IN THE FIJI COURT OF APPEAL
Civil Jurisdiction
Civil Appeal No. 41 of 1981

Between:

MAHESH CHAND s/o Mohan Lal — Appellant

and

SAVITRI DEVI d/o Govind Raju Naidu — Respondent

S.M. Koya for the Appellant.
S.R. Shankar for the Respondent.

Date of Hearing: 18th March 1982.
Delivery of Judgment: 2nd April 1982.

JUDGMENT OF THE COURT

Henry, J.A.

Respondent, a single woman, gave birth to a full-time male child on April 22, 1980. She laid a complaint under the provisions of the Maintenance & Affiliation Act No. 16/71 alleging that appellant was the father of the child. The complaint was heard in the Magistrate's Court at Sigatoka on August 27, 1980 when the learned Magistrate dismissed it. The learned Magistrate gave a short judgment in which he said:-

> " Corroboration not sufficient to satisfy the Court that complainant is telling the truth beyond reasonable doubt (sic) that (appellant) is the father. The complaint is dismissed. "

The relevant statutory provision is now the Maintenance & Affiliation Act (Cap. 52 Ed. 1978). Section

18

18(1) and (2) reads:-

"18(1) On the hearing of the complaint, the magistrate shall hear the evidence of the complainant and such other evidence as may be produced in support, and shall also hear any evidence tendered by or on behalf of the defendant.

(2) If the evidence of the complainant is corroborated in some material particular by other evidence to the satisfaction of the magistrate, he may adjudge the defendant to be the putative father of the child, and may also, if he sees fit in all the circumstances of the case, proceed to make against the putative father an order for the payment by him -

(a) of a sum of money not exceeding five hundred and twenty dollars annually for the maintenance and education of the child;

(b) the expenses incidental to the birth of the child;

(c) the funeral expenses of the child if it has died before the making of the order; and

(d) such costs as may have been incurred in obtaining the order:

Provided that the magistrate in making an order for payment of a sum of money under the provisions of paragraph (a) may direct that such payment shall be made by weekly, fortnightly, monthly or quarterly instalments. "

Respondent appealed to the Supreme Court. It is clear that the learned Magistrate was wrong when he required sufficient corroboration to satisfy himself that respondent was telling the truth beyond reasonable doubt. This completely misconceived the law. Counsel for appellant argued that the learned Magistrate made a finding on credibility of respondent and that, since this was so, there was no credible evidence before the Supreme Court, and, consequently, none before this Court. We do not agree that it was held in the Magistrate's Court that respondent was not telling the truth. A proper reading of the finding, in our view, is that corroboration was necessary to establish the truth of respondent's burden of proof but that the

corroboration necessary for that purpose was not sufficient.

However, be that as it may, the learned Judge reviewed the evidence and came to a conclusion that respondent's evidence ought to be believed and that her evidence was corroborated in a material particular by other evidence to his satisfaction.

Appellant neither gave evidence, nor did he call any witness. The only evidence was that of respondent and one other witness whose evidence is unimportant. The corroboration found by the learned Judge lay in the conduct of counsel when cross-examining respondent. In Phipson on Evidence 12th Edition para. 740 (p.321) the law is stated as follows:-

> ".....statements made for the purpose of influencing a judge's decision in chambers, whether made by counsel, solicitor or the latter's clerk, are evidence against the client on the trial of the action; and where a case is so conducted by counsel as to lead to the inference that a certain fact is admitted by him, the court or jury may treat it as proved, not only for the particular issue, but for all purposes, and for the whole case. "

Respondent said her periods ceased on August 24, 1979. This is consistent with the birth of the child approximately 270 days after her last period: Preston-Jones v. Preston-Jones [1951] 1 All E.R. 124 per Lord Simonds at p. 127 H. Accordingly, in the normal course, intercourse which was responsible for the pregnancy would have taken place in between the last period and August 24, that is to say within the previous 28 days.

Respondent told a straightforward story of regular intercourse with appellant both before and after August 24 and that she had not had intercourse with anyone else. The case of appellant, as put to respondent in cross-examination, was that the first occasion of intercourse was September 10 which meant that there was admitted intercourse 17 days after the pregnancy became apparent because her periods had ceased.

Unsubstantiated allegations of sexual misconduct were put to respondent in cross-examination. These were all denied by her but it is important to set them out so as to complete the case of appellant as put to respondent by counsel for appellant. It was put to respondent that she was "caught in the toilet with one Ganeshwar Reddy in about June-August 1979" and that there was a lot of trouble about the incident and that her father had beaten her. Further, that she had blamed the elder brother of appellant as being responsible for her condition.

The case put by counsel was therefore that there were sexual incidents which could have resulted in her pregnancy but that no intercourse with appellant had taken place until September 10. The important passages in the cross-examination are:-

> " Respondent told me his age. He told me last year he was nineteen. Agree we had sex on top of a hill one day as he was returning home. "

> " Deny I told respondent I was pregnant, the second time I had intercourse with him. Agree we had sex once after I told him I was pregnant. He promised to marry me. He denied paternity to start with, then admitted it so we had sex once more, then at the end he denied it again. "

> " Deny I only had intercourse with respondent on 10.9.79 and a week later, at which time I told respondent I was pregnant. "

Although the date, September 10, was a definite date, no attempt was made to identify it as to place or any other identifiable incident or even to state what day of the week it was. This was a crucial occasion and little or nothing is conveyed by asking a witness nearly a year later about a specific unidentified date. It appears as if appellant must have instructed his counsel that intercourse had taken place on a date after pregnancy had occurred but that he did not have sufficient material to put to the witness to identify the occasion which was crucial to his whole case. From the course of the conduct of the trial we are of opinion

that appellant must be taken to have admitted intercourse with respondent on at least two occasions in quite close proximity to the material time and that the parties who lived close to each other were generally on intimate terms not later than that time. The learned Judge was entitled to treat this conduct of counsel as such an admission. The further question which this Court has to determine is whether the learned Judge was in error as a matter of law in accepting an admission of such intimacy, not properly identified as to time, but obviously in close proximity to, but after, the time of conception.

