THAVANAYAKI

v.

MAHALINGAM

SUPREME COURT
SHARVANANDA, J., WIMALARATNE, J.,
& RATWATTE, J.,
S. C. APPEAL NO. 64/80
C. A. APPEAL NO. 741/78
M. C. POINT PEDRO NO. 14572
NOVEMBER 6, 1981

Maintenance — Marriage by Hindu rites — Paternity — Maintenance for applicant — maintenance for child —Corroboration s. 6 of Maintenance Ordinance — s. 157 of Evidence Ordinance.

The failure of the applicant to establish a marriage by Hindu rites can affect only her claim for maintenance but this will not entail automatic rejection of the evidence in regard to paternity.

It is well settled that the requirement of s. 6 of the Maintenance Ordinance that in order to justify the award of maintenance, the evidence of the mother should be corroborated in some material particular by "other evidence" is satisfied by any kind of corroboration admissible in law, including previous statements made by the mother to third persons and admissible under s. 157 of the Evidence Ordinance subject of course to the limitations stipulated in that section that such statements are made at or about the time the sexual intimacy was continuing between the parties.

The corroborative value of such previous statements can of course be of varying character dependent upon the circumstances of each case.

What is required in a maintenance case is that the totality of such items of corroborative evidence must be such as to satisfy the Magistrate that the evidence of the mother that the child begotten has been the result of her intimacy with the respondent is the truth and nothing but the truth. The corroborative evidence should be to the satisfaction of the Magistrate. The evidence of opportunity, the evidence of previous statements and the evidence of the conduct of the respondent can constitute satisfactory corroboration.

Cases referred to:

(1) Angohamy v. Kirinelis Appu (1911) 15 NLR 232.
(2) Ponnammah v. Seenithamby (1921) 22 NLR 395.
(3) Mahesan v. Chellammah (1939) 19 CL Rec 31.
(4) Wijeratne v. Kusumawathie (1948) 49 NLR 354.

APPEAL from Judgment of the Court of Appeal.

A. Thevarajah for applicant-appellant.
V. S. A. Pullenayagam for respondent-respondent.

Cur. adv. vult.

December 1, 1981.
WIMALARATNE, J.

The applicant claimed maintenance from the respondent alleging that they were married according to Hindu customary rites, that a female child Imayalini was born on 28.1.76 and that the respondent who was the father of the child failed to maintain them. The respondent denied marriage and paternity. At the trial the applicant failed to establish a marriage according to Hindu rites, but led evidence to show that she lived in the respondent's house on terms of intimacy for about six years before the child was born. The learned Magistrate, whilst refusing her application for maintenance for herself, held that her evidence of intimacy with the respondent was corroborated in material particulars by other evidence to his satisfaction, and ordered a sum of Rs. 50/- per month as maintenance for the child.

The respondent appealed, and the Court of Appeal allowed his appeal for the reason that the Magistrate, in attempting to answer the question regarding the paternity of the child, "starts on a false premise that the applicant's position was that she was factually married, and she had a belief that there was a *de facto* marriage. There was no justification for this assumption." The Court of Appeal also formed the view that there was no satisfactory evidence to corroborate the evidence that she and the respondent were on terms of intimacy, and that the child was begotten in consequence.

Learned Counsel for the applicant-appellant had contended that the Court of Appeal has erred on both matters, and it seems to us that Counsel's contention ought to prevail. It is true that the applicant came to court alleging that she was factually married to the respondent according to Hindu rites. It is because she failed to establish such marriage that the Magistrate refused her application for maintenance for herself. But it does not necessarily follow that her evidence that she was on terms of intimacy with the respondent in the belief that she was married ought automatically to have been rejected, for to do so would be to penalise an innocent child in whose favour maintenance was claimed. The learned Magistrate has not assumed a *de facto* marriage. On the contrary he has proceeded to determine the question as to whether applicant and respondent were on terms of intimacy, and has thereafter looked for corroboration of her evidence. It is therefore necessary to determine whether the Magistrate was justified in accepting the applicant's evidence.

