT OF THE COURT

[A] INTRODUCTION

This is an appeal from the decision of the Learned Magistrate at Lautoka, delivered on 26-03-2020. In its decision, the Magistrate's Court made a finding that the appellant and the respondent did not live in a de facto relationship within the definition of Section 154(A) of the Family Law Act, No. 18 of 2003 and dismissed the appellant's application for property settlement.

[B] THE MAGISTRATE'S FINDINGS

The Learned Magistrate's findings as to whether or not the appellant and the respondent were in a de facto relationship are set out at paragraph (28) and (29) of the reasons where his Worship said;

(28) *The duty of proving there was a de facto relationship cast upon the applicant lady. And it is to be proved on the balance of probability. However, on the above findings I am of the view that evidence is not sufficient for a reasonable person to come to a finding that they were in a de-facto relationship.*

(29) Accordingly, I conclude that applicant and respondent were not in a de-facto relationship. I further order that the substantive matter cannot proceed on the finding of this ruling and dismissed.

[C] The Legislation

The Court relied on s.154 and s.154A of the FLA. These sections read:

s.154 – "de facto relationship means" the relationship between a man and a woman who live with each other as spouses on a genuine domestic basis although not legally married to each other;……

"party to marriage" includes a party to a de-facto relationship;…"

s. 154A – "In determining whether two persons are in a de facto relationship, all the circumstances of the relationship are to be taken into account, including but not limited to the following as may be relevant in a particular case –

(a) the duration of the relationship;
(b) the nature and extent of common residence;
(c) whether or not sexual relationship exists;
(d) the degree of financial dependence or interdependence and arrangements for financial support between the parties;
(e) the ownership, use and acquisition of property;
(f) the degree of mutual commitment to shared life;
(g) the care and support of children, if any;
(h) the performance of household duties; and
(i) the reputation and public aspects of the relationship".

[D] GROUNDS OF APPEAL

The appellant relied on two (02) grounds of appeal. They are as follows;

Ground (01)

That the Learned Magistrate erred in law and in fact when he stated that there was no de-facto relationship between the Appellant and the Respondent.

Ground (02)

That the Learned Magistrate erred in law and in fact without properly considering the evidence adduced in the hearing that parties were in a common residence.

[E] Legal Principles – Appellate considerations

(01) In **Williams v Minister of Aboriginal Land Rights Act , 1983 and The State of New South Wales**[1] Heydon JA (Spigelman CJ & Sheller JA agreeing) said, in relation to challenges of that kind, that an appeal court:

> *……is in the same position as that ascribed to the Full Federal Court in* ***Minister for Immigration, Local Government and Ethnic Affairs v Hamsher*** *[1992] FCA 184; (1992) 35 FCR 359 at 369 per Beaumont and Lee JJ:*
>
> > *'…..the court is not obliged to proceed to make new findings of fact on all relevant issues and discharge the judgment appealed from if those findings differ from those of the trial judge and do not support the judgment. The court must be satisfied that the judgment of the trial judge is erroneous and it may be so satisfied if it reaches the conclusion that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence. The court is unlikely to be satisfied if all that is shown is that the trial judge made a choice between competing inferences, being a choice the court may not have been inclined to make but not a choice the trial judge should not have made. Where the majority judgment in* ***Warren v Coombes*** *[(1979) [1979]HCA 9; 142 CLR 531] (at 552-553) states that an appellate court must not shrink from giving effect to its own conclusion, it is speaking of a conclusion that the decision of the trial judge is wrong and that it should be corrected. (See also* ***Edwards v Noble*** *[1971] HCA 54; (1971) 125 CLR 296, per Barwick CJ (at 304), per Menzies J (at 308-309) and per Walsh J (at 318-319).)'*

(02) Heydon JA's observations have been cited with approval in **Adler v Australian Securities and Investments Commission**[2]; **Dolber v Halverson**[3]; and **Leeder v The State of Western Australia**[4].

(03) Those principles are to be applied in this case in the context of the Resident Magistrate's determination that the appellant and the respondent were not in a 'de facto' relationship for the purposes of the Act.

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[1] **[2000] NSWCA 255 [60]**
[2] **[2003] NSWCA 131; (2003) 179 FLR 1[17]**
[3] **[2007] NSWCA 335; (2007) 70 NSWLR 151, 164-165**
[4] **[2008] WASCA 192 [58].**

(04) The nature of the decision under challenge is relevant to the court's approach to the assessment of error by the Resident Magistrate. The following observation of Allsop J [as his Lordship then was] in **Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd**[5] (Drummond and Mansfield JJ agreeing) are relevant to a consideration of the appellate court's task in a case such as the present.

