Mr. Luke said that the appellants have already served between three and four months of their sentence. They must now serve the remainder. This appeal is dismissed.

DOVE-EDWIN, J.A. and COLE, J. concurred.

Appeal dismissed.

SPAINE *v.* SPAINE

SUPREME COURT (Beoku-Betts, J.): July 30th, 1965
(Divorce Case No. 29/63)

[1] **Family Law—custody of children—discretion of court—factors to be considered in making order:** A court has a wide discretion in making a custody order and should take into consideration all the circumstances of the case, including the age and sex of the child, its health, the lives led by its respective parents and their prospects of remarriage, the upbringing of the child by a single parent, or by a step-parent if there is a remarriage, and the upbringing of children together (page 252, lines 8–11; page 252, line 36—page 253, line 3).

[2] **Family Law — custody of children — right of mother to custody — mother's adultery not absolute bar to custody:** The mere fact that a wife is proved to have committed adultery is not of itself a sufficient reason for denying her the custody of her young child, especially if the child is a girl; where the wife is unsuitable in other respects, such as by being unstable, custody may be denied her (page 251, lines 16–19; page 252, lines 19–27).

The applicant wife applied by motion to vary a custody order made in respect of the child of the former marriage between the applicant and her husband the respondent.

At the time of the dissolution of the marriage between the applicant and the respondent, the Supreme Court (Marke, J.) made an order giving the custody of the two infant sons of the marriage to the respondent. In doing so, the court took into consideration the facts that it was desirable for the two children to be brought up together rather than one by each parent and that the applicant had committed adultery and was apparently conducting an affair with a man by whom she had become pregnant. The court felt that the interests of the children would be best served by giving their custody to their

father, the respondent, who could afford to and would bring them up properly, giving them a good start in life.

The applicant sought to vary this order in respect of the younger child, aged five years. She alleged that this child had been regularly ill, that his state of health had not been properly presented to the court making the order and that it would be harmful to separate him from his mother in whose custody he had hitherto been. She also alleged that the child became disturbed when attempts were made to take him to his father pursuant to the order of the court and that he resented staying with his father.

Cases referred to:

(1) *Mozley Stark* v. *Mozley Stark,* [1910] P. 190; [1908–10] All E.R. Rep. 643, considered.

(2) *Willoughby* v. *Willoughby,* [1951] P. 184; [1951] W.N. 45.

Marcus-Jones for the applicant;
R. E. A. Harding for the respondent.

BEOKU-BETTS, J.:

This application by motion filed on July 7th, 1965, is for a variation of an order of this court made on February 22nd, 1965, ordering that the child of the marriage between the applicant and respondent, Godfrey Spaine, be put in the custody of the respondent. The applicant Christiana Cedilia Spaine filed an affidavit stating the grounds and reasons for the application. This application was opposed by the respondent who also filed an affidavit.

I carefully read the affidavits and consulted the judgment of the learned judge in the action for divorce which preceded this motion. From the affidavit of the applicant, I gathered that there are two children born in wedlock, George and Godfrey. George had been living with the father since the separation of his parents in 1960, whilst Godfrey had always lived with the mother. The issue of the custody of the children came up in the trial before Marke, J. and he gave custody of the children to the respondent after, as he said, he had taken into consideration the interests of the children. He thought that if they were together and brought up together it would be in their best interest. In my view, the reasons given by the learned judge for making the order were based both on reality and law. In all decisions of this nature the welfare of the child or children must be the deciding factor and paramount consideration.

Some of the reasons given by the applicant for seeking variation

of the order are that the child Godfrey had always been ill from birth. He had been receiving medical treatment for asthma and after the judgment of the court suffered from measles. I read the medical report of Dr. Claudius Cole and Dr. Amara. Dr. Amara, of course, based his opinion on what he was told by the applicant and he added that from this experience there would be a psychological effect on the child if separated from the mother at this early age. The applicant also stated that when attempts were made to take the child to the father in compliance with the order of the court the child would cry and resented staying with the father. Paragraph 24 of the applicant's affidavit states that the fact of the poor state of health of the child was not before the court when the order for custody was made by Marke, J. I agree that this is true.

The learned judge took into consideration the instability of the applicant relating to her morals when considering the welfare of the children. The authorities cited do not state that because a woman is found guilty of adultery, she is therefore not fit to have custody of her young child. But I am sure where the mother is unstable, as the judge thought, it becomes another matter. This is what the learned judge says on this matter:

> "I feel sure from the vehemence with which the petitioner presented her charges against the respondent that she would not have omitted to charge him with adultery or not keeping a respectable home if she had the slightest suspicion that he was having an illicit association with another woman and not keeping a good home. I feel that the boys are likely to have a better home with their father and an opportunity of being brought up better by their father than if they were placed in custody of their mother."

