A

MOHAMMED SHARIF

v.

B **SALIMAN**

[SUPREME COURT, 1969 (Thompson Ag. P.J.), 15th, 29th August]

Appellate Jurisdiction

Bastardy—evidence—admissibility—evidence to contradict testimony of party on a collateral matter—general rule—exceptions—evidence by neighbour that parties living together as husband and wife—whether evidence of opinion—Criminal Procedure Act 1865 (28 & 29 Vict., c.18) (Imperial) s.6.

C

Practice and procedure—evidence admitted at trial—rejected after judgment reserved and case re-opened—magisterial trial—procedure not irregular.

In a paternity suit brought by the respondent in respect of illegitimate twin children born to her in 1967, the appellant called two witnesses D to give evidence that the respondent had given birth to another illegitimate child in 1957; the respondent in cross-examination had denied having given birth to any such child. After reserving judgment the magistrate called the case on again, and having heard counsel, decided that the evidence in question had been wrongly admitted; he disregarded it in deciding the issues in his judgment.

E *Held*: 1. There being no assessors or jury the procedure adopted by the magistrate was not irregular.

2. In the absence of any suggestion that the appellant was the father of the child allegedly born in 1957, and the event being not recent enough to show the respondent to be of generally immoral character, the evidence was merely collateral to the issues to be decided.

F 3. The evidence did not fall with any of the recognised exceptions to the general rule that evidence is inadmissible to contradict answers given to questions on collateral matters, and the magistrate's decision to exclude it was correct.

Per curiam: Evidence by a close neighbour that parties were living together as husband and wife for a lengthy period is not a mere statement G of opinion but of a fact known and self evident to the neighbours.

Case referred to: *Attorney-General v. Hitchcock* (1847) 1 Exch. 91; 154 E.R. 38.

Appeal against orders made by the Magistrate's Court in a paternity suit.

H *S. M. Koya* for the appellant.

S. Prasad for the respondent.

The facts sufficiently appear from the judgment.

THOMPSON J.: [29th August 1969]—

This appeal is against a finding that the appellant is the putative father of the respondent's illegitimate twin children born on 10th April, 1967, and an order to pay her 15/- per week for the maintenance of each of the children.

The respondent's case was that she and the appellant are cousins; that about 1964 she became the appellant's de facto wife and that from then until about the end of 1966, she lived with him as his wife at his home. She alleged that the twin children were the issue of that union. She said that she was driven out of the appellant's home when she was four months pregnant. The appellant's case was that the Respondent at no time lived with him as his wife, that he never had any sexual relationship with her and that consequently he was not the father of the children.

The respondent herself gave evidence in the course of which she denied a suggestion put to her in cross-examination that in about 1958 she gave birth to another illegitimate child. She called two witnesses, the first of them, Jaitul Nisha, gave evidence that she lived 8 to 10 yards from the appellant's house and that the appellant and the respondent lived there as husband and wife. She said that the respondent came there "about 4 or 5 years ago" and that when she left she was pregnant. The second witness, Ganesh Singh gave evidence that the appellant and the respondent worked for him and that the appellant told him that if the respondent came to him for money, he was to give it to her.

The appellant gave evidence that the respondent never lived with him as his wife, that he never worked for Ganesh Singh and that he never sent the respondent to Ganesh Singh to get money. He said also that Jaitul Nisha lived about 3 to 4 chains from his house, not 8 to 10 yards. He then called the witnesses. The first of them, Salamma, gave evidence that she acted as midwife when the respondent gave birth to a child in about 1957. The second witness, Roop Ram, also gave evidence that the respondent gave birth to a child in about 1957 and said that although he was a regular visitor to the appellant's house in the years 1966 and 1967, he never saw the respondent there. The third witness was a sirdar of the cane-cutting gang in which the appellant worked. He gave evidence that in 1966 he visited the appellant's house once or twice a month and did not see the respondent there.

There are three grounds of appeal :

(a) that the learned trial Magistrate erred in holding that the evidence of *SALAMMA* daughter of Narayan Sami was inadmissible in law;

(b) that the learned trial Magistrate erred in accepting the evidence of the respondent;

(c) that there is no evidence in law to corroborate the plaintiff's evidence that the appellant was the father of the children.

With regard to the third ground of appeal, Mr. Koya has submitted that, when Jaitul Nisha gave evidence that the appellant and the respondent were living together as husband and wife, she was merely expressing an opinion and that she should have given the facts on which she based her opinion. There might have been some force in this submission if Jaitul Nisha's evidence had been of seeing the parties living

together at the respondent's home on only one or two occasions. The appellant, however, admitted that she was a close neighbour. Where a close neighbour gives evidence that a couple are living together as husband and wife for a lengthy period, that, in my view, is a statement not of mere opinion but of a fact known and self-evident to the neighbours.

Mr. Koya submitted also that the cohabitation referred to by Jaitul Nisha was not necessarily that referred to by the respondent. Her evidence varied slightly from that given by the respondent; the dates given by the respondent indicated that she lived with the appellant for two or three years, whereas Jaitul Nisha said that they lived together for about four years. Both, however, were quite obviously referring to the same period from about 1964 onwards. Jaitul Nisha's evidence that the respondent was pregnant when she left the house leaves no doubt that both witnesses were referring to the same period of cohabitation.

