1970 *Present :* **Weeramantry, J.**

G. PEMAWATHIE, Petitioner, *and* A. KUDALUGODA ARATCHI and 4 others, Respondents

S. C. 364/69—Habeas Corpus Application

Habeas corpus—*Principles of English law and other legal systems—Extent to which they are applicable—Custody of illegitimate child in a stranger—Whether the stranger can subsequently resist the claim of the natural guardian for restoration of the child to her—Roman-Dutch law—Overriding importance of the welfare of the child—Courts Ordinance (Cap. 6), s. 45—Adoption of Children Ordinance (Cap. 61)—Children and Young Persons Ordinance (Cap. 23), ss. 34, 35.*

Although the consequences of the issue of a writ of *habeas corpus* under section 45 of the Courts Ordinance, the manner of its issue and the procedure and practice to be followed are determined by the English law, the question who has the right to the custody of a child must be determined by the legal system applicable to the parties in question.

Where the law governing the right to the custody of an illegitimate child is the Roman-Dutch law, the mother of the child is the natural guardian and is entitled as such to the custody of the child as against a stranger. If, however, the interests of the child would be gravely affected by an interference with its present custody, the claim of the stranger to custody would be preferred to the claim by the mother.

The petitioner was the mother of an illegitimate child. Four weeks after the birth of the child on 2nd April 1964, she permitted the child to be brought up by the 1st respondent. Six years later the petitioner, who had not abandoned or surrendered her interests in the child, made the present application for the custody of the child. The Magistrate, who held the inquiry, was quite satisfied that the child was looked after with much care and affection in the household of the 1st respondent and was treated as a member of the family. He was also of opinion that the petitioner was not likely to provide the comforts and happiness that the child was enjoying. There was no evidence whatsoever of any attention paid to the child by the petitioner throughout the period of the child's stay with the 1st respondent. The Magistrate expressed his unhesitating view that " the interests of the child demand that she be allowed to remain where she is now ".

Held, that the Court had the power to award the custody of the child in the circumstances of the present case to the 1st respondent, although the child had not been adopted by him under the provisions of the Adoption of Children Ordinance. It would be open to the petitioner to renew her application after three years.

" A review then of the decisions of this Court for a period of well over hundred years specially recognises that the right of the parent may be superseded by considerations of the welfare of the child. "

APPLICATION for a Writ of *habeas corpus*.

K. Sivananthan, with *Miss C. M. M. Karunaratne*, for the petitioner.

Ben Eliyatamby, for the respondents.

Cur. adv. vult.

September 2, 1970. WEERAMANTRY, J.—

This is an application by the mother of an illegitimate child for its custody. The child was in the custody of a third party at the time. I have at the conclusion of the hearing made a provisional order in favour of this third party for a period of three years and I now set out my reasons for doing so.

The child was born on the 2nd April 1964. The petitioner avers that as she was too poor to bring up the child she left the child shortly after its birth in the care and custody of one Mrs. Seneviratne and that the child was forcibly taken away from the house of Mrs. Seneviratne on 13th July 1969 by the 1st, 2nd and 4th respondents.

Although this was the position indicated in the petition the evidence revealed a somewhat different story, for the petitioner herself stated that after the birth of the child, when she was on her way home from hospital to her village, she met a gentleman at the Matara bus stand. As she was stranded at that time she accepted a suggestion made to her by that gentleman that she should stay in the house of one Seneviratne. The petitioner still lives in this household.

At the time she went to Mr. Seneviratne's house, Mrs. Seneviratne was expecting a child and Mr. Seneviratne was not happy at the idea of there being two infants in the house at the same time. In consequence the 1st respondent who was a friend of the Seneviratne's and who developed an affection for the child, requested permission to take the child to his house. The petitioner allowed this. The child has so remained in the house of the 1st respondent up to the date of the order, that is to say, for a period of six years.

It will be seen that this version conflicts with the position taken up in the petition not only in regard to the circumstances in which the child entered the custody of the respondents from the Seneviratne household, but also in regard to the date of this event. Her trip back from hospital would presumably have been within about 10 days after the birth of the child, so that the time of removal of the child by the respondents must have been shortly thereafter and not some time in 1969 as averred in the petition.

