1985 - 072

IN THE MATTER of an application for a Writ of Prohibition directed to THE HONOURABLE BASIL HOGAN, a Judge of the Family Court of Australia

Ex parte: THERESE RUTH MELVILLE

JUDGMENT
(ORAL)

WILSON J.

IN THE MATTER of an application for a Writ of Prohibition directed to THE HONOURABLE BASIL HOGAN, a Judge of the Family Court of Australia

Ex parte: THERESE RUTH MELVILLE

This is an application for an order nisi for a writ of prohibition directed to Mr Justice Hogan of the Family Court of Australia. The essential basis of the application is set out in the affidavit of the applicant wife, as follows:

> "I say that His Honour has prejudged my alleged contempt and predetermined what punishment I would receive. His Honour has also formed a biased opinion about the outcome of the custody application of my former husband (par. 49).
>
> I am firmly of the opinion that His Honour is not unprejudiced and impartial to my position in respect of the applications which are presently before the Family Court of Australia at Newcastle for hearing (par. 50).
>
> ...
>
> I am concerned that His Honour has formed the opinion that I have done something wrong and that he has also determined in advance what the punishment would be (par. 53).
>
> I intend to defend the application that I show cause why I should not be dealt with for contempt and further the application of my former husband for custody of the child ..." (par. 54).

I fully appreciate the anxiety of the wife and I can understand how she is of the mind that is expressed in these paragraphs. Of course, it may be said, fairly easily, that there is no sufficient evidence to establish that the

learned judge has, in fact, prejudged anything with respect to these applications. But that is not the whole test. The test is whether in all the circumstances the parties, or either of them, or the public, might entertain a reasonable apprehension that the judge might not bring an impartial and unprejudiced mind to the resolution of the questions involved in the proceedings: Reg. v. Watson; Ex parte Armstrong (1976) 136 C.L.R. 248; Livesey v. The N.S.W. Bar Association (1983) 57 A.L.J.R. 420.

That is the bench-mark or the criterion against which the materials to which Mr Mater has directed my attention are to be judged. Reliance is placed on a number of observations of the learned judge in the course of the hearing on 5 July 1985. It is unnecessary for me to recapitulate those passages which have just been referred to. It is important to observe that his Honour had not embarked on the hearing. The course of events on that day was directed to establishing the nature of the matters that required the attention of his Honour. There is no doubt that in the course of the discussion between his Honour and counsel his Honour made some strong remarks which he deliberately directed to the wife, the present applicant, who apparently was present in court. In any event, his Honour made it clear to counsel that he expected him to convey what he was saying to the wife.

Nevertheless, it seems to me that what his Honour was saying so emphatically (and whether this is how his remarks would appear to a reasonable observer or a party is something to which I will turn in a moment) was said in order to impress upon the wife the seriousness of a charge of contempt. His Honour observed that, based on his experience, some parties in other cases did not seem to appreciate sufficiently the serious consequences that might attend a finding of contempt.

At several points in his remarks his Honour used the word "if", saying, for example, that

> "... if it became necessary for her to be dealt with for contempt ... " -

and -

> "If the contempt application is established and the circumstances warranted ..." -

then certain consequences might follow. In one or two instances, he spoke without the presence of the word "if", and in particular in the passage:

> "... I am not saying she is doing these things but other people have done the same sort of things as she is doing ...".

It seems to me that his Honour was careless in his choice of words in that passage and that the obvious meaning of the words "as she is doing" is:

"as she is alleged to have been doing".

It is unnecessary to refer to any other passages.

The question remains as to how the matter would appear in all the circumstances to a reasonable observer or to a party who is able to appreciate reasonably what is taking place. I am far from satisfied that a party or observer could have had a reasonable apprehension that the judge had prejudged the issue. After all, the issue had not even been entered upon, no evidence had been led and the strength of his Honour's observations was a consequence, as I have already said, of his concern that the wife, who was alleged to be in contempt, should appreciate that such an allegation was to be taken seriously and that she should do her best to utilize the period of a couple of months before the hearing in a manner that would resolve the problems relating to access. The message coming through was that if access was resolved acceptably in that intervening period this would be a very material matter when the case came to be determined.

If it were a perfect world, every judge would be a model of discretion and would never say a word out of place. But that does not mean that a judge is liable to be prohibited every time that he fails to choose his words carefully and well. Nor does a judge who allows the weight of years that

separates him from a litigant to lead him, on the spur of the moment, to deliver what might be described as fatherly advice (and I think this is the sense in which the reference to the wife as a "silly little girl" is to be understood) furnish any basis for a reasonable apprehension that he might have already made up his mind on the issues which are yet to be tried. It may well cause some resentment but that of itself is no ground for prohibition.

The exercise of the prerogative jurisdiction of this Court is a serious matter. In circumstances such as the present its exercise is justified only on the basis of a clear prima facie conclusion that the conduct of the judge was such as to engender in the mind of a party or of the public a reasonable apprehension that the judge had so prejudged the issues that he might not bring an impartial and unprejudiced mind to the resolution of the questions involved. As I have said, I am unable to come to that conclusion. Of course, if in the conduct of the hearing there is any evidence of prejudgment of the issues having the relevant effect, then there is the opportunity of an appeal to the Full Court of the Family Court.

The application is dismissed.

IN THE HIGH COURT OF AUSTRALIA

IN THE MATTER OF AN APPLICATION FOR A WRIT OF PROHIBITION DIRECTED TO THE HONOURABLE BASIL HOGAN, A JUDGE OF THE FAMILY COURT OF AUSTRALIA

EX PARTE - THERESE RUTH MELVILLE

REASONS FOR JUDGMENT

Judgment delivered at Canberra

on 18th September 1985

(Oral) Wilson J.

RM74/30574