1950 *Present:* **Swan J.**

KIRI BANDA, Appellant, *and* HEMASINGHE, Respondent

S. C. 624—M. C. Kandy, 6,758

Evidence Ordinance—Section 112—Child born during continuance of valid marriage—Presumption of legitimacy—Meaning of "access".

The word "access" in section 112 of the Evidence Ordinance is used in the sense of "actual intercourse" and not "opportunity for intercourse".

Ranasinghe v. Sirimana (1946) 47 N. L. R. 112 not followed.

APPEAL from a judgment of the Magistrate's Court, Kandy.

M. M. Kumarakulasingham, for defendant-appellant.

No appearance for respondent.

Cur. adv. vult.

September 10, 1950. SWAN J.—

The appellant in this case was sued by the respondent for the maintenance of two illegitimate children. He denied paternity but the learned Magistrate held against him and ordered him to pay Rs. 30 per mensem for the elder child and Rs. 20 per mensem for the younger.

The respondent was married to one Abeywardene. Her evidence supported by that of her mother, was that Abeywardene left her in the middle of 1945 because he became aware of the fact that she was intimate with the appellant, and that Abeywardene never came back again. Thereafter, she lived with the appellant. The first child was born in October, 1946, and the second child in November, 1949.

There was other evidence which satisfied the learned Magistrate that Abeywardene had nothing to do with the respondent after they parted company in the middle of 1945. He, therefore, held that the presumption created by Section 112 of the Evidence Ordinance was rebutted.

Mr. Kumarakulasingham maintains that the presumption has not been rebutted by the evidence because there was opportunity for intercourse. He relies on the case of *Ranasinghe v. Sirimana* [1] in which Howard C. J., following what he thought to be the decision of the Privy Council in *Karapaya Servai v. Mayandi* [2], held that the Full Bench decision in *Jane Nona v. Don Leo* [3] could no longer be regarded as a binding authority. I wonder whether the learned Chief Justice would have come to the conclusion if he had considered whether or not the interpretation of the word "access" as meaning merely "opportunity of intercourse" in *Karapaya Servai v. Mayandi* was nothing more than *obiter dictum*.

In the case of *Alles v. Alles* [4] Wijeyewardene J. referred to *Jane Nona v. Don Leo* and said that as it was a decision of the Full Bench it was binding. Howard C. J. in *Ranasinghe v. Sirimana*, stating that he

[1] *(1946) 47 N. L. R. 112.*
[2] *A.I.R. (1934) P.C. 49.*
[3] *(1923) 25 N. L. R. 241.*
[4] *(1945) 46 N. L. R. 217.*

was not unmindful of the fact that Wijeyewardene J. took that view in *Alles v. Alles*, still came to the conclusion that the meaning given to the word " access " by the Full Bench in *Jane Nona v. Don Leo* could no longer be considered to be authoritative in view of the Privy Council decision in *Karapaya v. Mayandi*.

In *Pesona v. Babonchi Bass*.[1] my brother Basnayake considered *Ranasinghe v. Sirimana* and *Karapaya Servai v. Mayandi* and said that *Jane Nona v. Don Leo* was not overruled. My learned brother held that the *dictum* in *Karapaya Servai v. Mayandi* was merely *obiter*, and also took the view that a judgment of the Privy Council in an appeal from some other country is not binding on us until we adopt it ourselves.

While holding that *Jane Nona v. Don Leo* had not been overruled my learned brother ventured to depart from the meaning given to the word " access " by the learned judges who decided that case, and construed it to mean " *actual intercourse* " as well as " *personal access under circumstances which raise the presumption of actual intercourse.* "

In my opinion, the meaning given to the word *access in Jane Nona v. Don Leo* still holds good. I say so for the very good reason that in the *Alles case* their Lordships of the Privy Council had before them the interpretation of the word *access* by Wijewardene J. relying on *Jane Nona v. Don Leo* and did not say it was incorrect.[2]

The Alles' appeal was argued before Wijeyewardene J. and Cannon J. Counsel for the appellant wife relied on the interpretation of the word *access* as meaning no more than " opportunity for intercourse " given in *Karapaya Servai v Mayandi*. Counsel for the respondent husband maintained that the *dictum* of the Privy Council in that case was *obiter* and stated that the point and meaning of the word " *access* " in Section 112 of the Evidence Ordinance had been decided by the Full Bench in *Jane Nona v. Don Leo*. Commenting on this matter Wijeyewardene J. after quoting Section 112, states: —

> " That section has been construed in *Jane Nona v. Don Leo* which is a decision of the Full Bench and is binding on us. It was held in that case that the word ' access ' was used in Section 112 of the Evidence Ordinance, in the sense of ' *actual intercourse* ' and not ' *opportunity for intercourse.* ' "

When the *Alles* case went up to the Privy Council their Lordships, therefore, had before them the interpretation given by our Courts to the word " access " in Section 112. If that meaning was wrong I am certain the error would have been noticed and corrected. On the contrary it seems to me, from a perusal of the judgment of the Privy Council, that they accepted that interpretation as correct, as would appear from the following extract from the judgment [2] —

" One thing at least is clear. In Ceylon the governing rule is contained in a statutory provision, Section 112 of the Evidence Ordinance, which reads as follows:—' The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother

[1] *(1948) 49 N. L. R. 442.* [2] *(1950) 51 N. L. R. 416.*

remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man unless it can be shown that the man had no access to the mother at any time when such person could have been begotten or that he was impotent.' Under this system the Court does not find itself faced directly with the question whether the child whose status is in dispute is or is not the child of his ostensible father. That fact is conclusively proved by the mere circumstance of the birth occurring during the prescribed period, unless whoever denies the paternity can prove, not that the child was not conceived of any union with the ostensible father, but that that person had no access to the mother at a time when the child could have been begotten or was impotent. It is obvious that in many cases the onus of disproving any access at a time when the child could have been begotten must be a heavy one and it is not made the lighter by the uncertainity that still attends much scientific knowledge about the inception and progress of pregnancy. But, that being conceded, a Court that is furnished, as was the trial Court in this case, with an abundance of expert testimony bearing upon this very issue as to the dates within which Joseph Richard could have been begotten is faced with an issue of fact that is not incapable of being resolved ; and, though it must properly require to be well satisfied by the evidence if it is to conclude that such access as did take place did not take place at any time when conception was possible, it is not at liberty to reject an affirmative conclusion in deference to the general uncertainty that pervades the subject or to the existence of some merely theoretical doubt as to the unpredictable achievements of nature. The issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived. ''

In view of this I think one could safely say that the decision of *Jane Nona v. Don Leo* is still binding.

In the result the appeal fails and should be dismissed. I should add, however, that even if '' access '' meant '' opportunity for intercourse '' the evidence in this case justifies the conclusion that there was no such opportunity.

Appeal dismissed.