The 1st respondent is a graduate and a Government school teacher, the 2nd respondent is his mother and the 4th respondent his father. At the time the child was taken into his household the 1st respondent was a bachelor but he is now married.

He is anxious to retain the child and the learned Magistrate has been completely satisfied that the child is looked after with much care and affection in the household of the 1st respondent, and is treated as a member of the family.

Throughout the period of the child's stay with the 1st respondent there is no evidence whatsoever of any attention paid to the child by the petitioner and there is not even the slightest suggestion of her giving the child anything at all, not even a parcel of sweets.

The learned Magistrate who has seen the child in Court has been quite satisfied that the child is well looked after and happy, and photographs that have been produced in evidence showing the manner in which the child has been treated as a member of the household even at the time of a wedding in the family, completely support this position.

The 1st respondent has stated that the child has been with him since the child was four weeks of age. He has stated that the 5th respondent has been brought up as a sister of his, and addresses his parents as her parents. He has stated that he will be able to bring up this child and has no objection to the petitioner having reasonable access to her. His father has also given evidence and has stated that he has brought up the 5th respondent as a child of his own and has taken steps for adoption.

He does not have young children of his own and can provide for the future of this child.

Both the 1st and 4th respondents have stated that the petitioner cannot provide for the child.

The evidence would therefore reveal that the paragraph of the petition averring that the child was forcibly taken is false in the light of the petitioner's own evidence. This affects her bona fides and so also does her failure in her petition to reveal the fact that the child has been brought up for a period of over five years in the household of the respondents. In this context her allegation in the petition of forcible removal on 13th July 1969 does not accord at all with the facts and has presumably been put in order to minimise the period during which this child has been under the care and custody of the respondents.

The learned Magistrate has observed: "the conduct of the corpus in Court was eloquent testimony of her happiness in her present state. It is also my view that the petitioner may not be in a position to provide all comforts and happiness in life that this child now appears to enjoy. What struck me regarding the respondents was their genuine desire and love for this child. I am quite confident that given the opportunity these respondents will do everything in their power for the benefit of this child."

Upon a review of all the circumstances including a close observation of the child in court the learned Magistrate observed ". . . it is my unhesitating view that the interests of the child demand that she be allowed to remain where she is now".

However, the learned Magistrate has felt constrained in consequence of the decision of Nagalingam A. C. J. in *Abeywardene v. Jayanayake*[1] to recommend that the application be allowed on the basis that the respondents cannot resist the claim of the mother so long as the child has not been adopted under the provisions of the Adoption of Children Ordinance, No. 24 of 1941. Nagalingam A. C. J. there expressed the view that custody of a child by a person who is not the natural guardian and has not obtained an Adoption Order is illegal, and that the child must be restored to the custody of the natural parent even if the restoration is prejudicial to the interests of the child.

Many interesting questions of law are raised in consequence and it will become necessary to examine what the position is under our law in regard to the claim of the natural guardian of a child to have the child back where the child has been in the custody and care of third parties during a long period of time. It will become necessary for this purpose to examine what the attitude is both of the Roman-Dutch law and of the English law to the question whether a stranger can resist the claim of the natural guardian.

Before I examine this question I should briefly dispose of a preliminary submission made to the effect that *Habeas Corpus* applications fall to be determined by the principles of English law for the reason that the

[1] *(1953) 55 N. L. R. 54.*

law governing the prerogative writs is the English law. I do not think however that that general principle means that questions of custody fall to be determined by the English law. The question who has the right to the custody of a child must be determined by the law applicable to the parties in question and once it is determined by the legal system applicable that the right to custody exists, it is then that the writ of *Habeas Corpus* would issue. However the consequences of the issue of the writ, the manner of its issue and the procedure and practice to be followed would of course be determined by the English law.

Were the position otherwise the results produced would be incongruous. For example the right to the custody of a Muslim child cannot be determined otherwise than according to the principles of the Muslim law and the mere fact that English law is the law applicable to writs quite obviously does not render the English law the governing law in regard to the custody of a Muslim minor. So also in regard to other personal laws it is by the principles of those systems that the right of custody is determined and not by the principles of the English law.