> *What is error in any given case depends, of course, not only on the evidence, but also on the nature of the findings or conclusions made by the primary judge. The demonstration of error may not be straight –forward where findings or conclusions involve elements of fact, degree, opinion or judgment……*
>
> *This is not to elevate ordinary factual findings to the protected position of those based on credit, but it is to make clear, first, the advantages of the trial judge and, secondly, the need for demonstration of error. The inability to identify error may arise in part from the unwillingness of the appeal court to be persuaded that it is in as good a position as the trial judge to deal with the issues, because of the kinds of considerations referred to in [24] above. Or, it may be that the nature of the issue is one such that (though not a discretion) there cannot be said to be truly one correct answer. In such cases the availability of a different view, indeed even perhaps the preference of the appeal court for a different view may not be alone sufficient; see* ***Zuvela v Cosmarnan Concrete Pty Ltd*** *[1996] HCA 30;(1996) 71 ALJR 29 at 30-31; [1996] HCA 30; 140 ALR 227 at 229-230. In circumstances where, by the nature of the fact or conclusion, only one view is (at least legally) possible (for example, the proper construction of a statute or a clause in a document, where, although, as often said, minds might differ about such matters of construction, there can be but one correct meaning: see generally* ***Enfield City Corporation v Development Assessment Commission*** *[2000] HCA 5; (2000) 199 CLR 135, 151-156) the preference of the appeal court for one view would carry with it the conclusion of error. However, other findings and conclusions may be far more easily open to legitimate differences of opinion eg valuation questions,* ***see Fenton Nominees Pty Ltd v Valuer-General*** *(1981) 27 SASR 258, 259-263; 47 LGRA 71 at 73-76.*
>
> > *…….in that process of considering the facts for itself and giving weight to the views of, and advantages held by, the trial judge, if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge.*

[5] **(2001) FCA 1833**

> *The degree of tolerance for any such divergence in any particular case will often be a product of the perceived advantage enjoyed by the trial judge. Sometimes, where matters of impression and judgment are concerned, giving 'full weight' or 'particular weight' to the views of the trial judge might be seen to shade into a degree of tolerance of divergence of views…..However, as Hill J said in* ***Commissioner of Taxation (Cth) v Chubb Australia Ltd*** *[1995] FCA 1146; (1995) 56 FCR 557, 573, 'giving full weight' to the view appealed from should not be taken too far. The appeal court must come to the view that the trial judge was wrong in order to interfere. Even if the question is one of impression or judgment, a sufficiently clear difference of opinion may necessitate that conclusion.*

(05) In **T and C**[6], Thackray CJ noted the observations of Gleeson CJ concerning the concept of de facto marriage in the case of **MW v The Department of Community Services**[7]. In that case, Gleeson CJ made the following observations which provide some guidance as to the interpretation of the expression 'marriage –like relationship'.

> *Finn J was correct to stress the difference between living together and living together 'as a couple in a relationship in the nature of marriage or civil union'. The relationship between two people who live together, even though it is a sexual relationship, may, or may not, be a relationship in the nature of marriage or civil union. One consequence of relationships of the former kind becoming commonplace is that it may now be more difficult, rather than easier, to infer that they have the nature of marriage or civil union, at least where the care and upbringing of children are not involved.*
>
> *Marriage in Australia and New Zealand, involves legal requirements of formality, publicity and exclusivity. A person may be a party to only one marriage at a time. De facto relationships, on the other hand, do not involve these elements. They are entered into, and may be dissolved; informally….It goes without saying that there is no mandatory public registration of sexual relationships, even if they involve cohabitation. De facto relationships may co-exist with the marriage of one or both parties and, at least in some circumstances, people may be parties to multiple de facto relationships. Yet the law to be applied in this case acknowledges that some are, and some are not, in the nature of marriage. How is the difference to be determined? No single and comprehensive answer to that question can be given, but there is one test that applicable to the present case.*

(06) In **Stack v Dowden**[8], Baroness Hale of Richmond J. said:

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[6] **(2010) FCWA 91**
[7] **[2008] HCA 12; (2008) 244 ALR 205**
[8] **(2007) 2 AC 432**

'Cohabitation comes in many different shapes and sizes. People embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage….So many couples are cohabiting with a view to marriage at some late date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry, although only a third had firm plans: John Ermisch, Personal Relationships and Marriage Expectations (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-27. Cohabitation is much more likely to end in separation than is marriage, and cohabitations which end in separation tends to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves 'as good as married' anyway: Law Commission, Consultation Paper No 179, Part 2, para 2.45.'

(07) In the Federal Court case of **Lynam v The Director-General of Social Security**[9], the court considered whether a man and a woman were living together 'as husband and wife on a bona fide domestic basis'. Fitzgerald J said;

Each element of a relationship draws its color and its significant from the other elements, some of which may point in one direction and some in the other. What must be looked at is the composite picture. Any attempt to isolate individual factors and to attribute to them relative degrees of materiality or importance involves a denial of common experience and will almost inevitably be productive of error. The endless scope for differences in human attitudes and activities means that there will be an almost infinite variety of combinations of circumstances which may fall for consideration. In any particular case, it will be a question of fact and degree, a jury question, whether a relationship between two unrelated persons of the opposite sex meets the statutory test.

[F] CONSIDERATION AND THE DETERMINATION

(01) The question in this appeal is whether the Resident Magistrate was correct in finding that the parties were not in a de-facto relationship within the definition of Section 154(A) of the Family Law Act, No. 18 of 2003. The factors that may be taken into account in determining whether a de-facto relationship exists for the purpose of the Act include the matters contained in Section 154(A) of the Family Law Act, No.18 of 2003. In determining whether a de-facto relationship exists courts are often required to assess multiple pieces of circumstantial evidence. That is why the indicia set out in Section 154(A) is inclusive but not exhaustive. If sufficient pieces of evidence exist which, when viewed cumulatively and through the application of common sense and proper reasoning,

[9] **(1983) 9 FAM LR 305**

satisfy the finder of fact that the relationship is a de-facto relationship then the statutory test is met.

