HARAMANIS
v.
SOMALATHA

COURT OF APPEAL
JAYASURIYA, J.
C.A. NO. 47/90
M.C. TELDENIYA – PANWILA
CASE NO. 13652/MAINTENANCE
SEPTEMBER 25, 26 AND OCTOBER 31, 1997

Maintenance – Illegitimate child – Independent corroboration – Section 157 of the Evidence Ordinance – False evidence of defendant as corroboration – Statement of applicant as corroboration.

Held:
In an application for maintenance for an illegitimate child the evidence of her father stating that applicant and defendant lived in the same house and the deliberate and intentional falsehoods uttered by the defendant throw an altogether incriminating and sinister complexion on the evidence of opportunity for intercourse. The deliberate and intentional falsehoods advanced in strength, substantiated and corroborated the applicants evidence in material particulars and weakened the defendant's case.

Where a party litigant intentionally utters a falsehood in court, such falsehood weakens his case and advances in strength the case of his adversary. Lies uttered by a party could amount to corroboration of the case of his adversary.

The statement of the applicant that up to a month before the birth of the child which took place on 24. 12. 87 the defendant had sexual intercourse with her and he was living with her as his mistress on the promise of marriage until he deserted her on 11. 10. 87 is corroboration within the ambit of section 157 of the Evidence Ordinance inasmuch as "the statement was made at or about the time when the fact took place". This statement though emanating from the applicant

could be looked upon as corroboration as her evidence. The test is whether it was made as early as could reasonably be expected in the circumstances and whether there was or was not time for tutoring and concoction. It is a question of fact depending on the attendant circumstances of the case. No hard and fast rule can be laid down as to when a statement is sufficiently contemporaneous.

The applicant's father testified that when he came to hear of her pregnancy he had questioned the defendant who admitted he was responsible for the pregnancy and would marry the applicant was held by the Magistrate to be trustworthy and credible.

Cases referred to:

1. *Hobs v. Tinling* (1929) 2 KB 1, 22.
2. *Popovic v. Derks* 1961 VR 413, 433, 429-430.
3. *Rex v. Lucus* (1981) 2 All ER 1008.
4. *Karunanayake v. Karunasiri Perera* (1986) 2 Sri LR 27, 83.
5. *Mawaz v. Regina* (1967) 1 All ER 80, 82-83.
6. *Ariyadasa v. The Queen* 70 NLR 3.
7. *Thavanayaki v. Thamotheram Mahalingam* SC 64/80 CA 741/78 MC Point Pedro 14572/M.
8. *Ponnamma v. Seenithamby* 22 NLR 395.
9. 39 CLW 31.

APPEAL from the Magistrate's Court of Teldeniya – Panwila.

Rohan Sahabandu for defendant-appellant.

D. P. Mahinkande with *Preethika Sakalasuriya* for applicant-respondent.

Cur. adv. vult.

December 05, 1997.

JAYASURIYA, J.

The learned Magistrate of Teldeniya, in a carefully considered judgment delivered on 6. 3. 90, ordered the defendant-appellant to pay maintenance for the illegitimate child, Malagekumburegedara Dhammika Kumari at the rate of Rs. 500 per mensem and the order was directed to take effect from the 29th of January, 1988. In support of the

applicant's petition claiming maintenance for the said child, the applicant, a relation, Rajapakse Mudiyanselage Udagedara Jinadasa, her relation Malagekumburegedara Upananda, her father Samel, her elder brother Wijepala have given evidence before the Magistrate on her behalf. The birth certificate evidencing the birth of the said child on 24. 12. 87 has been produced marked E1. The applicant's complaint and statement to the police made on 29. 10. 87 has been marked as E2 and the statement in reply made by the defendant on 6. 11. 87 has been produced on behalf of the defendant marked X1.

The defendant has given evidence at the inquiry before the Magistrate and he has also adduced the evidence of his elder brother, Malagekumburegedara Jinasena before the learned Magistrate.