In Simpson v. Collinson [1964] 1 All E.R. 262 the headnote sufficiently sets out the decision of the Court, Sellers Davies & Danckwerts LJJ. It reads:-

> " An admission by a man against whom an affiliation order is sought that he had sexual intercourse with the applicant mother within two and four months of the conception of her child, is capable in law of being corroboration "in some material particular" as required by the Affiliation Proceedings Act, 1957, s. 4(2) of her evidence that he also had intercourse (which he denied) at the time of conception (Cole v. Manning (1877)), 2 Q.B.D. 611, approved and applied; see p. 263, letter I, and p. 265, letter B, post). "

The provision referred to is the same as that contained in the Fiji Act. Danckwerts LJ said at p. 263:-

> " Now it is to be observed that what the statute requires is not corroboration (as it appears to me) of the whole of the mother's evidence, but merely corroboration of the evidence of the mother in regard to 'some material particular' It seems to me that in this case the admissions made by the respondent that he had had intercourse twice with the appellant, albeit at a date before the child could possibly have been conceived, is capable of being corroboration of the appellant's evidence. It is a corroboration of the mother's story in a material particular, as it seems to me, namely, that she had been on intimate terms with the respondent, so much so that he admits that they had intercourse within a few weeks of the alleged intercourse resulting in conception -

the strongest evidence of inclination of the respondent to have intercourse with the appellant that one could have. "

Davies LJ said at p. 266:-

" All that is required, as has been pointed out, in the authorities which have been cited to us, to amount to admissible corroboration under the Statute is some (other) evidence that would make the story of the mother more probable. The respondent's admission was evidence of an inclination. "

Sellers LJ said at p. 267 -

" What amounts to corroboration is known to be a difficult matter to define in any degree of detail and in any particularity. As Lord Reading, C.J., said in R. v. Baskerville, the case cited by Davies, LJ., it is in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration. But, as the Lord Chief Justice said there, corroborative evidence is that which shows or tends to show that the story is true. "

The learned Lord Justice also said at p. 268 F:-

" But having been established by admission to be in such close proximity, although there was of course the vital intervening period of the menstruation of this girl in April, nevertheless it is so close that it is a factor, in my view, for the justices to consider in assessing, on the whole balance of the evidence, whether they accepted the complainant's story. It tends to support it. "

In Simpson's case the decision in Cole v. Manning (1887) 2 Q.B.D. 611 was discussed at some length. In that case it was proved that during the summner of 1874, several months before the child could have been begotten, the parties had been on terms of great friendship and intimacy. A Divisional Court consisting of Mellor & Field JJ said (p.613)

" No rule of law excludes testimony as to acts of familiarity before the time when the bastard child could have been begotten; and evidence of that kind shows at least a probability that the statement of the mother is true. "

In our respectful view, also, there is no rule of law which excludes admissions of sexual intercourse and intimacy, such as we have set out from being treated as showing at least a probability that the evidence of respondent is true. The matter of time is relevant only to proximity of conception. The principle involved is whether or not the admitted conduct, taken in its totality in the particular circumstances, is such that it can fairly lead the tribunal of fact to a conclusion that theevidence of the mother is more probable, or, as was said by Sellers LJ in one of the above quoted passages, shows or tends to show that the story is true.

One further case cited by counsel for appellant requires consideration. It is Holland v. Roberts 158 L.T.313, which was cited as a case showing that questions by cross-examining counsel could not amount to corroboration, and, in particular, the passage in the judgment of Greer L.J. at p. 316 was referred to. It reads:-

> " It is further alleged by Mr. Swanwick that the course of the cross-examination so coloured the evidence that we may regard the evidence as stronger than it would have been in the absence of cross-examination, but, in my judgment, questions in cross-examination by the representative of the alleged putative father are not evidence at all, especially in a case like this, where the cross-examination was based on the allegation that the defendant was himself the father of the child, and he was ready to meet corroborative evidence, if such were given. "

It was not a case where questions were asked in the nature of the questions in the instant case. Greer L.J. had earlier said that from "beginning to end this man has strongly denied that he ever had connection with the girl on the alleged occasion when in all probability the child was conceived". The Lord Justice later dealt with the question whether the matter put in cross-examination could amount to corroboration. He said -

"..... the mere fact that he, by question, admitted that there was some conversation about the girl being a fast girl and liable to have intercourse with him, when it is coupled with the implication in the question that he never had intercourse with her, does not seem to strengthen the evidence in any way as to opportunity. "

This case does not decide that the conduct of counsel in the instant case does not strengthen or tend to strengthen the evidence of the woman. It is only an illustration of facts which do not amount to corroboration and it is not an authority on different facts. It is the principle which we have enunciated which is important. Its application to any particular facts is a question to be decided in each case.

We hold that such a course of conduct by counsel is evidence, other than evidence from respondent, and that it is capable of showing or tending to show that respondent's story is true. It was for the learned Judge to say whether or not, in fact, it did have that effect. He so found that as a fact and his decision on fact cannot be questioned in this Court. The learned Judge did not misdirect himself in law in reaching that conclusion.

The appeal is dismissed with costs to be fixed by the Registrar.

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