Section 154(A) factors

(a) Duration of the relationship

(02) Obviously, there has to be a relationship before it can blossom into a de-facto relationship, if at all. For there to be a relationship, there must be an emotional association between two persons. The determination whether two people did live together as a couple is ultimately a case-specific inquiry and no one formulaic approach is prescribed.

(03) Concerning the duration of the marriage, the Resident Magistrate said; (reference is made to paragraph (9), (10), (11), and (12) of the decision).

> ***(09)*** *Applicant in her evidence adduced that she was in a relationship with the respondent man from 2011 December. Her position is that respondent came to Fiji for 5 days and did the "Nikar" Ceremony followed by two days stay with the applicant. She further said that whenever respondent came to Fiji he used to stay with her and went to her relations as well.*
>
> ***(10)*** *However, only one witness of the applicant confirmed that respondent visited their family house. On the other hand, respondent provided his travel details and applicant admitted that he has visited twice to Fiji. Applicant, is claiming the full time from the "Nikar" in 2011 to the day they broke up in 2016 be counted towards the time they were in relationship.*
>
> ***(11)*** *Even though cohabitation in a single place is mandatory there should be other evidence suggesting they used to consider them as de facto partners even when apart. Applicant said the respondent used to call him daily basis but failed to provide any details or at least the number he used to call her. It is also evidence that respondent has not stayed in Fiji more than 6 days at any given time.*
> ***(12)*** *On the above finding, I'm of the view that the period applicant claim cannot be considered as the full period she claims.*

(04) The Resident Magistrate did not express any conclusion concerning "the duration of the relationship". His Worship made no finding on the point. The absence of a finding in relation to a matter listed in Section 154(A) of the Family Law Act, No. 18 of 2003 in deciding whether the parties lived in a de-facto relationship is fatal because it is detrimental to the appellant's case.

(05) The appellant's evidence established that on 25-12-2011, a '**Nikah**' ceremony took place at 'Madrassa' at the residence of Molvi. The Islamic ceremony of marriage was conducted by Molvi. Nikah ceremony photographs were tendered to Court by the

appellant as exhibits. Furthermore, Molvi gave evidence in Court and confirmed that he conducted the Islamic ceremony of marriage between the appellant and respondent. The respondent admits that there was an Islamic marriage ceremony, a **Nikah** but he sought to argue that it was of no legal effect on the basis that there were no attesting witnesses. Leave all that aside for a moment; an Islamic marriage ceremony [a Nikah] is not treated as creating a valid marriage in English law. It is true that the appellant and the respondent had undertaken a religious marriage according to their faith which they themselves and the Islamic world considered made them husband and wife. I venture to say that the **Nikah** ceremony would be followed by a civil marriage ceremony. Without such a ceremony, they will not be legally recognized as being married. In this case, there was no civil ceremony for legal recognition after the **Nikah**. That is unfortunate. The appellant and the respondent will not be treated as validly married.

(06) As can be seen from the transcript of evidence from the Family Court hearing, the **appellant gave <u>evidence</u> that;**

(i) Following the customary marriage namely the Nikah ceremony, the appellant and the respondent travelled to Sigatoka as a couple to visit a respondent's friend and after that they came to a restaurant at Lautoka and had lunch. **[This piece of evidence was not challenged in cross-examination.]**

(ii) After having lunch, the respondent took the appellant to the hotel at Lautoka and spent two days in the hotel and cohabitated in a sexual relationship. The respondent denied having being with her at the hotel. However, the unchallenged evidence of the appellant's sister lends credence to the appellant's version that she spent two days at the hotel with the respondent. I pause here to observe that Counsel for the respondent in the lower court refrained from cross-examining the appellant's sister and therefore it is enticing to accept the unchallenged evidence of appellant's sister in *toto.*

(iii) The following day, respondent travelled to Ba with the appellant to meet the appellant's mother and shared time with the appellant's mother. Before leaving Ba, the respondent had promised the appellant's mother that he will take care of her daughter. **[This piece of evidence is unchallenged in cross-examination]**

(iv) Following the Nikha ceremony, the respondent and the appellant spent two days cohabiting, engaging in sexual intercourse and spending time together at the hotel. On the third day, the respondent who is a permanent resident in New Zealand returned to New Zealand.

(v) Before returning to New Zealand, the respondent had given a sum of $400.00 to the appellant as a financial support and had asked her to make

her passport and had told her that he will sponsor and take her to New Zealand. **[This piece of evidence is unchallenged in cross-examination and this is the telling piece of evidence concerning the respondent's intention to live with the appellant in New Zealand.]**

(07) The above pieces of evidence concerning cohabiting, sexual intimacy, shared activities and visiting parents provides a telling insight into the respondent's approach to his relationship with the appellant.

(08) Based on the above mentioned pieces of unchallenged evidence, the Resident Magistrate should have found a de-facto relationship to have commenced in December 2011. This was open to his Worship on the unchallenged evidence. Unfortunately, his Worship made no finding on the point and this has resulted in a serious miscarriage of justice.

