A

KUNJ BEHARI

v.

LORNA HICKS

B

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 23rd, 28th May]

Appellate Jurisdiction

Bastardy—practice and procedure—more than one child included in one summons—validity—nature of bastardy proceedings—submission of "no case to answer"—election—Bastardy Ordinance (Cap. 46) ss.17, 19, 22 (2)—Criminal Appeal Act 1907 (7 Edw. 7, c.23) (Imperial) s.4 (1)—Criminal Procedure Code (Cap. 14) s.300.

C

Evidence and proof—corroboration—bastardy proceedings—opportunity of intercourse—circumstances in which actions and failure to deny paternity may amount to corroboration—appropriate test.

In proceedings to establish paternity of illegitimate children under the Bastardy Ordinance a separate summons should be issued in respect of each child, except in the case of twins or triplets. Nevertheless, the proceedings are civil in nature, and a summons which includes more than one child (not being twins or triplets) is not a nullity, and an appeal therefrom on that ground cannot succeed unless the appellant can show that a substantial miscarriage of justice has resulted.

D

Semble: Though bastardy proceedings are civil in nature the procedure is assimilated to that in criminal proceedings, and a respondent should be permitted to make a submission of "no case to answer" without being put on his election in the matter of calling evidence.

E

Proof of mere opportunity of intercourse does not amount to corroboration of a complainant's evidence but may do so when the opportunity is proved in circumstances which make it likely that intercourse took place.

F

The actions of a respondent in relation to a child and in failing to deny paternity may amount to corroboration if the circumstances are such that the respondent would not be expected to have acted as he did or failed to deny paternity, if he were not the father.

Cases referred to :

G

R. v. Thompson [1914] 2 K.B. 99; 9 Cr.App.R. 252: *Burbury v. Jackson* [1917] 1 K.B. 16; (1916) 25 Cox C.C. 555: *R. v. Berry* (1859) Bell 46; 8 Cox C.C. 121; 169 E.R. 1161: *Thomas v. Jones* [1921] 1 K.B. 22; 124 L.T. 179.

Appeal against orders of a magistrate made under the Bastardy Ordinance.

H

C. Gordon for the appellant.

K. A. Stuart for the respondent.

The facts sufficiently appear from the judgment.

THOMPSON J. : [28th May 1969]—

This is an appeal against findings of paternity in respect of, and orders for contribution towards the maintenance of, two illegitimate children of the respondent, an unmarried woman. The children were born on 3rd July, 1965 and 5th October, 1968, respectively. One complaint was made in respect of both children and one summons issued. The proceedings throughout were in respect of both children. At the end of the complainant's case, learned counsel for the appellant sought to make a submission of "no case;" he was put to his election by the learned trial magistrate in the manner usual for civil actions and elected to make no submission but to adduce evidence. The appellant then gave evidence. The learned trial magistrate found that it had been proved that the respondent was the putative father of both children and ordered him to contribute $5 towards the maintenance of the first child and $3 towards that of the second.

There are six grounds of appeal :

"1. THAT the learned trial Magistrate erred in ruling that the two issues namely *ALEXANDER SHANE HICKS* born on the 3rd day of July, 1965 and *GLEN BOB* born on the 5th day of October, 1968 may be included in one summons under this Ordinance.

2. THAT the learned trial Magistrate erred in ruling that the evidence of the Respondent's brother *JULIAN HICKS* and the evidence of the Respondent's sister *KAY ATCHESON* was corroborative evidence under the Bastardy Ordinance.

3. THAT the learned trial Magistrate erred in ruling that the evidence of the witness *SUBRAMANI* was corroborative evidence under the Bastardy Ordinance.

4. THAT the learned trial Magistrate erred in ruling that the evidence of the Respondent's father *THOMAS HICKS* was corroborative evidence under the Bastardy Ordinance.

5. THAT the learned trial Magistrate had no jurisdiction to order maintenance at $5. 00 (Five dollar) per week for the said *ALEXANDER SHANE HICKS* and therefore the said order is null and void.

