

AT LAUVOKE

Appellate Jurisdiction
Civil Appeal No. 11 of 1977

000354

BETWEEN: EMA TAWAKE Appellant

-and-

ARJUN SINGH Respondent
s/o Megh Narayan

Mrs. M.E. Billeam, Counsel for the Appellant
Mr. A. Kuver, Counsel for the Respondent

JUDGMENT

This is an appeal against the refusal of the Magistrate at Sigatoka to make an affiliation order in favour of the appellant. It is a matter for remark that the complaint was filed as long ago as 13th January 1975. That is over three years ago, and the fact that there were no fewer than eighteen adjournments before the matter came to hearing on 22nd April 1977 reflects no credit upon the solicitors concerned or upon the various Magistrates who have been responsible for the Sigatoka Court.

The child in respect of which the affiliation order is sought, was born on 9th May 1974, and if the normal order was followed, and there is no evidence that it was not, sexual intercourse might have been expected to have taken place some 275 or 280 days earlier. That would be early in August 1973. The complainant said that she had been intimate with the respondent for some time, and he admitted that he had sexual relations with her as far back as 1971 and also in 1972. He admitted intercourse with her on 3rd August 1973 at Nadi, and again in September and possibly in October. He also admitted that he had sex with the complainant after her child was born, and in December 1973 he sent her a gift cheque for \$5.

There is no doubt that the admission of the respondent that he had intercourse with the complainant at or near the relevant time constituted corroboration of the girl's story, and that there was sufficient evidence there to enable the Magistrate, had he seen fit,

to make an order. See *Simpson v Collinson* (1964) 1 AER 262.

However, the learned Magistrate formed an unfavourable opinion of the complainant's veracity and he found that she was promiscuous and he declined to make an order. The complainant in her appeal alleges that evidence was received by the Magistrate which was in fact inadmissible, and which she says was weighed against her. It becomes, then, necessary to examine the evidence.

I will start with the evidence on behalf of the respondent. The record gives me the impression that the respondent himself was for the most part truthful. His evidence was supported by that of Bala Krishna, Jagdishwar Sharma, Sanjeu Reddy, and Randhir Singh. Bala Krishna testified that on 3rd August 1973 he went with three other men and the complainant to Nadi and that there he saw the complainant lying on the ground with one of the men apparently having sexual intercourse with him. That would be about 11.30 p.m. Although counsel for the respondent cross-examined the complainant about the journey from Sigatoka to which Bala Krishna testifies, no question was put to her about this alleged sexual intercourse. In these circumstances Bala Krishna's evidence was quite unworthy of credence. Then Jagdishwar Sharma testified that on Sunday night 5th August 1973 he slept with the complainant. Here again, it was not suggested to her that she had intercourse with Jagdishwar at Nadi, although it does seem to have been put to her generally as to whether she had intercourse with anyone else save respondent, and she admitted having relations with Jagdishwar after her child was born. This allegation of sexual relations with Jagdishwar in Nadi should have been put to her fairly and squarely. She was not cross-examined at all about the fact that she was alleged to have slept with Jagdishwar on the Sunday night, and that respondent saw them in the same bed. In this connection I refer to the words of Lord Herschell L.C. in *Browne v Dunn* (1894) 1 R 67,

"It seems to me absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made and not to take his evidence and pass it by as a matter altogether unchallenged, and then when it is impossible for him to explain, as if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses."

Then there was Sanjeu Reddy. The only relevant evidence which he gave - and it had been put to and denied by the complainant - was that she told him that Jagdishwar was the father of the child. Unfortunately he was allowed to give irrelevant and highly prejudicial evidence to the effect that he had often had intercourse with her starting from about 1971 and as recently as two or three months before the hearing of the complaint and that he had seen another person with her in the sugar cane, the inference being that she was having sex with that person. None of this was put to the complainant. The relevant evidence was that about four months after the child was born she said that it was Jagdishwar's child. A month later she said that it was respondent's. Her complaint, alleging that it was respondent's child was made eight months after the child's birth. The learned magistrate made no finding at all on this highly important piece of evidence. Randhir Singh gave evidence about having seen the complainant having sex with one Munendra. This again was not put to the complainant. This evidence and that of Sanjeu Reddy was quite inadmissible. see *R v Gibbons* (1862). IX Cox C.C. 105. The law on this subject is summed up by a short passage in 4 Hals. Volume 1 paragraph 633 where the learned author says

"In cross-examination the mother may be questioned as to her connection with other men but her answer may not be contradicted (see *R v Gibbons* 1862) cit supra), except where it is sought to shew that another man might be the father of the child see *Garbutt v Simpson* (1863) 32 L.J.M.C. 186."

The question which I have to consider is whether the Magistrate by accepting all this irrelevant and inadmissible evidence has disqualified himself from considering what is really the only germane question, whether Jagdishwar might be the father of the child. Here it is of the utmost importance that the respondent's case on this subject should have been put to complainant. It was not, and in my view the evidence of Jagdishwar should not have been received, much less accepted. If I were to deal with the matter simply on this basis, I would allow the appeal and make an order in favour of the complainant.

However, although the trial is manifestly unsatisfactory in the matters to which I have alluded, and although the complainant's evidence cannot be properly assessed until the allegations of the August week-end are put to her in some particularity, I have come to the conclusion that the Magistrate's rejection of the picture she painted that the respondent alone had sexual relations with her around the period of the child's conception necessitates a fresh hearing.

For that reason I take the view that this matter should be remitted to the Magistrates' Court for rehearing, and in view of the learned Magistrate's findings against the character of the complainant, the hearing should be before another Magistrate. I would also express the hope that the hearing should take place a great deal more speedily than the last. A great deal of the evidence to which I have referred as inadmissible should have been objected to by counsel for the complainant, and for that reason there will be no order as to costs.

LAUTOKA,
3rd February, 1978.

(sgd.) K.A. Stuart
JUDGE