(09) It was the further evidence of the appellant that after he returned to New Zealand, the appellant lived with her sister at Ba for about three months and thereafter at the invitation of the respondent she moved into the respondent's residential property at Nadi in 2012. The residential property at Nadi comprised of two apartments and the appellant moved into the apartment which was vacant. She continued to live at the appellant's apartment until July, 2016. It was the evidence of the appellant that when she moved into the apartment, there was no electricity and water and the respondent sent her $1,000.00 to apply for electricity and water. She said that the respondent communicated with her daily over the phone and used to send her monthly $200.00 for her living expenses. It was the evidence of the appellant that the respondent used to send her things including undergarments and he financially supported her from 2012 to July 2016 while she was living in the respondent's apartment. She also said that during the period 2012 to July 2016, the respondent visited her three times and at each time he stayed with her in the apartment for about three days. During the three days, she cooked for him, washed his clothes and also had sexual relations with him. She said that the respondent could not live with her in Fiji because of his business commitments in New Zealand. It is clear from her evidence that the appellant and the respondent continued to cohabit when he came to Fiji three times during the period 2012 to July 2016. In 2016, the appellant had become suspicious as to the respondent's living arrangements in New Zealand and found that he was living with another woman in New Zealand. Nevertheless, the relationship continued thereafter, although it began to weaken and head towards a 'slow death'. In July 2016, when the respondent visited her in Fiji, the appellant confronted the respondent over the female companion in New Zealand and as a result he fought with the appellant. The appellant obtained a DVRO against the respondent and the relationship finally came to an end in July 2016.

(10) Largely, as a result of the cross-examination of the appellant, the following body of evidence emerged which lends credence to the proposition that the respondent was in a de-facto relationship with the appellant. The following exchanges took place between the appellant and Counsel for the respondent in the course of the cross-examination of the appellant: (Reference is made to page (15) and (16) of the transcript of hearing).

Q: And you say hotel and a house whose house?
A: It was respondent's house which was located in Nadi but he told me stay in that house.

Q: No, staying together in whose house; not alone together?
A: My husband I was staying with him.

Q: Where?
A: Nadi back road.

Q: For how long?
A: He uses to come to Fiji for 2-3 days that is the time we use to stay together.

Q: How much time he came to Fiji?
A: 3 times and there was a case against him; when the case was dealt with then after the case he came again.

Q: Did you ever stay with him together for one week; 7 straight days?
A: No Sir he only uses to come for 2 days to Fiji.

Q: So you stayed with him together for two days correct?
A: Yes Sir.

Q: Apart from sex what else did you do?
A: I use to cook food for him I use to wash his clothes.

Q: But this is just two days correct?
A: He only comes for two days so I use to do those things for two days.

Q: Did you ever do this for 7 days consecutively?
A: He never uses to come for 7 days.

Q: Just two days?
A: Only for two days.

Q: You agree this was a very short relationship staying together would you agree?
A: Yes it was very short because he stated he can't come frequently and he cannot stay more than two days he has a business to operate.

Q: And as husband and wife do you agree it was a very short relationship; you stayed together very short and husband and wife also very short?
A: Yes Sir.

Q: *So you said you would talk to him on the phone almost every day, do you have any evidence?*
A: *I use to talk with him every day and sometimes in a one day he used to call twice in a day.*

Q: *Do you have any evidence?*
A: *I don't have any evidence for that but he used to call me on the phone.*

[Emphasis added]

(11) And further down at page (21) and page (22), it was even conceded by the respondent the relationship he had with the appellant.

Q: *We put it to you that you have never lived together in a house for more than 3 years?*
A: *I admit that I did not stay continuously 3 years with him but he use to come like sometimes not frequently; but whenever he use to come he use to stay with me.*

Q: ***Duration of relationship was very short yes or no?***
A: ***The respondent use to come for a short period of time so we only stayed for short period.***

Q: ***So you agree short?***
A: ***He use to come on those particular days and we stayed together for those days.***

……

Q: *There were no children; the performance of household chores again was short?*
A: *The duration I stayed in that house; I was looking after the house; I was doing the household chores.*

Q: *But he was no there? You are doing it for you wasn't it?*
A: *The period he was here; he was staying with me that was the time I use to do the household chores; like cook his food; and wash his clothes.*

Q: *Very short?*
A: *Yes because he use to come only for those days; short period of time.*

Q: *And finally the relationship was not really made public because it was a short relationship?*
A: *Yes we use to visit the families openly we use to go and visit his families and my family.*

Q: Yes it was only between your families correct?
A: He use to come to my family and I use to go to his family; it's public.

Q: But it was very short?
A: No answer.