As Tambiah J. observed in *Kamalawathie v. de Silva*[1] while referring to section 45 of the Courts Ordinance, in a multi-racial country like ours where different types of laws prevail it is an inevitable feature that the law governing the custody of a child would vary with the system of law applicable to the person concerned.[2] So also Nihill J. in *Samarasinghe v. de Simon*[3], referring to Fischer C.J.'s opinion in *Goonaratnayake v. Clayton*[4] observed that a court in exercising the jurisdiction given to it by section 45 of the Courts Ordinance, should apply the English law when considering the question submitted to it, but took care at the same time to indicate that this court would no doubt have regard to the personal law applicable to the parties before it.

I shall therefore proceed to examine the matters before me on the basis that the law governing the right to the custody of the child in question is the Roman-Dutch law.

Now, by the principles of the Roman-Dutch law it is clear that the mother of an illegitimate child is the natural guardian and entitled as such to the custody of the child as against a stranger.

In the present case however it is contended that the interests of the child would be so gravely affected by an interference with its present custody that this consideration would override the inherent right of the mother as the natural guardian.

It becomes necessary then to examine whether the Roman-Dutch law has recognised this principle of the right of the mother being over ridden by the interests of the child and whether, where the interests of the child so indicate, the claim of a stranger to custody would be preferred to the claim by the mother.

[1] *(1961) 64 N. L. R. 252 ; 60 C. L. W. 21.*
[2] *ibid, p. 255.*
[3] *(1941) 43 N. L. R. 129.*
[4] *(1929) 31 N. L. R. 132.*

One must commence an examination of this matter by referring to the best known Ceylon decision upon the subject, the case of *Samarasinghe v. de Simon*[1]. In that case the court held that where a parent has surrendered the custody of the child to another, the mere assertion of his natural right is not sufficient to entitle him to claim back the child and that the court would not disturb the *status quo* unless there was good ground for doing so. Nihill J. held that a good ground would be that it would not be detrimental to the best interests of the child that she should return to her home.

An examination of the facts in that case shows that there were a number of reasons not present in the instant case which inclined the court to restore the custody of the child to the father. The father had shown an interest in the child throughout the period of the child's stay with its foster parents and further it was not the understanding of either the foster parents or of the father that the father had relinquished all control over the child. This fact was evidenced by two letters between the foster parents and the father on the occasion when the foster parents desired to take the child with them on a trip to Egypt. Furthermore the father offered the child a home—and admittedly a good home—in Colombo with the conspicuous advantage that the child would share that home with her brothers and sisters of whose company she had hitherto been deprived in consequence of the children being scattered after the death of their mother. The father was upon an improvement of his financial circumstances attempting to bring all his children together under one roof and re-establish his family. In view of this combination of circumstances the court was prepared to disturb the *status quo* although it was manifest that the child was extremely happy and enjoying much love and affection in the home of her foster parents.

It is important to note that the case recognised the general principle that the mere assertion of the parent's natural right is not sufficient to entitle the parent to a restoration of custody and that the court would show an attitude of reluctance when asked to disturb the *status quo* when the child is apparently very well looked after.

I must next refer to some significant judgments of this court in recent years, in which the claim of a stranger has been preferred to that of a natural guardian. I refer first of all to *in re Waranakulasooriya*[2] where Fernando, A. J., as His Lordship the Chief Justice then was, followed Nihill J.'s observations on the law in *Samarasinghe v. de Simon*, in denying a claim by a mother to the custody of her daughter who had been placed at a convent by her father.[3] That is to say, a claim against the Mother Superior, who had no right to custody, failed despite the rights of the natural guardian, the court observing that it should be guided by the test whether a change in the *status quo* would be prejudicial to the interests of the child .It was also observed that this same test had been adopted recently by Fernando, A. J. in *Habeas Corpus* Application No. 1824.