Mr. Koya has also submitted that evidence of mere opportunity to indulge in sexual intercourse is not sufficient to amount to corroboration in an affiliation case. That is a sound, well-established proposition. In this case, however, the facts go far beyond mere opportunity; one of the recognised characteristics of the relationship of husband and wife, whether that relationship be *de jure* or *de facto*, is that the parties sleep together and have sexual intercourse with one another. In my view the evidence of Jaitul Nisha affords corroboration in a material particular. The third ground of appeal, therefore, must fail.

With regard to the second ground of appeal, Mr. Koya has submitted that the learned trial magistrate's findings are unsatisfactory because he has not stated his reasons for accepting the evidence of the respondent and her witnesses and rejecting the evidence of the appellant and his witnesses. No doubt it is most desirable that a magistrate should state clearly why he believes the evidence of one witness and rejects that of another but there is no requirement of law that he should do so. What the judgment needs to show is that the magistrate has not overlooked any of the evidence and that he has evaluated all of it before deciding which to accept and which to reject. In many cases where the evidence of the witnesses of one side is completely at variance from the evidence of the witnesses on the other side, much must depend on the impression made upon the trial magistrate by the witnesses and the manner in which they gave their evidence. In such cases there is little that the magistrate can say beyond the fact that, having given careful consideration to all the evidence and the manner in which it was given, he has decided that the witnesses on one side have told the truth and that those on the other side have lied. This appears to be such a case. There are no fatal inconsistencies in the evidence of the witnesses on either side, nor anything inherently improbable. It is clear from the judgment that the learned trial magistrate did evaluate the evidence even though he did not state the reasons for his conclusions on the credibility of the witnesses. Accordingly the second ground of appeal must fail.

With regard to the first ground of appeal the trial followed a rather unusual course. The witnesses Salamma and Roop Ram both gave evidence without objection from the respondent's counsel that the respondent gave birth to an illegitimate child in about 1957. Subsequently, after he had adjourned the case for judgment, the trial magistrate entertained

a doubt whether this evidence should have been admitted. He therefore called the case on again and invited counsel to address him on the question of its admissibility. In his judgment he dealt with this point; he decided that the evidence had been wrongly admitted. In consequence he disregarded it in deciding the issues in the case.

Mr. Koya submitted as the first limb of this ground of appeal that once the evidence was admitted, it could not properly be disregarded. I am unable to accept this submission as correct. From time to time cases arise in which it is found that evidence already admitted should not have been admitted. Where the trial is before a judge assisted by assessors it is then often necessary to discharge the assessors and to recommence the trial with new assessors. Where the court consists of a judge or magistrate sitting without assessors, however, the evidence can, in most cases simply be deleted from the record so that, when he is preparing the judgment, the judge or magistrate disregards it entirely. In this case the learned magistrate did not specifically order that the evidence which he held inadmissible should be deleted from the record but he prepared his judgment on the basis that it in fact no longer formed part of it. In my view, this does not afford any ground for setting aside the judgment as irregular in any way.

The second limb of the third ground of appeal is that the evidence was admissible and that the learned magistrate was wrong in holding that it should not have been admitted. Mr. Koya accepted that there was a general rule that, where a witness have given evidence on a matter merely collateral to the issues to be decided in the case, evidence cannot be adduced to contradict him. But he submitted first that the evidence in question was not merely collateral and second that, even if it was, it was within one of the classes recognised as exceptions to the general rule.

There was no suggestion that the appellant was the father of the child allegedly born to the respondent in 1958. Nor was that alleged event recent enough to show that the respondent was of generally immoral character, likely to have had sexual intercourse with other men at a time when she was cohabiting with the appellant as his wife. It was not, therefore, a matter directly in issue in the proceedings; it was a collateral matter.

It remains to be decided whether or not it fell within a class excepted from the general rule against the admissibility of evidence to contradict answers given to questions on collateral matters. *Pollock C.B. in A-G v. Hitchcock* (1847) 1 Exch. 91 at 100, observed "A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other..... It is certainly allowable to ask a witness in what manner he stands affected towards the opposite party in the cause, and whether he does not stand in such a relation to that person as is likely to affect him, and prevent him from having an unprejudiced state of mind..... If he denies that, you may give evidence as to what he has said, not with a view of having a direct effect on the issue, but to show what is the state of mind of

that witness." This is the basis of the first exception from the general rule, namely that evidence can be adduced to contradict a denial by a witness, if it tends to show that he is biassed towards or against one of the parties.

The second exception arises from the provisions of the English Criminal Procedure Act, 1865, section 6, which has been adopted in Fiji. That section provides for the previous conviction of a witness to be proved, if denied by him.

There are two other exceptions, described by Professor Cross at page 219 of the 3rd edition of his text-book on Evidence as "well recognised". These are :

(1) evidence of a previous contradictory statement;

(2) evidence that the moral character or physical condition of the witness is such as to militate against his telling the truth.

The alleged fact of the birth of an illegitimate child to the respondent in 1958 certainly did not tend to indicate bias on her part against the appellant. The evidence adduced to contradict the respondent's evidence denying the birth was not evidence of a previous inconsistent statement.

Finally, the fact that the respondent gave birth to an illegitimate child in 1958, standing alone without any other evidence of bad moral character in later years, does not tend to show that her moral character in 1968 was such as to militate against her telling the truth about the paternity of the illegitimate twin children the subject of the present proceedings.

In my view, therefore, the evidence to contradict the respondent's reply to the question about the child allegedly born in or about 1958 was not admissible and was properly disregarded by the learned trial magistrate. The first ground of appeal must accordingly fail.

The appeal is dismissed. The appellant is to pay the respondent's costs of this appeal, to be taxed if not agreed.

Appeal dismissed.