R v LUSINK and ANOTHER Ex parte SHAW

HIGH COURT OF AUSTRALIA

GIBBS ACJ, STEPHEN, MURPHY, AICKIN and WILSON JJ

7 August, 14 November 1980 — Canberra

Prerogative writ — Prohibition — Judicial bias.

Family law — Maintenance — Property not of a party — Whether court can take account of.

Family law — Settlement of property — Offer — In presence of court — Whether advisable.

In June 1980 there commenced in the Family Court the hearing of a wife's application for maintenance and property settlement for herself and the children of the marriage. Before evidence was called, counsel for the husband made, in the presence of the court, an open offer to settle the matter. The offer was rejected and proceedings continued.

At the conclusion of the wife's case, the trial judge indicated to counsel for the husband, that on the evidence as presented to that point, she considered the husband's initial offer unsatisfactory in view of the overall wealth of his family. She also considered that the then living conditions of the wife and children were unsuitable and that other arrangements would have to be made.

Counsel for the husband then asked the trial judge to disqualify herself. This was refused. Prohibition was then sought from the High Court on the ground that it could reasonably be suspected by a fair-minded person that the trial judge had prejudged the matter.

Held, per Gibbs ACJ, Stephen, Murphy and Wilson JJ (Aickin J dissenting):—

(i) The court which is asked to grant prohibition will not lightly conclude that the judge may reasonably be suspected of bias. It must be firmly established that such a suspicion may reasonably be engendered in the minds of the parties or the public.

R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546; *R v Watson: Ex parte Armstrong* (1976) 136 CLR 248; 9 ALR 551, applied.

(ii) The evidence did not justify a conclusion that the views which the trial judge expressed, although strong, were other than provisional, or that it could reasonably be suspected that at the end of the case she would not decide with a fair and unprejudiced mind. The application for prohibition should therefore be refused.

Per Gibbs ACJ, Stephen, Aickin and Wilson JJ (*obiter dicta*): It would appear that the trial judge adopted the erroneous view that in determining what order for maintenance or settlement of property should be made against the husband, it would be permissible to have regard, not only to the financial resources of the husband, but also to property of the husband's relatives to which he had no claim. However, such an error while acting within jurisdiction would be no ground for the grant of prohibition

Per Murphy J (*obiter dicta*): The Family Court is not able to make an order in respect of property to which a party has no claim but, in some circumstances, it may properly have regard to such property as bearing on the capacity of the party to make adequate provision for himself or his family.

Per Stephen and Aickin JJ (*obiter dicta*): Offers of settlement and their rejection should occur as between the parties and not in open court.

Application

This was an application to the High Court of Australia for an order prohibiting a trial judge in the Family Court of Australia from continuing with the hearing of a matter, on the basis that the trial judge had prejudged the matter. The facts appear sufficiently from the judgment of Gibbs ACJ hereunder.

A H Goldberg QC and *P C Young*, for the prosecutor (husband).

B F Monotti, for the respondents.

Cur. adv. vult.

Gibbs ACJ. This is an application for a writ of prohibition directed to a judge of the Family Court prohibiting her from proceeding with the further hearing and determination of an action pending between the prosecutor (the husband) and his wife in that court.

On 2 June 1980 there commenced in the Family Court the hearing of the wife's application for maintenance for herself and the five children of the marriage and for a lump sum payment by way of property settlement. Before evidence was called, counsel for the husband made in the presence of the court an open offer to settle the matter. It will be convenient to mention the nature of the offer after the effect of the evidence has been briefly discussed. The offer was rejected and the proceedings continued.

Evidence was then given by the wife and by another witness on her behalf. It is unnecessary for present purposes to state the effect of this evidence in full detail. It appeared that the husband and the wife had carried on in partnership a business which had been trading at a substantial loss. The husband was not in employment at the time of the hearing. He had an interest (mainly future and contingent) in a large estate. The wife and children, who had previously enjoyed a high standard of living, had been evicted from the matrimonial home, which had been sold by a mortgagee; at the time of the hearing they were living in rented accommodation which was said to be most unsuitable. The offer to which reference has been made was that the husband would assume sole responsibility for the debts of the partnership and for the debt still owing to the mortgagee of the former matrimonial home and would pay maintenance for the children of the marriage in a total sum of $50 per week.

