

IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 53 of 1982

Between: SAROJINI GOUNDAR APPELLANT
d/o Kanyappa Goundar

- and -

PARMESHWARAN RESPONDENT
s/o Satya Raju

K.C. Ramrakha & A.K. Singh for the Appellant
A.B. Ali for the Respondent

Date of Hearing: 10th March, 1983.

Date of Delivery of Judgment: 23rd March, 1983.

JUDGMENT OF THE COURT

Speight J.A.

This is an appeal pursuant to section 12(1)(c) of the Court of Appeal Act (Cap. 8) against a decision of Mr. Justice Madhoji wherein the learned judge allowed an appeal from a decision of Mr. Pathik Resident Magistrate sitting in the Magistrate's Court at Suva. Being a second appeal it is on point of law only.

The original proceedings had been a complaint by the present Appellant under the Maintenance and Affiliation Act No. 16 of 1971 alleging that the Respondent was the father of her bastard child born on 23rd December, 1979.

At the original hearing the Appellant, then the Complainant had given evidence, and had called four supporting witnesses. The Respondent had also given evidence but did not call any other witness.

The learned Magistrate delivered a reserved decision on 5th June, 1981 in which he adjudged the Respondent to be the father and he made a maintenance order.

From that decision the present Respondent appealed and was successful. Before discussing that appeal it is necessary to outline briefly the evidence given in the Magistrate's Court.

The Complainant was employed as a cleaner at C.W.M. Hospital where the Respondent was a medical officer working in the Skin Clinic. She was 31 years old and unmarried. He was 38 years, married with two children. She claimed that an intimate relationship developed between them and that she would visit Respondent in the Clinic after its normal hours of closing - usually between 4.30 and 5.30p.m, and that intercourse had taken place there from time to time until she eventually found herself pregnant. She said that after some of these occasions he took her to her home in his car. She claimed that Respondent had made certain arrangements aimed at procuring an abortion but this had not eventuated and she eventually gave birth to the child in question.

Three of complainant's workmates gave supporting evidence to the effect that they had quite often seen the woman go to the doctor's clinic after hours and remain

there for some time with the door shut. One eavesdropper heard them "talking and gossiping" - another saw them together in the doctor's car after work on one or two occasions.

It was agreed that the doctor was of friendly disposition and got on well with the non-established staff, and may have been more approachable to such people than others. Finally the complainant's mother gave evidence. She said that when she had learned of her daughter's pregnancy she had taxed the doctor with responsibility, and if her evidence is correct, his reply was an unequivocal admission.

The Respondent doctor gave evidence and denied responsibility, denied any intimate relationship and said that any calls by the complainant at his clinic at whatever hour were for the purpose of obtaining treatment for minor ailments. He denied the mother's evidence and said he had not even met her until the time of the Court hearing.

The learned Magistrate in his decision properly discussed the requirement of Section 18 of the Act which provides:-

- "(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 particulars by other evidence to the satisfaction of the Magistrate, he may adjudge the defendant to be the putative father of the child....."

He said he had carefully considered all the evidence, and he discussed appropriate case law dealing with corroboration.

In particular the well known proposition that mere opportunity is not of itself corroboration; that evidence of association which is equally capable of supporting innocent or guilty relationship is of no supportive value; but such material to be relevant must tip the scales of probability in favour of an intimate association before it can be accepted as corroborative.

He concluded that the evidence of the complainant's fellow workers established something more than the brief and proper encounters which would be explicable on the basis of after hours medical treatment, and hence was corroborative. Of more significance was his acceptance of the truthfulness of the mother's evidence as to Respondent's admission of responsibility.

As already stated the Magistrate made a finding of paternity and made a maintenance order. From this decision the Respondent doctor appealed.

Before Mr. Justice Madhoji he advanced 2 grounds:

- (a) Related to the credibility of the evidence of the Complainant and submitted she should not have been believed. This ground could hardly be given great consideration in view of the well recognised principle as to findings on credibility and neither counsel were further concerned in this Court to pursue that issue.
- (b) That as a matter of law there was no corroboration.