The applicant in her evidence has stated that in 1985, on the invitation of the defendant and his relations, she went over to the defendant's house and resided in that house to look after and nurse and to attend to the needs of the defendant's aged and sick parents. She has stated that she was related to the defendant and she was in the habit of referring to him as her "bappa" and the defendant referred to her as "wedimal duwa". She has stated that her own parents' house is situated in very close proximity and words spoken loud in one house could be heard in the other house as they were so closely situated. In her evidence she has stated that the defendant's mother succumbed to her illness and died in November, 1986. She has stated that the defendant made love to her and had the first act of sexual intercourse with her at the defendant's mother's house in the early part of 1986. Thereafter, she has stated, that the defendant persistently had sexual intercourse with her promising to marry her and she stated that he did not let her get married to any other man. According to her testimony, the child on behalf of whom this application is made for maintenance was conceived in February-March, 1987. She has stated that she lived with the defendant as his mistress continuously even after the death of the defendant's mother in November, 1986 and that he deserted her and put an end to the cohabitation only one month before the date of the birth of the said child which

took place on the 24th December, 1987. She has made a complaint and statement to the police on the 29th of October, 1987, which has been produced marked E2. The defendant's statement in reply to the police made on 6. 11. 87 has been produced by the defendant marked X1. The application for maintenance has been filed in the Magistrate's Court on the 29th of January, 1988. The applicant has referred to a love affair which developed between the defendant and herself and to the first act of sexual intercourse of the part on the defendant with her which took place in the early part of 1986. In her evidence she has stated that the defendant addressed her and has stated thus:

"ලොකුදුව මම මෙතරම් කාලයක් බැන්දේ නැහැ. මම හැර වෙන කවුරුත් බඳින්න එපා. . . . කාත්තාට සළකන්න කවුරුත් නැහැ. මගේ අනිත් සහෝදරයො හිටියට ඔය වගේ උදවු පදවු කරනවාද? ඒ නිසා මම ඔයාට වෙන කසාදයක් බඳින්න දෙන්නේ නැහැ."

She has also referred to acts on the part of the defendant manifesting love towards her and she has described in detail the events which led to and culminated in the first act of sexual intercourse which took place in 1986. She has stated that even after the death of the defendant's mother that the defendant lived with her in the same house and continued to have sexual intercourse with her promising marriage in the future. She has referred in her evidence that she brought to the notice of the defendant that her menstrual flow ceased in February-March, 1987 and thereafter, the defendant had subsequently suggested that in view of the gossip in the village it would be better for them to leave the village and live together outside the village and return after about two years to the village after the birth of the child. She has stated that even after making this statement the defendant continued to have sexual intercourse with her and that she lived with him as his mistress in the same house and that the defendant attended to her needs and supplied her with the meals and food to which she manifested a special preference. She has stated that the defendant deserted her and ceased to maintain her one month before the birth of the said child. In her statement to the police (marked E2) she has stated that whilst she was residing at the defendant's house that the defendant had sexual intercourse with her and she lived with him as

his mistress; that the defendant held out a promise of marriage to her and that he by his acts did not permit her to get married to any other person.

Though her evidence was subjected to a long drawn cross-examination, it is apparent that she has stood the test of cross-examination and the protracted cross-examination has made no dent whatsoever on her testimonial trustworthiness. In the circumstances, the learned Magistrate has accepted her evidence as truthful testimony adduced before him and commented that there has been no reason or ground established before him to reject her testimony. The learned Magistrate has held that the defendant has failed to effectively impugn or impeach her evidence. At the inquiry the learned Magistrate has held that the defendant had failed to establish the spurious charges suggested to her under cross-examination. The learned Magistrate has carefully considered the evidence of the applicant's relation, Upananda and held that there was no reason before him on hehalf of the defendant to justify the rejection of Upananda's evidence. However, as witness Upananda under cross-examination has related facts which in examination-in-chief he had stated that he was unaware of such facts, the learned judge has decided not to act upon his evidence.

The learned Magistrate has considered carefully the evidence given by the applicant's father and held that none of the allegations and charges suggested in cross-examination to him had been established by the defendant and, in the circumstances he is unable to accede to the defendant's counsel's request to reject his testimony. He has held that the applicant's father, Samel, has given trustworthy and credible evidence and that he has arrived at a favourable finding in regard to his testimonial trustworthiness and that he prefers to accept the applicant's evidence after having had the benefit of her demeanour and deportment. He has held that Samel has given evidence in corroboration of the applicant's testimony in regard to material particulars. Reviewing the evidence of witness Wijepala, the learned Magistrate has commented that since he came to the village once a month, he lacked sufficient means of knowledge and therefore he is not prepared to act on his testimony.