Briefly the facts are these. The applicant is the youngest daughter of one K. Kandasamy, whose wife died about 1969. As her other brothers and sisters were married and living separately, she was looked after by her mother's brother Thamotherampillai who resided in the adjoining house with his wife and two unmarried sons, the younger of whom was Mahalingam, the respondent. She was about 16 years and Mahalingam who was about 20 was yet a student but was also helping his father in his cultivation. Although a common fence separated the two houses, a gate provided easy access from one house to the other. The applicant stated that it was her uncle Thamotherampillai who after her mother's death invited her to live in their house on the promise that Mahalingam would be married to her, and that Mahalingam's parents accepted her as their daughter-in-law. Having seen and heard both the applicant and Mahalingam in the witness box the learned Magistrate has accepted the evidence of the applicant. He has expressed the view that "considering the relationship between the parties her (the applicant's) failure to prove a valid marriage in keeping with modern law does not make her a liar and thereby destroy her genuine belief that she was married to the respondent," because according to ancient Hindu custom where a girl thinks that another person is her husband and if there is an understanding between them they were considered validly married. It seems unnecessary for present purposes to embark upon an analysis of the requirement of a valid marriage according to ancient customs among the Hindus. It would suffice to note that after seeing and hearing the witnesses the Magistrate was quite satisfied that the applicant was virtually living in both houses, that she was treated as their daugther-in-law by the respondent's parents, and that she and the respondent lived together as husband and wife for a period of about six years before the child was born.

Having accepted the applicant's evidence of the fact of intimacy with the respondent the learned Magistrate has looked for corroboration "in some material particulars to his satisfaction" as required by section 6 of the Maintenance Ordinance (Cap. 91). There was no direct evidence of corroboration of the fact of intimacy but three items of circumstantial evidence appear to have satisfied the Magistrate. They were evidence of opportunity, evidence of previous statements made by the applicant to others and evidence of the conduct of the respondent and of her mother.

The applicant's evidence, that she virtually resided in the respondent's house received corroboration from two independent witnesses, Chandrasekera, a teacher who was a stranger, and

Nagaratnam, a farmer who lived close by. Their testimony was believed by the Magistrate, and their evidence went a long way to show that the applicant was very often in the respondent's house. The applicant and respondent were of marriagable age, and related as first cousins. In fact the respondent's elder brother was at the same time engaged to be married to the daughter of another brother of Thamotherampillai. The respondent produced some householder's lists according to which the applicant's name appeared as a member not of Thamotherampillai's household but of her father Kandasamy's. The Respondent said in evidence that after her mother's death the applicant resided in a different village, Atchuvely from 1969 to 1976, and that for about 8 or 9 years he had not even spoken to her. The Magistrate has disbelieved the respondent, and it would be wrong for an Appellate Court on a reading of the depositions alone to reverse a Magistrate's finding on a question of fact of that nature.

The second item of corroboration consists of certain previous statements made by the applicant. The Magistrate has believed that when she was pregnant the applicant told the respondent that she was pregnant by him, and that the respondent told her that "somehow or other he will accept me in January (1976)". She also told the respondent's mother of her condition, and the mother took her to a native physician and obtained medicine for the purpose of destroying the foetus. On 11.11.75 she was seven months pregnant. When she informed her father he drank an insecticide and committed suicide because of the disgrace she had brought upon the family. On that date the respondent and his brothers and parents had joined in driving her out of their house. An inquest was held on the death of Kandasamy. The applicant told the coroner in evidence that she had been on terms of intimacy with the respondent for 8 months.

Learned Counsel for the respondent has attacked the receipt by the Magistrate as corroboration of any previous statements made by the applicant, and has contended that if such previous statements are not acted upon, then there is no evidence to corroborate the applicant's evidence in any material particulars.

It is often said that a witness cannot corroborate himself. Hence there is an old general rule in English Common Law under which a witness may not be asked in chief whether he has formerly made a statement consistent with his present testimony. He cannot narrate such statement if it was oral, or refer to it if it was in writing (save for the purpose of refreshing his memory) and other witnesses may not be called to prove it -- see *Cross on Evidence*

(506 Ed) 236. Two reasons for this rule have been adduced. One is the ease with which evidence of this nature could be manufactured; the other is that this type of evidence would be superfluous, for the assertions of a witness are to be regarded in general as true, until there is some particular reason for impeaching them as false.

When the British introduced the Indian Evidence Act, No. 1 of 1872 and the Ceylon Evidence Ordinance, No. 14 of 1895, they departed from this rule and incorporated section 157, in terms of which "in order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, may be proved". One notes the care and precautions which the framers have adopted in order to overcome the possibility of fabrication. The previous statement had to be either one made "at or about" the time when the fact sought to be corroborated took place or had to be made before a "competent authority."