When counsel for the husband was about to open his case the learned judge addressed counsel as follows "Mr Young, just before you open

your case, I am going to make a couple of preliminary comments, only for the benefit of your client and it may very well be he will want some time to talk to the trustees. On the evidence so far, and I am not to be taken to be prejudging the case, it is clear, and I am sure you have advised your client, that this family of wife and five children, no matter what, cannot be left living in the present environment with the present accommodation they have got. That is not to say the court is going to make some order which cannot be complied with, nor is it going to be an order which is going to be providing a house I would say comparable with what the standard of living has been in the past, if indeed your case lives up to the proof you have so far set out. However, it is my view that some arrangements are going to have to be made for some accommodation on a permanent basis to be provided for these five kids. Leaving the wife out of it and it may very well be your client is going to need to talk to the trustees or the family or whatever."

Counsel for the husband said, "May I answer that" and the learned judge interposed: "I am not saying he is going to have to pay cash or anything." Counsel for the husband then stated to her Honour that the trustees of the estate were not prepared to advance any further money to the husband and indeed could not do so. He said that if the valuations obtained by the husband were accepted the amount already paid out by the trustees of the estate to the husband exceeded the amount contingently payable to him in the future and that the other beneficiaries (the husband's brothers and sisters) were not prepared to forego their own entitlement to pay money to the wife. The learned judge then said: "I do not want to argue on this point. I am going to say there is no way this family are going to be left living in the circumstances they are presently living in, which I do not believe are denied. Where there are five children and a wife living on a pension, where the other side of the family, no matter if you stand here and argue with me, have got these sort of resources. By that, I am not, as I say, suggesting that there is going to be huge amounts having to be paid out in cash. It is quite clear, however, moneys will have to be found and orders will be made accordingly, that at least there are moneys to pay a substantial deposit on some house for the family. There has got to be some accommodation for this family and it may be there will have to be a deposit paid and the husband will have to then take on the repayments, whether he has to go out and dig roads. I just want to make it quite clear that on the evidence so far, the open offer you have made, and those are your instructions, are totally unacceptable to the court and no way will anything like that be ordered. That is not to give Mr Monotti and his client false hopes, but where there are these sort of resources this family has to be housed."

Further discussion then ensued. Counsel for the husband suggested that he might arrange a conference with the trustees of the estate and the husband's relatives and that in consequence his instructions might be varied, to which the learned judge replied: "That is why I thought it was a fair comment to make. I do not want to be making orders at the end of this case which may be taken by surprise, which are unrealistic or

unfulfillable. However, the court must regard the welfare of the kids as the paramount consideration and the children have got to have the security of a roof over their head."

Counsel then said that it might well be that his client would be concerned, having regard to what her Honour had said, if the matter proceeded in her Honour's court. Her Honour replied: "I am not prepared to disqualify myself on what I have said so far. I am just making comments which you would hear from any judge of this court on the fact as they have appeared before the court to this moment . . ."

There was some further discussion about the adjournment of the matter to enable counsel for the husband to confer with the trustees and the husband's relatives, in the course of which the learned judge repeated that she would not disqualify herself from hearing the matter. She added: "I have pressed the point that I am not prejudging. I am only saying that I do not believe there is any judge in this court who would say that the welfare of the children is being satisfied in their present environment. Now, I am not putting it any higher than that, on the facts of this case. Clearly, that is all I am saying and I would not think that was a ground for disqualification . . ." The proceedings were adjourned, and the suggested conference was held, but the matter was not resolved.

It should be mentioned that the transcript of the proceedings before the learned judge was issued without normal checking, in the interests of expedition, and cannot be taken to be completely accurate.

