CHANDRADASA
v.
KUMARI

COURT OF APPEAL
YAPA, J.
CA NO. 248/88
MC KURUNEGALA NO. 95108/M
MAY 7, 1997.

Maintenance – Unsatisfactory and contradictory evidence – S. 157 Evidence Ordinance – Corroboration – Admissions of views expressed by certain Authors – Considering material not available in the case to disregard the medical evidence.

Held :

1. It was several months after the 1st act of sexual intercourse that the mother of the respondent was told that she was expecting a child from a sexual relationship she had with the appellant. It is not a statement made at or about the time of the event as required by s. 157 of Evidence Ordinance.

   "It was a serious error on the part of the Magistrate to have considered the mother's evidence as having corroborated the evidence of the appellant, without properly evaluating her evidence."

2. The acceptance of material from books was unwarranted and was not permissible in law, the function of the Magistrate is to come to a finding on the material available in the case.

3. The evidence of the applicant appears to be very unsatisfactory and unreliable, in such a situation the question of corroboration does not arise.

Cases referred to:

1. *Ponnammah v. Seenithamby* – 22 NLR 396.
2. *Tennekoon v. Tennekoon* – 78 NLR 13.
3. *Regina v. Pinhamy* – 57 NLR 169 at 175.
4. *Turin v. Liyanora* – 53 NLR 310.

D. S. Wijesinghe P.C. with *Ms. Dhammika Dharmadasa* for defendant-appellant.

H. Wijetunge for applicant-respondent.

Cur. adv. vult.

March 31, 1998

YAPA, J.

The applicant-respondent (hereinafter referred to as the applicant) claimed maintenance from the defendant-appellant (hereinafter referred to as the defendant) a sum of Rs. 500/- per month as maintenance to her child named Justin Jayawardena, alleging that the defendant was the father of the said child born to her on 16.12.84. After the inquiry, the learned Magistrate by his order dated 22.09.88 decided that the defendant was the father of the said child and ordered him to pay a sum of Rs. 150/- per month, as maintenance to the child of the applicant. This appeal is against the said order dated 22.09.88.

At the inquiry, the applicant and her mother gave evidence in support of her claim for maintenance. The applicant in her evidence said that she lived with her parents in close proximity to the defendant's house. According to her she had a "love affair" with the defendant which started in the month of February or March, 1984. At that time she was 17 years old and was a student in grade 10. She said that on 14.05.84 defendant's sister Lalitha had invited her to the defendant's house to keep company with her, as Lalitha's parents had gone to observe sil, since 14.05.84 happened to be the Wesak Poya day. Applicant said that she went to the defendant's house on that day with the permission of her parents and on the night of 14.05.84 she had slept in the hall, while defendant's sister Lalitha had slept in a room. According to the applicant, that night the defendant had come to her and called her to his room and had sexual intercourse with her on the promise of marrying her. This was the first occasion she had sex with the defendant. Thereafter, on several other occasions, for about two or three months, the defendant

had sexual intercourse with her. She said that they had not exchanged any letters but the defendant had given her a photograph and a handkerchief, which she produced marked as E2 and E3, respectively. After 14.05.84 she said that her menstruation had stopped and therefore, she had realized that she was expecting a child. She said that it was three or four months later, that her mother came to know that she was expecting a child and till then the defendant continued to associate her. Thereafter, her mother had informed the parents of the defendant, who had first consented to their association but later, they were opposed to any settlement. Therefore, the applicant had made a complaint to the Police on 15.10.84 and the said complaint was produced marked E1. At the time she made the complaint to the Police the defendant had stopped associating her. Applicant finally said that after a period of seven months, from the date of her first sexual intercourse with the defendant, on 16th December, 1984, she gave birth to the child named Justin Jayawardena. In her cross-examination, seven contradictions were marked by the defendant's Counsel.

Applicant's mother Premalatha, in her evidence said that the defendant stayed with his parents close to her house and she had come to know that there was an intimate relationship between the defendant and her daughter, from a person who was in the habit of visiting the defendant's house. She said that her daughter used to visit the house of the defendant to keep company with the sister of the defendant, on days when the defendant's parents were not at home. When she came to know of the relationship between her daughter and the defendant, she had informed the mother of the defendant who wanted her not to inform any one, but to be under observation. This witness said that when she realized that her daughter was expecting a child, she had questioned her daughter, who told her that on 14.05.84, the defendant had ruined her and that she was expecting a child. Premalatha said that it was on 29th September, 1984, that her daughter revealed this fact to her. Thereafter, this witness had informed the mother of the defendant who suggested to her, that they should take her daughter to a doctor, in order to find out whether she was expecting a baby. After the doctor had confirmed that her daughter was expecting a baby, the parents of the defendant had suggested that an abortion be done and that they would bear the expenses. Premalatha finally said that since the defendant was not willing to marry her daughter, they had made a complaint to the Police.