[Emphasis added]

(12) **No suggestion was made to the appellant in the course of cross-examination that the above body of evidence emerged in cross-examination was not the case and had let go unchallenged as far as the respondent's case is concerned. The most glaring matter I gleaned from the above body of evidence emerged in the cross-examination is that there is an admission by the respondent that he cohabited with the appellant in the Nadi property. This admission cuts across the respondent's evidence given under oath that a de-facto relationship never existed. The Resident Magistrate should have rejected his evidence, i.e, *a de facto relationship never existed,* as untrue, because the stance he has taken when he was in the witness box is an afterthought.**

(13) 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, then that circumstance would often be a very good reason for accepting the evidence of that witness upon that matter. For example, **Cross on Evidence**[10] the authors state (at paragraph 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 so this may be held to imply acceptance of the evidence in chief."*

See; **Phipson on Evidence**[11]

(14) The established practice is stated briefly by **Odgers, Pleading and Practice**[12].

Cross-examination

"This such 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.*

[10] **2nd Australian ed, 1979**
[11] **12th ed, 1976 at para 1593**
[12] **7th ed, (1912), page 312**

[Emphasis added]

(15) If the respondent's Counsel proposes to submit that the evidence of the appellant on the above pieces of evidence should not be accepted, the appellant should be allowed an opportunity to deal with the suggestion. The significance in that suggestion is that (A) It gives the appellant the opportunity to deny the suggestion on oath. (B) It gives the appellant the opportunity to call corroborative evidence which in the absence of such a suggestion is unlikely to have been called. There was no suggestion made to her that the above mentioned body of evidence emerged in cross-examination was not the case.

(16) The evidence adduced by the respondent should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**[13]. The rule in **Browne v Dunn** applies in both civil and criminal proceedings. **Browne v Dunn** is a ground for the exclusion of evidence. The court does have the power to reject relevant and otherwise admissible contradictory evidence on the ground that it should have been, but was not, put to a witness in cross-examination.

(17) The Learned Magistrate erred in law in failing to apply the rule in **Browne v Dunn.** The inclusion of the contradictory evidence of the respondent, in the circumstances has led to a miscarriage of Justice. The rule in **Browne v Dunn** was neither considered nor applied. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.

(18) The Learned Magistrate did have the power to refuse to admit the evidence of the respondent that was not put to appellant in accordance with the rule in **Browne v Dunn**. In **Schneidas**[14] the rule was applied even in circumstances where the accused was a lay person conducting his own defence. Schneidas was discussed by Hunt J. in **Allied Pastoral Holdings Pty Limited v FCT**[15] without dissent. In **Regina v Body**[16] **Gleeson CJ, Carruthers and Bruce JJ**, followed the decision in Schneidas. The court upheld the decision of the trial Judge that evidence sought to be adduced by the accused should be rejected on the basis of the unfairness caused to the crown by contravention of the rule in **Browne v Dunn**.

(19) In my opinion, the Learned Magistrate erred in law and the admission of the respondent's evidence, in the circumstances has led to a miscarriage of Justice.

(20) The appellant was cross-examined about the evidence concerning the monies sent to her by the respondent. The transcript of the appellant's evidence given under cross-examination contains this; (Reference is made to page 17, of the transcript of hearing).

> *Q: We will bring evidence for respondent himself that these monies were actually send to you for maintenance and repairs of the house and not*

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[13] **(1894) 6 The Reports 67 (H.L.)**
[14] **(1981) 4A Crim-R 101**
[15] **(1983) 1 NSWLR 1**
[16] **Unreported, NSWCCA, 28.08.1994**

because of that 'Nikha' so I am putting it to you that these monies were not send to you following the Nikha it was send for the upkeep of the house?

A: That money was for my expense and also for the household expense; the house maintenance was done through the money which I received from rent income.

Q: Then how do you explain these on the first page; the first 3 payments which was before what you are claiming was the Nikha? How do you explain those monies? Page 1 how do you explain those monies?
A: These was given to me for my expenses.

Q: What about the house repairs? These monies were not send to give color to the de-facto relationship; 24th Sept 2011.

Court: Exhibit 2 shown to the witness [page 3 of the court record]
Showing page [1] of exhibit 2

Q: We put it to you these first 3 if you say Nikha took place on 25th December 2011; these dates 24th September 2011; 25th November 2011; and 12 December 2011; these were all before the Nikha dates do you understand?
A: No answer.

Q: So our question is these monies were send for the upkeep of the house yes or no?
A: When I went to house there was no water and electricity in that house so he sends me $1000 to do all that?

Q: Yes it was not because of the Nikha it cannot be understand?
A: He sends me those monies to go and apply for the water and electricity and to stay.

Q: Yes but for the Nikha; because your evidence is before the4 court he kept sending monies because of the Nikha and upkeep of the house?
A: When the Nikha was done he uses to send me $200 every month.

Q: Yes but it's not Nikha yes?
A: Apart from him no one else send me the money he was the only one who send me this monies.

(21) And further down at page 21;

Q: The financial arrangement was not for you but for the upkeep of the house? Yes or no?

A: *At the very first time he gave money for the electricity and water to put it in the house and then later he use to give money for my expenses and to provide things for the house.*

(22) As can be seen, she maintains that the respondent provided her a significant financial support and there is no evidence that she received a benefit or other income between 2012 and July 2016, apart from the money she received from the respondent. The onus is upon the respondent, if he can, to satisfy the court on the balance of probability that the monies were sent only for the maintenance costs of the residential property. No single document has been produced by the respondent to show that the monies were sent for maintenance costs of the residential property. There is nothing to suggest that such money had been sent or spent on maintenance of the house owned by the respondent. In his evidence, the respondent never spoke of the maintenance work which was done on the house. What was the maintenance work carried on the respondent's house? This was not put into evidence.