Prohibition is now sought on the ground that it could reasonably be suspected by a fair-minded person that the learned judge had prejudged the matter. Mr Goldberg, who appeared before us on behalf of the husband, submitted that the words used by the learned judge in the course of the discussion with counsel give rise to the suspicion that she had decided, before hearing the husband's evidence, that he would be ordered to provide a sum of money at least sufficient to pay a substantial deposit on the purchase of a house for the wife and children. He submitted that there was a reasonable suspicion of bias (in the sense of the pre-determination of an issue in the case) and that prohibition should issue in accordance with the principles laid down by this court in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; 9 ALR 551.

In that case it was pointed out (CLR at 264) that it is not uncommon, and sometimes necessary, for a judge, during argument, to formulate propositions for the purpose of enabling their correctness to be tested, and that "as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory". However, in some cases the words or conduct of the judge may be such as to lead the parties reasonably to think that the judge has prejudged an important question in the case, and then prohibition may issue. Of course, the court which is asked to grant prohibition will not lightly conclude that the judge may reasonably be suspected of bias in this sense; it must be "firmly established" that such a suspicion may reasonably be engendered in the minds of the parties or the public, as was made clear

by the court in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553-4, in the passage cited in *R v Watson; Ex parte Armstrong* (136 CLR at 262).

It may be thought that, in the present case, the learned judge expressed herself more absolutely than was altogether prudent. However, it would be exaggerating the importance of the mode of expression which the learned judge adopted to conclude that she had decided that she would make an order of a particular kind, irrespective of the state of the evidence at the end of the case, and irrespective of the arguments finally presented. An examination of the statements made by her Honour, which are set out above, shows that she expressed no firm view as to the precise form of the order which she suggested might be made. She described her own remarks merely as "comments . . . on the facts as they have appeared before the court to this moment . . ." and repeatedly emphasized that she was not to be taken as prejudging the case. Her remarks have to be considered in the light of the fact that counsel for the husband had made in the presence of the court an offer which would have done nothing to provide a home for the wife and children. In part the judge's remarks were no doubt intended to express forcibly the view which she had formed at that stage of the evidence that the offer was quite inadequate (it is unnecessary here to consider the wisdom or propriety of the practice which is said to exist of making offers of settlement in the course of proceedings in the Family Court). No doubt also the learned judge hoped to spur the husband, and perhaps his relatives, to greater efforts to provide a home for the wife and children. The evidence does not, however, justify a conclusion that the views which the learned judge expressed, although strong, were other than provisional, or that it could reasonably be suspected that at the end of the case she would not decide with a fair and unprejudiced mind.

It is no doubt true that some of the remarks of the learned judge, if taken at their face value, appear to suggest that she was adopting the erroneous view that in determining what order for maintenance or settlement of property should be made against the husband under the Family Law Act 1975 (Cth) as amended, it would be permissible to have regard, not only to the financial resources of the husband, but also to property of the husband's relatives to which he had no claim. However, even if that were the case, such an error while acting within jurisdiction would be no ground for the grant of prohibition, and still less would the case be one for prohibition when no action had been taken or decision based on such a view.

On the whole I consider that it could not reasonably be suspected that the learned judge had prejudged the present case. Accordingly no case for prohibition has been made out.

I would refuse the application.

Stephen J. I have read and am in entire agreement with the reasons for judgment of the Acting Chief Justice.

Only on one aspect do I wish to add anything. It concerns the offer of settlement which was made by the husband in open court and was rejected by the wife, again in open court.

Whatever suggestion of prejudgment may have been introduced by what her Honour subsequently said, as recounted in the judgment of the Acting Chief Justice, it was, I think, brought about by this procedure of open offer and rejection, initiated by the applicant and in which her Honour became, perforce, a participant.

The contrast between the plight of the wife and her five young children, and the wealthy background of her husband, the substantial assets in her father-in-law's estate, the considerable existing wealth of other members of the husband's family; all this must have made the husband's offer appear derisory. Once the husband's evidence came to be heard the offer might be shown to be all that his circumstances would allow him to make. But at least at the conclusion of the wife's case the offer might seem so unreasonable as to be calculated to provoke very much the reaction which her Honour expressed during the opening of the husband's case.