After the applicant's case was concluded, the defendant gave evidence and denied having had sexual intercourse with the applicant on 14.05.84 and also denied having had sexual intercourse with her at any time thereafter. He said, in his house during that time, other than his parents, his brother and sister also stayed with him. During that time his brother was 19 years of age and his sister was 20 years of age, and generally they were in the house at night. On 14.05.84 he said that he was staying in his sister's house at Mawathagama, and that he had been living there since 31.12.81, as his sister's husband had gone abroad and therefore, he had to stay there looking after their house and the boutique. According to him, after having gone to his sister's house, he had not gone back to stay with his parents, but had stayed at Ridigama since 12.02.87, as he had started a business. He further denied having given the handkerchief marked E3 and his photograph marked E2, to the applicant. His explanation regard to the photograph was that an extra copy of his photograph taken for the purpose of obtaining his passport had been in his album, and the applicant may have taken it while going through his album. He finally said, that when he came to know that the Police were looking for him over the applicant's complaint, he had gone to the Mawathagama Police on 18.10.84 and had made a statement, rejecting the allegation.

Namasena, a clerk attached to the Kurunegala hospital produced the bedhead ticket relating to the applicant, marked V7. Kirindiwella, a retired staff nurse of the Kurunegala hospital gave evidence and said that she had worked in the labour room on 16.12.84. She identified her handwriting in the bedhead ticket marked V7, which she said was kept in the ward No. 9 of the hospital. She said that the bedhead ticket had been issued to one Manel Shanthi Kumari (applicant), according to which she had given birth to a male child on 16.12.84 at 7.56 p.m., weighing 5 pounds and 13 ounces. It was her evidence, that generally a child born in Sri Lanka whose weight was more than 4 pounds and 8 ounces, such a child was considered as a full term baby. She said that if the child was born prematurely, the child would be sent to the special baby room. She finally said that according to the bedhead ticket marked V7, Manel Shanthi Kumari (applicant) had been admitted to the hospital at 4.55 p.m. on 16.12.84, the child had been born to her at 7.56 p.m. and she had been discharged from the hospital on 17.12.84, which was the following day.

Dr. Nadesan, Judicial Medical Officer, Colombo South Hospital, gave evidence and said that he had 15 years' of experience as a doctor. After obtaining his M.B.B.S degree, he had obtained his postgraduate qualifications in England. As a medical officer he had the experience of having attended to child deliveries. He said according to the bedhead ticket marked V7, applicant had been admitted to the ward No. 9 of the hospital on 16.12.84 at 4.55 p.m. and she had given birth to a child at 7.56 p.m. on the same date. The weight of the child had been recorded in V7 as 5 pounds and 13 ounces. He said, according to Sri Lankan standards, the child was a full term baby. He said according to the evidence of the applicant, she had sexual intercourse for the first time on 14.05.84 and the child according to V7, had been born within seven months or 28 weeks thereafter. Generally, he said that a full term baby is born within a period of 36 weeks and therefore, if the first act of sexual intercourse had taken place on 14.05.84, and the child was born on 16.12.84, the child would have a weight of about 3 pounds and his height would have been about 14 inches. In this case, the mother and the child had left hospital on the following day, and this had happened since the child was a healthy full term baby. Therefore he said, in this case having regard to the date of birth and the weight of the child, it was not possible to say that the said child had been born, consequent to a sexual relationship that had taken place on 14.05.84. He expressed the view that the applicant should have been at least pregnant by 14.05.84.

At the hearing of this appeal, one of the submissions made by the learned Counsel for the defendant-appellant was that the evidence of the applicant was unsatisfactory and complained about the failure on the part of the learned Magistrate to consider the contradictions marked, when assessing the applicant's evidence. There were seven contradictions marked during the cross-examination of the applicant. The contradiction marked VI related to the period when her menses had stopped after the first act of intercourse. When the applicant gave evidence at the first inquiry on 18.07.86, which was later abandoned due to the change of the Magistrate, she said that her menses had stopped only after two months since her act of sexual intercourse with the defendant on 14.05.84. However, when she gave evidence later on 19.08.87 at the 2nd inquiry, she said that her menses did not take place after 14.05.84. The contradiction V2 was marked in relation to the time, when the parents of the applicant came to know of applicant's sexual relationship with the defendant. It was her evidence in Court,

that her parents came to know of this fact, three or four months later from some one else. However, in her statement made to the Police on 15.10.84, she had taken up the position that she informed her parents, one month before making her police statement, which was about five months after the incident. The contradiction V3 was marked since the applicant said in her evidence, that she had mentioned to the Police that the defendant was agreeable to marry her after an abortion, whereas, what she had in fact stated to the Police, was that she had requested the defendant several times to marry her, which he had refused to do. The contradiction V4 related to the stage at which the defendant had left the applicant. It was the evidence of the applicant that the defendant left her three or four months after she became pregnant. However, in her statement made to the police she had stated that in the 1st month itself she informed the defendant about her pregnancy and thereafter, he had left her and gone to his sister's place at Mawathagama. Contradictions V5 and V6 were marked on account of the contradictory position taken by the applicant with regard to the date on which the applicant's mother came to know of her sexual relationship with the defendant. When the applicant gave evidence in the first inquiry on 18.07.86 she had said that her mother came to know of their relationship on 29.09.84, and that she in fact had told her mother of her pregnancy in the month of September. However, when she gave evidence on 30.09.87, she denied both these positions taken up by her in her evidence on 18.07.86. The contradiction V7 was marked in view of the applicant's denial in cross-examination of the evidence initially given by her, where she stated that she and the defendant exchanged gifts, meaning the photograph and the handkerchief and it was thereafter, that her mother came to know of their relationship.