(23) **It was the evidence of the respondent given under oath that he did not provide accommodation to the appellant and she was the caretaker of his residential property at Nadi.** As I said, the onus is upon the respondent, if he can, to satisfy the court that the appellant was the caretaker of his residential property between the periods 2012 to 2016. No single document has been produced to court by the respondent to show that he paid wages to the appellant. The truth is that the respondent failed to show that the appellant was the caretaker of his residential property at Nadi during the period between 2012 and 2016.

(24) **Besides, there was no suggestion made to the appellant in the course of cross-examination that she was the caretaker of the property in Nadi during the period 2012 and 2016**. By itself, it does prove that Counsel for the respondent in the lower court did not have any reasonable grounds to suspect the evidence of the appellant lady concerning her accommodation at the respondent's premises in Nadi. In other words, the absence of any grounds for suspicion has been provided by counsel for the respondent in the lower court. It must be accorded weight.

(25) As stated above, if a witness is not cross-examined in relation to a particular matter upon which he has given evidence, then that circumstance would often be a good reason for accepting the evidence of that witness upon that matter, See;

- **Cross on Evidence, (2nd Australian Edition, 1979] at paragraph 10.50.**
- **Phipson on Evidence, (12th Edition) at paragraph 1593.**

(26) The evidence adduced by the respondent, i.e. the appellant was the caretaker of his residential property, should have been rejected on the basis of the unfairness caused to the appellant by contravention of the rule in **Browne v Dunn**[17]. As stated above, the rule

[17] **(1894) 6 The Reports 67 (H.L.)**

in **Browne v Dunn** applies in both civil and criminal proceedings. **Browne v Dunn** is a ground for the exclusion of evidence. The court does have the power to reject relevant and otherwise admissible contradictory evidence on the ground that it should have been, but was not, put to a witness in cross-examination.

(27) The Learned Magistrate erred in law in failing to apply the rule in **Browne v Dunn.** The inclusion of the contradictory evidence of the respondent, in the circumstances has led to a miscarriage of Justice. The rule in **Browne v Dunn** was neither considered nor applied. Fairness ordinarily requires that if a challenge is to be made to the evidence of a witness, the ground of the challenge be put to the witness in cross-examination.

(28) At the costs of some repetition, I state that the Learned Magistrate did have the power to refuse to admit the evidence of the respondent that was not put to appellant in accordance with the rule in **Browne v Dunn**. In **Schneidas**[18] the rule was applied even in circumstances where the accused was a lay person conducting his own defence. Schneidas was discussed by Hunt J. in **Allied Pastoral Holdings Pty Limited v FCT**[19] without dissent. In **Regina v Body**[20] **Gleeson CJ, Carruthers and Bruce JJ**, followed the decision in Schneidas. The court upheld the decision of the trial Judge that evidence sought to be adduced by the accused should be rejected on the basis of the unfairness caused to the crown by contravention of the rule in **Browne v Dunn**.

In my opinion, the Learned Magistrate erred in law and the admission of the respondent's evidence, in the circumstances has led to a miscarriage of Justice.

(29) Concerning the duration of the de-facto relationship, the Resident Magistrate should have fixed the time span as commencing in January 2012 and terminating in July 2016. The absence of finding by the Resident Magistrate concerning the duration of the de-facto relationship is detrimental to the appellant and therefore is fatal.

(b) The nature and extent of common residence

(30) It was the unchallenged evidence of the appellant that during the period between 2012 and 2016, the respondent visited and stayed in the property at Nadi three times for short periods, not more than three days at a time. He cohabited with the appellant in the Nadi property. There is evidence that sexual relations occurred. She cooked for him and washed his clothes. She said that he cannot live with her in Fiji because of his business related activities in New Zealand.

(31) The extent of the common residence over a period of three (3) years was not great. But when it occurred it presented in the nature of the de-facto couple sharing accommodation, sexual activity and social engagements.

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[18] **(1981) 4A Crim-R 101**
[19] **(1983) 1 NSWLR 1**
[20] **(Unreported, NSWCCA, 28.08.1994)**

There are many examples in the common law of parties residing in different residences, or with different families, but nevertheless there was cohabitation so long as the parties retained the intention of cohabiting whenever possible so that their "consortium" was regarded as continuous (see for example *Huxtable v Huxtable* (1899) 68 LJ P 83 (DC) per Jeune P at p. 85)

> What is or is not cohabitation is not a simple question. Cohabitation may be of two sorts, one continuous, and the other intermittent. The parties may reside together constantly, or there may be only occasional intercourse between them, which may, nevertheless, amount to cohabitation in the legal sense of the term. Such cohabitation may indeed exist together with an agreement to live apart.

Couples may cohabit from time to time where, for example, one party has to spend long periods away from home for reasons of occupation, or is a member of the Armed Forces, or a merchant seafarer or otherwise, but intermittent cohabitation of that kind amounted to consortium and even in more limited circumstances. Once a relationship (de facto or marriage or civil union) commences then where a physical separation thereafter occurs on a voluntary basis the Court has to closely examine how that originally came about and what a party's attitude to the relationship then was and whether the Court is satisfied that then or at some time later the parties or one party ceased to recognize the existence of the relationship[21].