In analysing and evaluating the evidence of the defendant, he has held that the defendant intentionally and deliberately has given false and untrue evidence before him. He has held that he has given false evidence in regard to certain crucial facts which have a pertinent bearing on the facts in issue in the case. He has held that the defendant falsely denied the relationship which existed between the defendant and the applicant. The defendant has stated thus in his evidence :

'මගේ ඥාති සම්බන්ධකමක් නැහැ කිසිම'

The learned Magistrate has further held that the defendant has falsely denied that the applicant came over and resided in the defendant's house to look after his aged and sick parents. The Magistrate has further held that in his attempt to falsely deny that the applicant lived in his house to nurse, look after and attend to his parents' needs, the defendant falsely referred to his brother and brother's wife and certain other persons as having nursed and looked after his aged and sick parents. The evidence of the defendant and his witness Jinasena, when analysed and evaluated are contradictory and inconsistent in regard to two crucially important aspects: In the circumstances, the learned Magistrate has applied the Test of Consistency and Inconsistency *inter se*. The defendant has stated that during the time he worked at the Ragama hospital in the years 1986-87 he resided during this time not in his house but elsewhere, in his sister's house. this period is crucial as it relates to the time of the conception of the child in question. The defendant has specifically stated thus:

'1985 සිට 1987 දක්වා රාගම ඉස්පිරිතාලේ වැඩකළා. රාගම රෝහලේ වැඩ කරන විට මම අක්කාගේ ගෙදර පදිංචි වුණේ.'

The defendant has made a deliberate and intentional move to falsely establish that during the period this child was conceived he was not living in his own house. However, his own elder brother, Jinasena, has given directly contradictory and inconsistent evidence on this point. He has stated thus:

'1986, 1987 වර්ෂයේ මට මතකයි. ඒ කාලයේ ගෙදර පදිංචි වෙලා වගඋත්තරකරු ඔහුගේ මව සහෝදරයෙක් හා මස්සිනා.'

Though Jinasena too attempted to give false evidence on other aspects on behalf of his brother, he has clearly contradicted the defendant's version and stated that the defendant lived in his own house where his mother lived during the period 1986-87 and that the applicant was related to the defendant. In view of this glaring inconsistencies in the testimony adduced *inter se,* the learned judge has applied the Test of Consistency and Inconsistency and rejected the evidence of the defendant as deliberately and intentionally false. Besides, the learned Magistrate has held that the applicant's father, Samel, has given evidence corroborating the testimony of the applicant that during the period 1986-87, which is the relevant period related to the conception of the child, the applicant and the defendant lived in the defendant's house together. This evidence taken in conjunction with the deliberate and intentional falsehoods the defendant had uttered because the truth may give rise to certain incriminating inferences being drawn against him, throws an altogeher incriminating and sinister complexion on the evidence of *opportunity* for intercourse. Vide the dicta of Scrutton, LJ. in *Hobbs v. Tinling*[1] – *at 22.* The principle is that a lie on some material issue by a party indicates a consciousness that if he tells the truth he will lose. In this context, Justice Hall succinctly remarked : "Matters which otherwise might be ambiguous or colourless are rendered corroborative by reason of the false denial *"Popovic v. Derks*[2] at 422. Note the pertinent observations of Justice Sholl in the same decision, in regard to the effect of a false denial of an opportunity for intercourse. Vide *Popovic v. Derks (supra)* at 429 to 430. The learned Magistrate has held that the evidence of the applicant has been corroborated by the deliberate and intentional falsehood uttered in court by the defendant. He has held that the defendant had deliberately and intentionally uttered lies when the defendant stated untruthfully that there was never a relationship between himself and the applicant and when he stated that the applicant never resided and lived in his house. He has held that these deliberate and intentional falsehoods advanced in strength, substantiated and corroborated the applicant's evidence in material particulars and weakened the defendant's case.

In these circumstances, the principles of law laid down by Lord Lane, Chief Justice in *Rex v. Lucus*[3] are applicable to the attendant facts of this case. Where a party litigant intentionally utters a falsehood in court, such falsehood weakens his case and advances in strength the case of his adversary. In fact, Lord Lane in this case expressed the view that lies uttered by a party could amount to corroboration of the case of his adversary. Justice Atukorale in *Karunanayake v. Karunasiri Perera*[4] at 83 gave his mind to the issue whether the principles laid down in *Rex v. Lucus* (*supra*) were applicable to Sri Lanka. In this context, Justice Atukorale remarked : "It seems to me that the Test which would be applied in determining whether a lie told by an accused or a defendant, *whether in or outside court* is capable of constituting corroboration or not, have been correctly set out by Lord Lane, Chief Justice in *Rex v. Lucus*. Under the circumstances, I think I should adopt and apply the criteria formulated by him to local cases, both criminal and civil, in which the question arises for consideration". See also in this context the decision of Lord Hodgson in *Mawaz v. Regina*[5], at 82-83.