In an earlier paragraph of the judgment in the divorce action the learned judge observes:

> "During the subsistence of the marriage she has pursued an irregular association with a man for whom she became pregnant. Who that was, or whether he was married or single, this court does not know, nor can the court say whether she had ceased to associate with that man and intends to live an honourable life. From this background of so much of the life of the petitioner as she has been willing to disclose to the court, the court has to consider whether it would be justified in placing these two children in her care."

What the learned judge is saying is clear.

Now to the fact that the child's state of health was not before the court which made the order. The fact is that the child, according to the applicant, had never enjoyed good health. This is not surprising in view of the carrying on of the applicant. I saw the child in court and it looked quite well and happy. For health reasons alone it will be better for the child to be with his father. I refer to Tolstoy, *Law & Practice of Divorce*, 2nd ed., at 151 (1949):

> "The Court has today a very wide discretion in these matters and takes into consideration all the circumstances of the case, such as the age and sex of the children, the life led by the respective parents, the child's upbringing. . . ."

In this case the child is over five years old and is a male child. The child is not too young to be given into the custody of its father although it was brought up entirely by the mother.

I would not say more on the life the parents live; that was referred to and considered by the learned judge. The applicant's counsel referred to the case of *Mozley Stark* v. *Mozley Stark* (1), where it was said:

> "[T]he matrimonial offence [adultery by the wife] which justified the divorce ought not to be regarded for all time and under all circumstances as sufficient to disentitle the mother to access to her daughter, or even to the custody of her daughter, assuming her to be under sixteen." ([1910] P. at 193; [1908–10] All E.R. Rep. at 645).

I agree entirely with this principle if in the case the child was a daughter and that the mother's adultery was the only reason why the learned judge gave custody of their daughter to the respondent. The learned judge here, in considering the welfare of the child, thought that as they were both boys five and six years of age they would be better off if they were both brought up together by their father. The respondent's adultery was also considered but not exclusively.

I have been asked to consider the health of the child and the fact that the child had never lived with his father the respondent. In doing this, as I had said earlier, I have to consider the order of the learned judge who observed the witnesses before he made his order. I have taken into account all the circumstances of this case, the medical reports and above all the fact that the mother intends to get married to another man in September of this year. I do not think it is good to separate the two boys. The father is a respectable man who could afford to give the children a good chance in life. The health of the child does not appear to have suffered with the

father as I saw him in court looking well and happy. In my view it would not be good for Godfrey to be brought up by a stepfather whilst the father is alive, competent and able to bring up his child. Both the applicant and the respondent go out to work and both rely on somebody to take care of the children. This is not unusual these days. What is important, would the father bring up Godfrey in the child's interest? I am of the opinion that he would. See *Willoughby* v. *Willoughby* (2).

I would, however, request that the mother be allowed access to the children when possible and that the parents should not allow the friction existing to deprive the children of this access. The respondent should allow this access at reasonable times and the applicant should not take this opportunity to unsettle the child.

I refuse the application, and make no order as to costs.

Application refused.

T. CHOITHRAM AND SONS LIMITED *v.* P. CHOITHRAM AND SONS AND REGISTRAR GENERAL

SUPREME COURT (Beoku-Betts, J.): July 30th, 1965
(Civil Case No. 364/64)

[1] Personal Property—goodwill—trade marks and names—injury to goodwill essential in action for infringement: It is not necessary for a plaintiff, in an action for infringement of a particular trade mark or name, to show that the defendant had a fraudulent motive as long as he shows actual or probable injury to his goodwill (page 258, lines 15–20).

[2] Trade Marks, Trade Names and Designs—infringement—fraudulent motive not essential if injury to goodwill: See [1] above.

[3] Trade Marks, Trade Names and Designs—infringement—knowledge of existing mark or name—infringement after knowledge may raise presumption of intention to deceive: Where a person has knowledge of an existing trade mark or name or, having adopted an identical or similar mark or name as his own, subsequently obtains such knowledge and nevertheless infringes, or continues to infringe the existing mark or name, he is presumed to intend the natural consequence of his acts and, if such natural consequence be to deceive the public, he will be restrained from continuing to use his mark or name (page 258, lines 20–28).

[4] Trade Marks, Trade Names and Designs—trade names—infringement—plaintiff need not show fraud but likelihood of deception of public: In an action to restrain a person from using a particular trade name