(32) The Resident Magistrate said;

> (15) *In my opinion this short stay cannot be considered as common residence, as this can be a visit to his house where the applicant is looking after the house; as claimed by the respondent.*

(33) The Resident Magistrate erred in the assessment of facts. His Worship was wrong in accepting the respondent's evidence in this regard. No cogent reason appears why his Worship accepted the respondent's evidence.

(34) I said in paragraph (23) to (28) above, the respondent's claim that the appellant is the caretaker of his residential premises should not be accorded weight. The evidence concerning sexual intimacy, shared activities and attendance at family friends provides a telling insight into the respondent's approach to his relationship with the appellant. In cross-examination, the appellant gave emphatic evidence to the effect that she considered the house was to be a home for her and the respondent. The relationship continued notwithstanding that the parties were apart. The Resident Magistrate was wrong in finding that the appellant was the caretaker of the respondent's residential premises at Nadi. The Resident Magistrate failed to take into account the matters I set out in paragraph (23) to (28) above. They have been overlooked by the Magistrate in the credibility assessment. The true nature and characteristic of a de-facto relationship remains the fact that a common residence is not shared at times, does not break the period

[21] **Scragg v Scott 2006 NZFLR 1276 at page 1088 and 1089, Gendall, Ellen and France JJ**

of qualifying de-facto relationship. The Resident Magistrate's conclusion concerning the "nature and extent of common residence" seems to be based upon the contention that the extent of common residence, in the sense of physically living together, was the pre-requisite to a de-facto relationship and therefore, when not sharing the same accommodation the parties were not "living together" for the purpose of Section 154 (A) of the Family Law Act, 2003. I do not accept that contention due to the reasons I have set out in paragraph (31) above.

(c) <u>Whether or not a sexual relationship exists</u>

(35) Following an evaluation of the evidence of the appellant and the respondent his Worship concluded that there were no sexual relations between the parties.

(36) In paragraph (16) and (17) of the decision, the Resident Magistrate said;

> *(16) The only available evidence and practically possible is the evidence of the parties in this regard. Applicant claims that they had sexual intercourse on the day they had "Nikhar", the following day and on respondent's visit to Fiji on second time whereas respondent even denies staying with the applicant in the same hotel.*
>
> *(17) Applicant produced an invoice of the hotel but same was objected by the respondent as the invoice has not been issued to applicant. Same was later marked while respondent gave his evidence. It is to be observed that name of the applicant is not on the invoice and no other confirmation that she was with the respondent. Had that been established I would have safely assumed that the probability is high for a sexual relationship in its narrowest meaning.*

(37) In reaching the essential conclusion did the Magistrate adequately evaluate the essence of the personal relationship between the parties? In my view, the Magistrate fell into the trap of reasoning. I venture to say that acceptance of the respondent's evidence did not conclude the matter.

(38) The respondent denied accompanying the appellant to the hotel. On the other hand, the appellant says that the respondent took her to the hotel and spent two days in the hotel and cohabited in a sexual relationship before returning to New Zealand. The Magistrate erred. His Worship failed to accord proper weight to the factual evidence of the sister of the appellant which lends credence to the appellant's version that the respondent spent two days at the hotel with the appellant.

The transcript of appellant's sisters evidence in chief contains this; (Reference is made to page 29 of the transcript of hearing).

> *Q: What happened after the Nikah ceremony?*

A: We all had food over there; the visitors who came they had food and all that was done then my sister and her partner they went from there; and the very next day they went to one room at a hotel, and then on that day they picked us and we went to Denarau; and whilst returning back we had lunch at restaurant and then after that we went back to the hotel..

(39) The appellant's sister was not cross-examined on this. See paragraph 6(ii) and (13) to (18) above. This piece of evidence sheds light on the appellant's evidence. This is the most telling piece of evidence. Hence, it is safer to infer that the appellant and the respondent cohabited in a sexual relationship in another hotel before returning to New Zealand. The Magistrate overlooked this piece of evidence and therefore his assessment of credibility was flawed.

(40) Furthermore, it is the evidence of the appellant that during the period between 2012- July 2016 the respondent visited her thrice at the residential property owned by the respondent at Nadi and each time he stayed with her in the property for about three days. She said during his stay, she cooked for him, washed his clothes and also had sexual relations with him. This he accepted when the appellant was giving evidence under cross-examination. (See paragraph 10 to 18). The following exchange took place between the appellant and counsel for the respondent when the appellant was giving evidence under cross-examination; (Reference is made to page 15 of the transcript of hearing).

Q: How many times he came to Fiji?
A: 3 times and there was a case against him; when the case was dealt with then after the case he came again.

Q: Did you ever stay with him together for one week; 7 straight days?
A: No Sir, he only uses to come for 02 days to Fiji.

Q: So, you stayed with him together for two days, correct?
A: Yes Sir.

Q: Apart from sex what else did you do?
A: I use to cook food for him. I use to wash his clothes.