I doubt the desirability of offers of settlement in Family Court cases being made in open court. To inform the judge who is to try the case of what is being offered and refused necessarily tends to involve him in the bargaining process. The judge may find it difficult to put out of his mind during the hearing the fact of an offer which when made appears to be unreasonable. In any event, there will be a tendency for the offer and its rejection to overshadow the proceedings, the weighing of testimony and the determination of the true issues being subordinated to the false issue of the reasonableness both of the offer and of its rejection. The making of the offer in the judge's presence is tantamount to an invitation to him to engage in the bargaining process, to the detriment of his proper functions.

The court was told that there was authority in the Family Court for the making of offers in open court, the unreported decision of Fogarty J in *Citarella v Citarella* (22 October 1979) being cited. In that case Fogarty J referred to the making of open offers at an early stage in proceedings as a useful and indeed the only substitute in the case of Family Court proceedings, for the making of a payment into court, available in other jurisdictions. Only by such an offer might a respondent, in appropriate cases, seek to safeguard himself against an order for costs.

No doubt the fact of the making and rejection of an offer may have a useful role to play in any question of how costs ought to be dealt with, a role which the present state of the Rules of the Family Court otherwise leaves unfilled. But this need not take place in open Court. The convenience of having the terms of the offer and of the rejection on the record appears to me to be outweighed by the resultant involvement of the judge in the bargaining process. Hesitant as one must be to intrude into procedural aspects of a jurisdiction possessing the unique features and special problems of the Family Court, it does seem that such offers and their rejection should occur as between the parties and not in open

court. At the conclusion of the hearing, when the order for costs becomes an issue, evidence could then be given of the making and refusal of offers between the parties, to none of which the judge will already have been made privy.

I would refuse the application.

Murphy J. I agree with the Acting Chief Justice's analysis of the evidence. It does not justify a conclusion that the judge would not decide with a fair and unprejudiced mind and no case for prohibition has been made out.

There was no suggestion in this case that the trial judge came to the case biassed or prejudiced. The complaint is that, during the course of the case, the judge expressed views adverse to the husband's case before hearing all the evidence to be presented by the husband. I say all the evidence because documentary material emanating from the husband was before the court, some part of his case had been presented in cross-examination, and his counsel had made an open offer of settlement. Some may think it an ideal that trial judges (sitting without a jury) should keep completely aloof until they give judgment, express no view about what they consider important or unimportant and not indicate what impression any evidence makes on them, whether they would need further evidence to be satisfied on some point, or what they think are the real points in issue. In practice this would make trials artificial and longer.

Almost all experienced practitioners welcome indications by judges, whether at the first instance or on appeal, of the provisional impressions made upon them by evidence or argument of factual or legal issues.

The judicial process is quite opposed to the idea that a judge forms no impression until the very last word before judgment. On the contrary, one side begins by introducing arguments or evidence intended to create a provisional view in its favour, and often succeeds. The other side seeks to reverse the process by cross-examination and then presenting its case. The extent to which any impression is formed depends upon the strength of the evidence and the conduct of the case up until that point.

Often during the course of a trial, a judge is required to give formal rulings which indicate a provisional, or even concluded, view on some aspect of the case. Sometimes, an impression may be created, even before an oral hearing, by documentary material containing the opposing legal or factual contentions. This occurs daily in the ordinary conduct of civil trials without a jury (different considerations apply in criminal matters and in jury trials). In family law cases, judges often have to make an order tailored to meet the realities of the financial or custodial situation of a broken family; it is very often important for them to direct parties' attention to the kind of order contemplated if the judge were to arrive at a conclusion warranted by the evidence that had emerged thus far. In this way, a party has the opportunity to dispel any adverse impression by evidence or show that such an order would not be appropriate

The applicant contended that the judge was erroneously proceeding on the basis that she could have regard to financial resources of the husband's relatives (to which he had no claim) when making an order for maintenance or settlement of property under the Family Law Act 1975. I am not prepared to accede to any general proposition that she could not.