6. THAT the learned trial Magistrate wrongly put the Appellant's counsel on election when the Counsel wanted to make a submission of no case to answer."

The first ground has been put to this Court by Mr. Gordon in the terms that "the summons is bad for duplicity." He has drawn attention to the provisions of sections 17 and 19 of the Bastardy Ordinance (Cap. 46) — section 17 reads :

"17. Twins or triplets may be included in one summons under this Ordinance but a separate order shall be made in respect of each child."

Section 19 is in the following terms :

"19. Except as provided for or varied by this Ordinance all procedure including the computation of and other matters with respect to costs shall be as near as may be according to the procedure under the Criminal Procedure Code."

I have little doubt that, except where they are twins or triplets, there should be a separate summons for every child and that the proceedings in this case were incorrectly commenced. However, that is not to say that the proceedings are a nullity. The fact that the procedure to be followed is that prescribed by the Criminal Procedure Code does not mean that all the substantive law relating to the effect of failure to follow the procedure must necessarily apply; these are civil, not criminal, proceedings and it is only the procedure appropriate to criminal cases which has been adopted. Even in criminal cases, however, duplicity in a charge does not necessarily make the proceedings a nullity. In the case of *R. v. Thompson* [1914] 2 K.B. 99 the Court of Criminal Appeal applied the proviso in section 4(1) of the Criminal Appeal Act, 1907, in such a case, holding that, as no embarrassment or prejudice had been caused to the appellant, the conviction should not be quashed "on a mere technicality." By virtue of section 22(2) of the Bastardy Ordinance (Cap. 46), the provisions of the Criminal Procedure Code relating to appeals apply to the present appeal; the Criminal Procedure Code contains in section 300 provisions similar to those in Section 4(1) of the Criminal Appeal Act, 1907.

Even though the proceedings in the magistrate's court were commenced incorrectly, the appellant is not, in my view, entitled to succeed in his appeal unless he shows that a substantial miscarriage of justice resulted therefrom. No attempt was made to show this. The nature of the complaint was perfectly clear to the appellant and his counsel. I am satisfied that no substantial miscarriage of justice has actually occurred. As far as the first ground is concerned, the appeal must fail.

The second and third grounds relate to the evidence accepted by the learned trial magistrate as corroborative of the respondent's evidence concerning the appellant's paternity of the first child. Her brother, Julian Hicks, and her sister, Kay Atcheson, gave evidence that shortly after the child was born the appellant visited the respondent's home, held the baby and kissed it and gave the respondent £5 for the child. Subramani, a taxi-driver, gave evidence of taking the appellant and respondent to an unfrequented dark place at night and leaving them there for 2 hours on two occasions in 1964.

Mr. Gordon has submitted that these two pieces of evidence are not capable of being corroboration of the respondent's evidence. Certainly proof of mere opportunity of intercourse does not amount to corroboration. But it is otherwise when there is proof of opportunity in circumstances which make it likely that intercourse took place. In *Burbury v. Jackson* (1916) 25 Cox C.C. 555 at 558 (cited by Mr. Gordon), Lord Reading C.J. observed "If two persons of opposite sexes were seen going together to some dark or secret place, that might under certain circumstances be corroborative evidence." In the circumstances of this country in the year 1964, it can undoubtedly be corroborative evidence. The learned trial magistrate was, in my view, entitled to regard Subramani's evidence as corroborative of that of the respondent that she was associating with the appellant away from her house and having frequent sexual intercourse with him.

In order to determine whether the evidence of the respondent's brother and sister was corroborative evidence of the appellant's paternity of the child, it is necessary to pose the question "Would any young man, not a

member of the respondent's family, have acted as, according to their evidence, the appellant did, if he were not the father?" The respondent gave no account of why he acted in that manner but denied doing so. I am fortified in taking this view by the decision in *R. v. Berry* (1859) 1 Bell C.C. 46 where payment of money by the father within 12 months of the child's birth was held to be corroboration of his paternity. If the brother and sister are believed and the appellant is not, the only reasonable conclusion to be drawn is, in my view, that he acted as he did because he was the father of the child. The evidence was, therefore, properly treated by the learned trial magistrate as corroborative evidence. The appeal cannot succeed, therefore, on the second and third grounds.