[1] *(1941) 43 N. L. R. 129.* [2] *(1955) 56 N. L. R. 525.*

[3] *ibid, at p. 527.*

In re Waranakulasooriya is also important for the observation that the right under our law of a parent to the custody of a minor is not absolute as is evidenced by sections 34 and 35 of the Children and Young Persons Ordinance of 1939. It enabled a court to deprive a parent of this right if for reasons specified in its sections, the parent is unfit to exercise care and guardianship over the child.

More recently Samerawickrame, J. in the case of *Frugtniet v. Fernando*[1] refused custody to the mother observing that in a case of this nature the paramount consideration is the welfare and the happiness of the *corpus*, who in that case was in the custody of strangers with whom she was happy and contented, as she was looked after by them with great affection.

One more recent instance of a decision on these lines is the judgment of de Kretser, J. in *Endoris v. Kiripetta.*[2] The child in that case was 8 years old and had been brought up by his aunt, a sister of the petitioner. In that case again the right of the parent was treated as defeasible if a sufficient case was made out. De Kretser, J. there observed that the court would not deprive the parent of the custody of the child if only for the reason that it would be brought up better and have a better chance in life if given over to another. He held that it was for the person seeking to displace the natural right of the parent to the custody of the child to make out his case that consideration for the welfare of the child demands it. This judgment while emphasising the right of the parent, also indicates a recognition that the right of the parent would be overridden if a consideration for the welfare of the child demanded it.

The juridical basis for the denial by court of the rights of the natural guardian in appropriate cases was given expression to by Sansoni J. who in *Weragoda v. Weragoda*[3] observed that although in England the principle of the interests of the child being paramount applies, because presumably the court is the guardian of all infants, in Roman-Dutch law the State is the upper guardian of all minors, and that he did not think there was any material difference between the two concepts. The court would in deciding what is best for the child have regard to the rights of parents, their character and any other factor which the court thinks ought to be weighed.

Again in *Deutrom v. Jinadasa*[4] Alles J. held that in every case concerning the custody of a minor child the welfare of the child is the paramount consideration to be taken into account and that although the mother is the natural guardian of her illegitimate child, her right to custody may be forfeited if it is established that such custody may be dangerous to the life, health and morals of the child. The case is also important as laying down that in order to determine questions of custody all the available evidentiary material should be examined, a principle stressed

[1] *(1969) 74 N. L. R. 448.*
[2] *(1968) 73 N. L. R. 21.*
[3] *(1961) 66 N.L.R. 83.*
[4] *(1970) 78 C. L. W. 17.*

also by Sansoni, J. in *Weragoda v. Weragoda*[1] who, following *McKee v. McKee*[2] observed that in questions of custody "the welfare and the happiness of the infant is the paramount consideration . . . to this paramount consideration all others yield."

Tambiah, J. in *Kamalawathie v. de Silva*[3] after an extensive examination of the party observed "however in applications which have come up in this court, whatever the system of law which may have been applied to determine the custody of the child, this court has always asserted in unmistakable language that it has the discretion to remove a child from the lawful custody of the father if such a course was necessary in the interests of the life, health or morals of the child."

There is thus no dearth of authority in the recent decisions of this Court recognising the overriding importance of the welfare of the child even in cases where the natural guardian's claim is resisted by a stranger.

It will indeed be seen upon a perusal of the decisions of this Court that this is no recent trend but goes back well over a hundred years, for similar rulings have been given by this Court at least as far back as 1862. In *In re the application of Oysanatchi*[4], decided in that year, by a Full Bench of this Court, there is a significant passage to which I would wish to refer. It is to this effect: "The court decides that in any case where a child's relative has consented to that child being taken at a time of its extreme need by a person, who has maintained it, and is willing to continue to maintain it, with all proper kindness and in comfort and respectability, and when that relative after a long lapse of time comes forward, at a very suspicious period of a female child's existence to claim possession of it, though utterly unable to maintain it, this court will not misuse the right of habeas corpus to take the child from a good and virtuous home and deliver it over to misery and want . . . "

In *In re Andrew Greig*[5] also the principle was recognised that the Supreme Court has a large discretion resembling that exercised by the Chancellor in England who as *parens patriae* looks to the interests of the children as well as to the circumstances and wishes of the parents.