The Family Court is not able to make an order in respect of property to which a party has no claim but, in some circumstances, it may properly have regard to such property as bearing on the capacity of the party to make adequate provision for himself or his family and in some circumstances it may be absurd not to do so. A maintenance order may be made on the basis of the party's capacity to obtain the money or property by work or otherwise rather than the money which the party has. It is common in our society with its family and other trusts, family companies and mass production of tax-avoidance schemes for persons with apparently no assets and little or no income to be living in circumstances of affluence. In determining what order is just, it may be unrealistic to ignore the fact that a party has close associations with companies or persons with very large financial resources, from whom or through whom he may be able to raise monies to provide for himself or his family. Of course, despite such associations a person may be incapable of making such provision.

The application should be refused.

Aickin J. The material facts and sections of the transcript of the proceedings in the Family Court are set out in the reasons for judgment of Gibbs ACJ.

The considerations which are material to the determination of the questions of "bias" in the sense of prejudging a cause were examined and authoritatively determined by this court in *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248; 9 ALR 551. It is enough for present purposes to say that if in all the circumstances the parties or the public might reasonably suspect that the judge was not unprejudiced or impartial then prohibition will be available. It is a test which is not always easy to apply for it may involve questions of degree and particular circumstances may strike different minds in different ways.

It is no doubt true that the observations of Lusink J which are now called in question were made in the context of the open offer made by the husband's counsel in her presence. However, even in that context, those observations appear to be such as to warrant a reasonable suspicion that she prejudged important aspects of the case.

In the first passage quoted by Gibbs ACJ the following sentences are significant: "On the evidence so far, and I am not to be taken to be prejudging the case, it is clear, and I am sure you have advised your client, that this family of wife and five children, no matter what, cannot be left living in the present environment with the present accommodation they have got. . . . However, it is my view that some arrangements are going to have to be made for some accommodation on a permanent basis to be provided for these five kids. Leaving the wife out of it and it

may very well be your client is going to need to talk to the trustees or the family or whatever."

Those statements, with the emphasis supplied by the phrases "no matter what" and "some arrangements are going to have to be made" are such as to convey to a reasonable observer appraised of the circumstances that Lusink J had determined to make an order without having heard argument on behalf of the husband or investigating his own resources. In the second passage quoted by Gibbs ACJ that impression is reinforced, especially in the following sentences: "Where there are five children and a wife living on a pension, where the other side of the family, no matter if you stand here and argue with me, have got these sort of resources. By that, I am not, as I say, suggesting that there is going to be huge amounts having to be paid out in cash. It is quite clear, however, moneys will have to be found and orders will be made accordingly, that at least there are moneys to pay a substantial deposit on some house for the family." That statement in its context may reasonably be taken to indicate a firm decision irrespective of whatever arguments might be addressed to her.

I do not overlook that Lusink J said at the beginning of the first passage quoted by Gibbs ACJ: "I am not to be taken to be prejudging the case" but the emphatic nature of the comments which followed and of the comments in the second quotation convey a very different impression. At a later stage the judge refused to disqualify herself and said: "I have pressed the point that I am not prejudging."

The critical question, however, is not whether a judge believes he or she has prejudged a question, but whether that is what a party or the public might reasonably suspect had occurred (see per Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599, a judgment cited with approval by this court in *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546 at 553). In some circumstances repeated denials of prejudging might well convey the impression of "protesting too much", but in the present case it is sufficient to observe that those statements do not detract from the impression which, in my view, the statements made by Lusink J could reasonably convey to those present.

I agree with what Gibbs ACJ has said as to the references to the financial resources of the husband's relatives. To have regard to those resources as well as the husband's own resources would be an error, but not one going to jurisdiction. An attempt to make an order directly affecting the resources of the relatives would, of course, be outside jurisdiction.

I share the doubts expressed by Stephen J as to the usefulness of offers made in open court in the course of proceedings.

For those reasons I am of opinion that the application for prohibition should succeed.

Wilson J. I have had the advantage of reading the reasons prepared by Gibbs ACJ. I agree entirely with them, and have nothing to add. The application should be refused.

Order

Application for a writ of prohibition refused.
Order that the prosecutor pay the second respondent's costs.

Solicitors for the respondents: *Slater & Gordon.*

Solicitors for the prosecutor: *Wisewoulds.*

VICTOR KLINE
BARRISTER-AT-LAW