(41) No suggestion was made to the appellant in cross-examination that this was not the case and had been let go unchallenged so far as the evidence concerning sexual relations are concerned. By itself, it does prove that counsel for the respondent in the lower court did not have reasonable grounds to suspect the evidence of the appellant in relation to her sexual relations with the respondent. In other words, the absence of any grounds for suspicion has been provided by the respondent. It must be accorded weight.

This piece of evidence was either overlooked, or given inadequate weight, in the course of credibility assessment and therefore it is flawed.

(d) <u>The degree of financial dependence or interdependence and arrangements for financial support between the parties</u>

(42) In paragraph (18), (19) and (20) of the decision, the Resident Magistrate said;

> ***(18)*** *There is no interdependence of parties in this matter. Applicant marked some money transferred receipts by the respondent and claimed that they were for her maintenance. She also said that respondent had let her receive the rent from one of his flats.*
>
> ***(19)*** *During the cross examination it was revealed that some receipts she marked are dated even before their first meet. Respondent claimed that money is not as maintenance but to look after his house. Court also noted that payments are not regular in time wise or amount wise, thus hard to accept as maintenance. There is no clear clarification by applicant as to how she received money from respondent even before she has been introduced to the respondent.*
>
> ***(20)*** *In the given circumstances it is much probable that money could have sent for maintaining and looking after the house. Thus I am not satisfied that there was a financial support or any such arrangement existed in a capacity of a de facto relationship.*

(43) It was the evidence of the appellant that when she moved into the apartment owned by the respondent there was no electricity and water and the respondent sent her $1,000.00 to apply for electricity and water. She further deposed that the respondent used to send her monthly $200.00 for her living expenses. It was the evidence of the appellant that the respondent used to send her things including undergarments and he financially supported her from 2012 to July 2016 while she was living in the respondent's apartment at Nadi, See paragraphs (20) to (23) above.

(44) Therefore, it is difficult to believe that the respondent sent money for the maintenance costs of the house.

(45) His Worship made a mistake when his Worship said he was satisfied with the respondent's evidence that he sent money only for the maintenance costs of the house. His decision should be altered in this regard. The appellant is more readily to be believed as to the purpose of sending money to her. The Magistrate misconstrued the evidence regarding financial support. Leaving all that aside, however there was no evidence that the appellant received a benefit or other income between 2012 to July 2016, apart from being financially supported by the respondent. She lived rent free with the respondent paying rates, insurance and other recurring outgoings on the home over a period of 03 years. Hence, there was financial support for the appellant made by the respondent. The Magistrate overlooked this matter and his findings of fact and conclusion concerning the financial dependence was flawed.

(e) <u>The ownership, use and acquisition of property</u>

This was not a feature in this case.

[f] <u>The Degree of Mutual Commitment to Shared Life</u>

(46) The word "mutual' involves a commitment on the part of both parties and that is to a "shared life". This paragraph also refers to "the degree" of such mutual commitment. It may be high, moderate or law. But of course it should exist.

(47) In paragraph (23) and (24) of the decision, the Magistrate said;

> ***(23)*** *As I have already stated they have not lived together more than 6 days at a raw. Therefore evidence regarding a shared life is limited. Only relevant evidence of applicant lady trying for a shared life is her attempt to migrate to New Zealand. She stated that respondent did not provide with the necessary documents. However during the cross examination it was revealed the reason for rejection of her visa has nothing to do with the respondent. After all there is no evidence that respondent was willing to sponsor her; it's all what she thought of it.*
>
> ***(24)*** *The care and support of children is not applicable in this case and the performance of household duties is similar to what I have already discussed the ownership use and acquisition of property as they have not lived more than 6 days in the house and that also hasn't been proved as husband and wife.*

(48) It was the evidence of the sister of the appellant that she regarded the parties as a couple. This was never challenged by way of cross-examination. I say, by the absence of cross-examination upon evidence how the couple in a particular relationship project themselves to the outside world, the respondent does admit that the evidence of appellant's sister is true. Then what is there for the Magistrate to say it is unsafe to consider the evidence of family members and insist on the evidence of third parties. I venture to say that the evidence of third parties as to the appearance of the parties as a couple is of marginal assistance because appearances can be deceptive. Of course, I do not deny for a moment that how a couple in a particular relationship project themselves to the outside world may assist in revealing how they view their relationship.

(49) There is evidence from members of the appellant family regarding the appellant and the respondent as a couple. This is a relevant piece of evidence as to the reputation or public aspects of the parties' relationship.

(50) I am deposed to interfere with his Worship's findings concerning the degree of mutual commitment to shared life.

So in the end, I am driven to conclude that counsel for the appellant is right. The grounds of appeal succeed. The appeal should be allowed.

<u>ORDERS:</u>

1. The appeal is allowed.

2. The decision of the Resident Magistrate dated 26-03-2020 is set aside.

3. I conclude that the parties lived in a de-facto relationship within the definition of Section 154(A) of the Family Law Act, No. 18 of 2003 since January, 2012 to July 2016.

4. The case record is remitted back to the Magistrates Court for trial on the issue of property distribution.

5. The trial on the issue of property distribution should be concluded within three (03) months from the date of the judgment.

6. There will be no order as to costs.

…….
Jude Nanayakkara
[Judge]

High Court – Lautoka,
Wednesday, 17th February, 2021