Professor J. D. Heydon in an article appearing in (1973) 89 LQR 552 discussed this relevant issue whether lies uttered could operate as corroboration.

According to the testimony of the applicant, the defendant has deserted her one month before the birth of the child which took place on 24. 12. 87. However, in E2 she has stated that the defendant deserted her on 11. 10. 87 and up to that date he was having sexual intercourse and he was living with her as his mistress extending promises of marriage. The complaint marked E2 had been made on 29. 10. 87. Thus, that statement comes within the ambit of section 157 of the Evidence Ordinance insomuch as "the statement was made at or about the time when the fact took place" and in terms of the judgment pronounced by Justice Wimalaratne; this statement, though emanating from the applicant could be looked upon as corroboration of her evidence. The Test of Spontaneity and the Test of Contemporaneity are sufficiently satisfied. The law in its wisdom requires that

the statement should be made within a reasonable time. The test is whether it was made as early as could reasonably be expected in the circumstances and whether there was or was not time for tutoring and concoction. It is a question of fact depending on the attendant circumstances of the case. No hard and fast rule can be laid down as to when a statement is sufficiently contemporaneous. Vide the observations of Justice H. N. G Fernando in *Ariyadasa v. Queen*[6] at 3.

Justice Wimalaratne in the decision in *Thavanayaki v. Thamotheram Mahalingam*[7] remarked that the full Bench decision in *Ponnammah v. Seenithamby*[8] has settled the law relating to the admissibility of previous statements as corroboration of the mother's evidence and in the circumstances, the difficulties entertained by Justice Nihil in the decision reported in 39 CLW 31[9] are not sustainable and justified. His Lordship remarked: "Our law has departed from the old general rule in English law which excludes the witness' former statement to corroborate his testimony. When the British introduced the Indain and Ceylon Evidence Ordinance they departed from the English Rule and incorporated section 157 of the Evidence Ordinance with the limit stipulated in the section. Thus, the statement marked E2, besides establishing the consistency of the applicant's version uttered in court, it also amounts to corroboration in material particulars of her testimony in court.

Though the learned counsel for the apellant persistently urged that there was no independent corroboration of the applicant's testimony in respect of material particulars in terms of section 6 of the Maintenance Ordinance, it must be emphasised that witness Samel in his evidence has stated that when he came to hear of the pregnancy of his daughter that he had questioned the defendant and that the defendant had admitted that he was responsible for her pregnancy and had on that occasion promised to Samel that he would marry his daughter. Samel has stated thus in his evidence:

'මම වගඋත්තරකාරුගෙත් ගිහින් ඇහුවා. මහු කිව්වා කලබල වෙන්න එපා, කසාද බැඳලා එක්කගෙන යනවා. මම නිශ්ශබ්ද වුනා. ළමයා බවට ඇවිත් මාස 3ක් විතර ඇති.'

The evidence of Samel has been held by the learned Magistrate to be entitled to testimonial trustworthiness and credibility. Samel's evidence relating to the communication made by the defendant on his interrogation of the defendant contains an implied admission made by the defendant that he was the father of the child whom the applicant carried in her womb and that he would marry the applicant and take her away as his wife. In the circumstances, I hold that the only contention urged before me by learned counsel for the defendant-appellant that there was no independent corroboration of the applicant's evidence in material particulars is an unsustainable and untenable contention. Learned counsel for the apellant did not impugn the quantum of the award of maintenance in a sum of Rs. 500 ordered by the learned Magistrate. The applicant has stated that the defendant is in receipt of a monthly income from his profession as air-conditioning and refrigeration technician in a sum Rs. 2,500 per month, in addition to his other income from his houses and agricultural land. The defendant himself has accepted the fact that he draws an income of Rs. 1,500 per mensem from his profession.

I consider the award of maintenance decreed by the learned Magistrate as eminently fair, reasonable and equitable. In the result, I proceed to dismiss the appeal of the defendant-appellant with costs in a sum of Rs. 3,150 payable by the defendant-appellant to the applicant-respondent.

Appeal dismissed.