The learned judge discussed the Magistrate's decision at length. As just mentioned he dismissed the first ground. In respect of the question of corroboration he examined the evidence in detail and ruled -

- (i) That the evidence of association was of no probative value as corroboration. Reference was made to Thomas v. Jones (1921) 1 K.B. 22 and Burbury v. Jackson (1917) 1 K.B. 18 to the effect that where the evidence points neither in one direction or another it does not amount to corroboration, and in his view the evidence of the three workmates was of this kind and therefore innocuous.
- (ii) That the mother's evidence should have been "fully scrutinized and treated with caution". In the result there can be no doubt that the learned Judge held that there was no corroboration of the Complainant. That must mean the evidence of the mother, which was uncompromising in saying the Respondent had admitted responsibility was to be rejected. It seems difficult to escape the conclusion that the Judge held that if a purported corroborative witness is the Complainant's mother her evidence must ipso facto be rejected. Such a proposition of course is not tenable.

Having so concluded that the "association" evidence was neutral, and the mother's evidence could not be accepted because she was the mother, the learned Judge ruled the complainant's evidence was uncorroborated and that an order could not properly have been made in view of the statutory caveat.

However he then took a further somewhat unusual step. There had been evidence that the complainant had been referred (unsuccessfully) to a Dr. Tarak for an abortion and that the Respondent had spoken to that person

for that purpose and the Judge felt that the evidence of that Doctor should have been called. He therefore directed a rehearing, so that such evidence could be made available.

Mr. Ramrakha contends, and in our view correctly, that the conduct of a case is in the hands of the parties. If, as complainant's counsel, he had elected not to call Dr. Tarak, then his case must stand any unfavourable inference that might be drawn, and if his proof was found defective on appeal, then the result should be that the appeal should be dismissed - and that in a case such as this the ordering of a rehearing in a further "search for truth" is not appropriate in an adversary system. We agree.

We therefore conclude that the learned appeal Judge erred on a point of law. That being so the appeal from his decision is allowed and it is now necessary for this Court to consider the merits of the original appeal from the Magistrate's Court. Looking at it afresh on a general appeal basis, one needs to look at four classes of evidence.

1. The learned Magistrate accepted the Complainant as credible and rejected the Respondent. An appellate court, not having the advantage of seeing and hearing, could not in the circumstances substitute its view on that finding.
2. Then there was the association evidence. It is acknowledged that if this was equivocal, not as to credibility, but as to inference the Appeal Court is as well placed as the Court of first instance.

There was no suggestion that the three fellow workers were not truthful. Taking into account the number and circumstances of the visits, the evidence of being in Respondent's car and the sharp division between their social classes this was in our view on the authorities marginally available as corroboration, but had there been no other evidence it was probably insufficient to carry that degree of conviction this class of case must have.

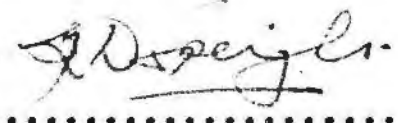
3. The evidence of the mother if believed was conclusive corroboration. Observations already made about the unwillingness indeed impropriety of an appellate court reversing findings of credibility seem to us to put the mother beyond debate - there was powerful corroboration, given acceptance of the testimony.
4. Passing reference was made to physical resemblance between child and putative father. We see no reason to differ from the expression of law by Stuart J. in Hussain Bibi v. Mohammed Aziz Civ. App. 7/76 but we note that the learned Magistrate gave this aspect but fleeting attention and minimal weight, and we agree with that approach in this case.

For all these reasons, as an Appellate Court we would be obliged to uphold the conclusion arrived at in the Magistrate's Court.

Consequently the appeal from the Supreme Court is allowed, the decision of the Magistrate's Court is restored and the Respondent will pay costs for both the Supreme Court and this Court.



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Vice President



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Judge of Appeal