1932 *Present* : **Drieberg J.**

In the Matter of an Application for a Writ of *Habeas Corpus.*

RAN MENIKA *v.* PAYNTER.

Habeas corpus—*Right of mother to custody of child—Power of Court to interfere with right—Only where it is essential for safety or welfare of child.*

The Supreme Court will not deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given to another. The Court must be satisfied that it is essential to its safety or welfare that the rights of the parent should be superseded or interfered with.

THIS was an application for a writ of *habeas corpus.* The facts appear from the judgment.

G. K. W. Perera, for the petitioner.

J. R. V. Ferdinands, for the respondent.

May 3, 1932. DRIEBERG J.—

This is an application by the mother of a boy who was placed on June 26, 1931, by the applicant's mother in the Nuwara Eliya Christian Mission School which is under the control of the respondent, the Rev. Mr. A. S. Paynter.

The boy, who is thirteen years old, is the son of an European who kept the applicant as his mistress; she thereafter became the mistress of another European by whom she had two children, a boy nine years old and a girl of six years. It was suggested that the third child was by another man, but the Police Magistrate has accepted the peitioner's evidence on this point. The father of the boy Arthur made provision for him and this is being administered in Curatorship Case No. 872 of the District Court of Kandy, the petitioner being curatrix.

There is no ground for finding that the petitioner has neglected the interests of the boy. On the countrary, she appears to have done all she could. He was attending the Sri Rahula College when he was removed, and had been boarded for some time, as the curatorship case shows, with Miss Roosemalecocq of Kandy.

The boy was taken to the respondent on the suggestion of N. R. Reddie who knew him when they were both at Sri Rahula College. Reddie in his evidence suggests that he was engaged in vigilance work but not in the locality where the petitioner lived. Reddie says that the boy was well looked after, he knew nothing about the petitioner's mode of life, and his only reason for suggesting the boy being placed at Mr. Paynter's school was that he would get an industrial training there. He went to the petitioner's house where he met her mother and he suggested that the boy should be sent to Mr. Paynter's school, all he told them in favour of this was that he would be educated free. In answer to a

question whether he told her of any conditions attaching to entrance into the school, Reddie said that he told the mother that the boy would not be sent back to her.

The boy was taken to the respondent on June 26, 1931, by the petitioner's mother; the petitioner says that the next day she asked her mother to get the boy back. The respondent says that a few days after June 26 the petitioner's mother asked that the boy be given back. It is clear that the petitioner gave a reluctant consent, deferring possibly to her mother's wishes, and immediately thereafter repented of her decision. When the petitioner's mother failed to get the boy back the petitioner herself went to the school but was not allowed to see the boy, She then started these proceedings.

The matter was referred to the Police Magistrate of Nuwara Eliya for inquiry. The application was there resisted on the ground that she was leading the life of a prostitute. She was refused an opportunity of leading evidence to disprove this charge, of which she had no notice. The Police Magistrate found against her. I was not satisfied with this finding and I ordered an inquiry by the Police Magistrate of Kandy. The Police Magistrate of Kandy has found, and I agree with him, that there is nothing to be said against the petitioner except that she has lived under the protection of two Europeans in succession by whom she has had children. She sends these children to a good school and does the best she can for them with the help given by their fathers. Reddie, who is partly responsible for the information given to Mr. Paynter of the bad character of the petitioner, admits that the boy was well looked after and that the only reason for his suggesting a change of school was the advantage of an industrial training at the Nuwara Eliya school. Can the Court deprive the petitioner of her legal right to the custody of her child and her right to its companionship for the reason only that it will have greater advantages and a better start in life if given over to the respondent?

Mr. Ferdinands contended that the Court should be guided solely by the interests of the child, and he relied on the ruling in *The Queen v. Gygnall*[1]. It was there held that the Court had the power where the interests of a child called for it to refuse a mother the custody of her child though she was not guilty of such conduct as would disentitle her to it. The Courts of Chancery had this power which was exercised by the Courts of Common Law after the Judicature Act of 1873. The Supreme Court has the same power, see *Mohammadu Cassim v. Casie Lebbe*[2] But this does not mean that the Court can deprive a parent of the custody of a child for the reason only that it would be brought up better and have a better chance in life if given over to another ; the Court cannot have regard only to the balance of advantages. In *The Queen v. Gygnall,* Lord Esher M.R. in stating the grounds on which a Court should exercise its discretion followed the judgment of Knight Bruce V.C. in the case of *In re Fynn (2 de G. & S. 457, at page 474)*. There is there such a clear and complete statement of the law that I may well quote in full. Knight Bruce V.C. said, "Of the present case I may say, that

[1] *(1893) 2 Q. B. 232.*

[2] *(1927) 29 N. L. R. 136.*

were I at liberty, as I am not, to act on the view which out of Court I should, as a private person, take of the course likely to be most beneficial for the infants, I should have no doubt whatever upon the question of interfering with the father's power. Without any hesitation I should do so—to what extent and in what manner I do not say. But there may and must be many cases of conduct, many cases of family differences, family difficulties, and family misfortunes, in which, though interposition would be for the interest and advantage of minor children, Courts of Justice have not the means of interfering usefully, or, if they have the means, ought not to interfere; and the jurisdiction to which the present petition is addressed is one that, infinitely various as are the possible circumstances in which it is applicable, is yet restricted, and I believe wisely restricted, by certain principles and rules from which there can with propriety be in its exercise no departure. The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and in a sense, on condition of performing these duties; but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance; nor could a Court of Justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious, and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well-disposed, exercising a private judgment, would wish his children to be, for their sakes and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them it must be satisfied, not only that it has the means of acting safely and efficiently but also that the father has so conducted himself, or has shown himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong".

It cannot be said that it is essential to the welfare of this boy that he should be taken from his mother and left at Mr. Paynter's school. The case has to be considered from this point of view, for different considerations would arise if he had been given over to the respondent's school and after the lapse of some years his mother wanted him back. This was so in the case of *The Queen v. Gygnall* where Kay L.J. said "It would be a different question where the attempt is to take a child away from the custody of the father or mother and a very strong case would have to be made out to deprive the parent of the custody of a child which had up to that time been in the custody of the parent. Here we have not to deal with that case".

The position cannot be affected by the fact that the child was a few days with Mr. Paynter before the petitioner, who had not formally consented to his being placed there, wanted him back.

I order that the boy Arthur Huntley Gordon be given over by the respondent to the custody of the petitioner. Return these proceedings to the Police Magistrate of Kandy and ask him to notice the parties to appear before him and give effect to this order.

The petitioner has been put to expense over this matter, and I direct that the respondent should pay her costs, which I fix at Rs. 73.50.