In an early case, that of *Angohamy v. Kirinelis Appu* (1911) 15 NLR 232[1], Wood Renton, J. expressed the opinion that when section 7 (present section 6) speaks of the corroboration of the evidence of the mother it must be taken to include any kind of corroboration. In other words section 157 of the Evidence Ordinance applied to section 7 of the Maintenance Ordinance. Having certain doubts about this view Shaw, J. referred "the very important point" as to whether previous statements made by the mother of an illegitimate child to third persons as to the paternity of the child are sufficient corroboration for the purpose of satisfying the requirements of section 7 of the Maintenance Ordinance, to a full Court. A Full Bench comprising Bertram, C. J., Ennis and de Sampayo, J.J. in the case of *Ponnammah v. Seenithamby* (1921) 22 NLR 395[2], whilst not agreeing with the Magistrate that the statement made by the girl to the mother and afterwards to the local Headman, can be considered as being made at or about the time of the intimacy, Bertram, C. J. expressed the view that "if a statement is made at or about the time when sexual intimacy is continuing between the parties, then it seems to me that under section 157 of the Evidence Ordinance, a statement by the woman to another person alleging that intimacy is corroboration within the meaning of the section." Commenting on the view taken by Wood Renton, J. that section 157 of the Evidence Ordinance applied to section 7, Bertram, C. J. stated "and that, I take it, must be accepted as the law" at p. 398.

One would have thought that the Full Bench decision settled the law as to the admissibility of previous statements as corroboration of the mother's evidence. But twenty years later Nihill, J. in *Mahesan v. Chellammah* (1939) XIX C.L. Rec. 31[3] characterised as "difficult" the question of the admissibility of the girl's statement to her mother. With respect, any difficulty had been resolved by the Full Bench in 1921 and the difficulty seen by Nihill, J. did not arise. It seems to me that the law is well settled after the Full Bench decision, and that is, that the requirement of section 6 of the Maintenance Ordinance that in order to justify the award of maintenance, the evidence of the mother should be corroborated in some material particulars by "other evidence" is satisfied by any kind of corroboration admissible in law, including previous statements made by the mother to third persons and admissible under section 157 of the Evidence Ordinance, subject of course to the limitations stipulated in that section.

The corroborative value of such previous statements can of course be of varying character, dependent upon the circumstances of each case, for a person may equally persistently adhere to falsehood once uttered, if there be a motive for it. Previous statements would only constitute one type of corroborative evidence. There can be several others, too numerous to enumerate. What is required in a Maintenance case is that the totality of such items of corroborative evidence must be such as to satisfy the Magistrate that the evidence of the mother that the child begotten has been the result of her intimacy with the respondent is the truth, and nothing but the truth. As Basnayake, J. (as he then was) pointed out in *Wijeratne v. Kusumawathie* (1948) 49 NLR 354[4]:– "In considering in appeal the question of corroboration under section 6 of the Maintenance Ordinance, I think the court, should give due weight to the words 'to the satisfaction of the Magistrate.' These words in my view require that, if there is evidence which if believed supports the Magistrate's conclusion that the mother of the child is corroborated in some material particular, this Court should not on a reading of the depositions interfere on the mere question of the degree of corroboration" at p. 355.

One notes the care with which the Magistrate has given the benefit of all reasonable doubts to the respondent. He has, for example, not taken into account the evidence of the applicant given before the coroner on 11.11.75 on the ground that it was not a statement made "at or about" the time of the intimacy, whereas it was, because the Magistrate had accepted her evidence that she was living in the respondent's house up to that day.

The third item of corroborative evidence is the conduct of the respondent. When she informed him of her pregnancy he promised "somehow or other to accept her in January." That evidence as well as the evidence that the respondent's mother took the applicant to a native physician has been believed by the Magistrate. One could not expect the applicant to have called the respondent's mother, for that may have been disastrous to her own case. On the other hand the respondent ought to have contradicted that evidence by calling his mother as a witness.

To sum up, it would appear that although the applicant failed to establish a marriage according to Hindu custom, she did convince the Magistrate that she lived with the respondent for a period of six years, and that the child Imayalini was born as a result of their intimacy. The Court of Appeal therefore erred when it rejected the Magistrate's finding of fact, for in reaching that conclusion the Magistrate had not gone on any assumption of marriage, but had considered the evidence of their relationship independently. The Court also erred when it said that the Magistrate had misdirected himself on the matter of corroboration. The Magistrate was satisfied that the evidence of opportunity, the evidence of previous statements and the evidence of the conduct of the respondent constituted satisfactory corroboration of the applicant's evidence. The Court of Appeal was not justified in disturbing those findings of fact.

For these reasons I would allow this appeal, and restore the order made by the Magistrate awarding the applicant a sum of Rs. 50/- per month as maintenance in respect of the child Imayalini. The applicant will also be entitled to the costs of this appeal which I would fix at Rs. 500/-.

SHARVANANDA, J. — I agree.

RATWATTE, J — I agree.

Appeal allowed.