So also in *Mohamadu Cassim v. Cassim Lebbe*[6], a case of a Muslim child who was in the custody of her maternal aunt from her infancy till her 9th year, the court again recognised the principle that the parents' right is not absolute, and refused to order the restoration of the child to the father's custody, on the basis that such a change would be detrimental to the welfare of the child. The Court there observed further, following the grounds upon which the parents' rights should be interfered with in England[7], that even though the mother of a female child has not been guilty of misconduct yet the court may refuse to give custody to the mother if satisfied that such refusal was essential for the well being of the child.

[1] *(1961) 66 N. L. R. 83 at 86.*
[2] *(1951) A. C 352.*
[3] *(1961) 64 N. L. R. 252 at 255.*
[4] *(1860-62) Ram. 130.*
[5] *3 Lor. 149.*
[6] *(1927) 29 N. L. R 136.*
[7] *Regina v. Gingall, (1893) 2 Q. B. 232.*

A review then of the decisions of this Court for a period of well over hundred years specially recognises that the right of the parent may be superseded by considerations of the welfare of the child. I am unable therefore to accept the contention urged on behalf of the petitioner that our law affords no recognition to the principle that the natural guardian's right to custody cannot be defeated by a stranger.

It is perfectly clear that mere considerations of financial or economic welfare would not suffice to deprive the parent of the custody of the child, but in the present case the matter goes far beyond such considerations. The learned Magistrate's unhesitating view is that the interests of the child demand that she be allowed to remain where she is now. After so long a period of loving care and of the enjoyment of a comfortable and settled home it would in all probability be most damaging to the mental and physical welfare of the child that she be uprooted and transferred to the custody of a mother who is not only unable to provide her even with a home, but whose affection for the child seems also to be in doubt, having regard to her lack of interest in the child during all these years. This case would indeed come very close to the case wherein the Full Bench of this Court observed that it would not issue a writ of habeas corpus to hand over the child to a life of misery.

Having made these observations in regard to the decisions of this Court I would wish to make reference to some decisions of the courts of South Africa wherein also the principle has gained recognition increasingly in recent years that the welfare and interests of the child are, in matters of custody, the paramount consideration. I refer to these cases not only as indicative of a similar idea having been adopted by the South African courts but also as emphasising the principle that the court as upper guardian of minors has the right and indeed the duty to make orders if need be superseding the rights of the parents or natural guardians.

The principle is of course well recognised in cases between spouses that the court has power as upper guardian of all minors to interfere with a father's custody on special grounds such as, for example, dangers to the child's life, health or morals, even when no divorce or separation authorising a separate home has been granted [1].

South African decisions however are not confined to cases as between parents but there have been decisions where parents had been deprived of the custody of children at the instance of third parties on special grounds. In *Short v. Naisby* [2] the court acting in its capacity as upper guardian considered an application by the paternal grandmother of three minor children for an order against their mother for the custody of the children. The court held that the interests of the children are of paramount importance. Consequently where the allegations against the father of a failure to take an interest in the children and other circumstances make out a *prima facie* case, it was held to be the

[1] *Vide Calitz v. Calitz (1938) A. D. 56.* [2] *(1955) 3 S. A. L. R. 572.*

duty of the court as upper guardian to investigate the matter and decide for itself what was in the best interests of the children. The court observed[1] that it would have no jurisdiction to deprive the surviving parent of her custody at the instance of third parties except under its power as upper guardian and then only on special grounds but held that such special grounds would include danger to a child's life, health or morals.

In *September v. Karriem*[2] the Court held that if in an application for the custody of children the court is of opinion that it should interfere with the rights of the parents because the interests of the child demand such interference, it should be at large to act in the manner best fitted to further such interests and that this may even mean that the child should be taken from the custody and control of one or other or both parents and be given to a stranger. It was pointed out that danger to the child's life, health or morals was not the only ground which would justify interference[3] but that the court as upper guardian should be given as complete a picture of the child and its needs as possible so that nothing of relevance should be excluded. Whilst certain aspects taken separately might not be of importance any combination that might build up a strong case in favour of one or other conclusions is relevant.