The fourth ground relates to the evidence of the respondent's father, Thomas Hicks, that, after the second child was born, he went to the appellant and asked him what he was going to do about the child and the respondent and that the appellant then, and on two subsequent occasions, simply told him to go and see his uncle. This was the only evidence about the second child apart from the respondent's own evidence.

The basis on which the learned trial magistrate has accepted this evidence as corroborative of the respondent's is that, if the appellant had not been the father of the child, he would simply have denied paternity and would not have told Thomas Hicks to go and see his uncle. The judgment is not based on any finding that the appellant lied to Thomas Hicks but on what was regarded by the magistrate as being his tacit admission. Failure to deny an allegation may, depending in the circumstances, amount to an admission. The case of *Thomas v. Jones* [1921] 1 K.B. 22 cited by Mr. Gordon is not on this point.

Once again, on the basis that the respondent's father has told the truth and the learned trial magistrate's finding to that effect is not challenged in the grounds of appeal — the proper test of whether or not his evidence amounts to corroboration of the respondent's appears to be: "Would the appellant have acted in that manner if he were not the father of the child?" A man who was not the father could be expected to deny paternity in such circumstances; nor would he tell the girl's father to go and see his uncle unless there was some question to be discussed about the appellant's liability for the child. The learned trial magistrate, in my view, rightly treated the evidence of the respondent's father as corroboration of the respondent's own evidence. The appellant cannot succeed therefore, on the fourth ground.

With regard to the fifth ground, Mr. Stuart has agreed that the magistrate had no power to order the appellant to pay more than $3 a week. The original order was invalid insofar as is fixed the amount to be paid weekly in excess of that sum. The appellant is entitled to have the order set aside; this court can, under the provisions of section 300 of the Criminal Procedure Code, substitute for the order set aside one for payment of an amount not exceeding $3 a week.

The sixth ground raises a question of some doubt. In civil actions, a defendant seeking to submit at the close of the plaintiff's case that no prima facie case has been established should normally be put to the election either to make his submission or to adduce evidence in support of his own case. Bastardy proceedings are civil proceedings (*R. v. Berry*) although they have always been regarded as being to some extent akin to

criminal proceedings. The Bastardy Ordinance specifically provides that all procedure shall be as near as may be according to the procedure under the Criminal Procedure Code. That Code does not make specific provision for the accused person or his counsel to make a submission of "no case" and then to go on to make a defence and adduce evidence but that is the established practice.

As the procedure is assimilated to that in criminal proceedings, the defendant in bastardy proceedings should, in my view, be permitted to make a submission of "no case" and, if that submission fails, to make a defence. The fact that a defendant's counsel was wrongly put on to his election may be a reason for allowing an appeal. This would normally be so where the submission was made and rejected, as the defendant in such a case would have been deprived of his right to make his defence. But where no submission has been made and, if any had been made, it would clearly have been rejected, the defendant has suffered no injustice or even embarrassment by the fact that his counsel was prevented from making the submission. The present case is of such a nature; the evidence adduced by the respondent was sufficient, if believed, to establish her case prima facie. It is clear from the judgment that the respondent and her witnesses had impressed the learned trial magistrate favourably; he would undoubtedly have rejected any submission that no prima facie case had been established. No substantial miscarriage of justice has occurred; the proviso to Section 300 of the Criminal Procedure Code should be applied.

Except in respect of the quantum of the contribution to be paid by the appellant towards the maintenance of the child Alexander Shane Hicks, the appeal fails on every ground and is dismissed. The order for contribution towards the maintenance of Alexander Shane Hicks is set aside and there is substituted therefor the following order:

"The appellant to pay $3 per week, commencing on 28th February, 1969, towards the maintenance of Alexander Shane Hicks."

The appellant is to pay the respondent $50 costs in respect of this appeal.

Appeal dismissed (except as to quantum).