The court there considered that the plaintiff's attitude to the child since its infancy and the child's own reaction to its removal from a family as a member of which it has been reared and the deleterious effect of such a change of environment upon the health and well being of the child were all matters of the greatest relevance which should be taken into account.

There is an older case, the decision of Maasdorp J. in *Parrington v. Shugan*[4] where that learned Judge refused the application of a mother for the restoration to her of her child by a stranger who was not related to the child.

In *September v. Karriem*[5] the Court observed that there was no good reason for drawing any distinction between relations and strangers for if interference with the rights of the parents was demanded in the interests of the child the court should be free to act irrespective of the question whether the third party to whom the child is to be handed over is a relation or a stranger.

It seems clear therefore that the South African law as well recognises such a right in the court.

Although as I have said this Court would guide itself by the principles of the Roman-Dutch law rather than the English still it is of interest to note that in England as well decisions on the lines I have indicated have been made, having regard to the interests of the child. I would refer in particular to the cases of *Re White, ex White*[6] and *Barnardo v. McHugh*[7]. In the former case the Court, on the application of the

[1] *ibid, at p. 575.*
[2] *(1959) 3 S. A. L. R. 687.*
[3] *ibid, at p. 689.*
[4] *(1908) C. T. R. 912 referred to in September v. Karriem supra p. 688.*
[5] *at pp. 688-9.*
[6] *(1848) 10 L. T. O. S. 331 at 349.*
[7] *(1891) H. L. 388.*

mother of an illegitimate child refused to order it to be restored to her, where it appeared that it had been in the custody of the parties now possessing it for seven years with the mother's consent, that the child was well taken care of and that the child itself who was eight years of age and very intelligent wished to remain with its present protectors. In the latter case, Lord Herschell observed that if it would be detrimental to the interests of the child that it be given to the mother, the Court would not feel bound to accede to the wishes of the mother, even where the rival claimant to the custody of the child is a third party. So also Halsbury observes[1] that " in any proceedings before any court concerning the custody or upbringing of an infant . . . the court must regard the welfare of the infant as the first and paramount consideration . . . this provision applies whether both parents are living or either or both is or are dead . . . "[2]; and again " where the parent . . . has allowed the child to be brought up by, and at the expense of, another person . . . for such length of time and in such circumstances as to satisfy the court that the parent has been unmindful of the parental duties owed to the child, the court must not make an order for the delivery of the child to the parent, unless satisfied as to the fitness of the parent to have the custody, having regard to the welfare of the child[3].

All these authorities seem to indicate then that the court has jurisdiction to make an order awarding the custody to a third party even as against a parent. In regard to the observation of Nagalingam J. that the custody of such third party would be illegal in the absence of an Adoption Order it would be of interest to point out with much respect, that the English Adoption Acts of 1950[4] and 1958[5] both contained provisions similar to those in our Adoption of Children Ordinance but that the English cases despite this provision have not considered custody in the absence of an adoption order to be illegal. For example in *Re E*[6] where an adoption order sought by a family which had looked after an illegitimate infant had been refused, still, despite an application by the mother the court continued wardship and custody of the children in the family so looking after the child.

I may add that all that has been stated hitherto is in the context of a case where the mother has not abandoned or surrendered her interests in the child. There is a definite finding by the learned Magistrate to this effect and it is on this basis that these matters are herein discussed.

For these reasons I have concluded that this Court has the power to award the custody of the child in the circumstances of the present case to the 1st respondent. I have however made only a provisional order

[1] *3rd ed. vol. 21, pp. 193-4.* [2] *See also the Guardianship of Infants Act, 1925 S. 1.*

[3] *Halsbury, 3rd ed. Vol. 21, pp. 1967; see also Mathieson v. Napier (1918) 87 L. J. Ch. 445, C. A.*

[4] *14 Geo. 6 c. 26.* [5] *7 & 8 Eliz. 2, C. 5.* [6] *(1963) 3 All E. R. 874.*

in favour of this respondent and when this order expires, three years after the date on which it was made, the question of custody may be reviewed should the mother so desire. The Court would then be better able to decide upon the custody having regard to the long term interests of the child.

Provisional order made in favour of the 1st respondent.