Learned Counsel further submitted that the learned Magistrate has disregarded all these contradictions on the basis that there was no material to show that the applicant was a person of loose morals and therefore sought to disregard them. It must be stated, that this approach on the part of the Magistrate to accept the evidence of the applicant without considering the contradictions was erroneous. The Magistrate should have carefully examined the contradictions, to see whether they were material contradictions, which would have made the Court hesitant to act on the evidence of the applicant. A close examination of the contradictions marked would clearly show, that the applicant has not been consistent in her evidence, on some of the important matters,

when she gave evidence. This lack of consistency on the part of the applicant, was a factor that should have been considered by the Magistrate, before he decided to act on her evidence, for the reason that it cannot be said that some of the contradictions that were marked, had very little bearing on the question whether the court should have acted on her evidence. Therefore in my view, there is substance in this submission of the learned Counsel.

Another argument that was advanced by learned Counsel was that the Magistrate had erroneously considered the evidence of Premalatha, the mother of the applicant, as having corroborated the evidence of the applicant. According to the applicant's mother, she was informed of the sexual intimacy of the applicant and the defendant only in September, 1984. In fact, there was evidence that she came to know that the applicant was expecting a child only on 29.09.84. Further, contradictions V5 and V6 marked in the evidence of the applicant related to the same subject matter. In view of the evidence of the applicant and her mother Premalatha, it was apparent that Premalatha had come to know that the applicant was expecting a child several months after the date of the first act of sexual intercourse. According to Premalatha, it was on 29th September, 1984, that the applicant had told her that the defendant had ruined her on 14.05.84. Therefore, it was submitted by learned Counsel that this item of evidence cannot in any way be considered as corroborative evidence. He further submitted that according to section 157 of the Evidence Ordinance, any former statement made several months after the incident would not amount to corroboration, since such a statement should be at or about the time of the event, and therefore, a statement made four months later will not fall under this section. This requirement has not been considered by the Magistrate before he came to the conclusion that the evidence of Premalatha has corroborated the evidence of the applicant. Further in the light of the material coming from the applicant and her mother Premalatha, it was on the 29th September, 1984, several months after the 1st act of sexual intercourse, that Premalatha was told that the applicant was expecting a child from a sexual relationship she had with the defendant. Therefore, it would not be a statement made at or about the time of the event as required by section 157 of the Evidence Ordinance. In the case of *Ponnammah v. Seenitamby*[1], statements made by the mother to third persons some months after conception, and some months after intimacy had ceased, was held not to be corroborated, as the statements were not made

at or about the time of the intimacy. Similar view was expressed in the case of *Tennekoon v. Tennekoon*[2]. Therefore, it was a serious error on the part of the Magistrate to have considered Premalatha's evidence as having corroborated the evidence of the applicant, without properly evaluating her evidence. In the circumstances, this submission of the learned Counsel should succeed.

Another submission that was made by learned Counsel for the appellant was that the learned Magistrate has failed to consider the strong impact of the evidence of Dr. Nadesan on the veracity of the applicant's evidence. It was the applicant's position that the first act of sexual intercourse took place on 14.05.84 and the child was born to her on 16.12.84. However, according to the evidence of Dr. Nadesan, a child born on 16.12.84 could not have been conceived on 14.05.84, the interval being seven months or 28 weeks, having regard to the weight of the child at birth being 5 pounds and 13 ounces, the height of the child being 18 inches and in addition, the mother and the child being discharged on 17.12.84, the following day. Dr. Nadesan was of the view that the child born to the applicant was a full term baby which would have required a period of at least 36 weeks to grow up to that weight and height. Learned Counsel submitted that the learned Magistrate has not only failed to consider the strong impact of this medical evidence on the veracity of the applicant's evidence, but in addition the Magistrate has decided to disregard the evidence of Dr. Nadesan on the basis of certain views that had been expressed by two authors in two books published in U.K and U.S.A. Counsel further submitted that the views of the two authors were wrongly admitted into the case by the Magistrate in order to disregard the evidence of Dr. Nadesan. On this matter, it was the submission of the learned Counsel that the acceptance of such material from books was totally unwarranted and was not permissible in law, for the reason that the opinions of such authors have not been properly admitted before Court or for that matter placed before Dr. Nadesan for his consideration at any stage of the inquiry. Therefore such material brought into the case by the Magistrate himself would become inadmissible under the provisions of the Evidence Ordinance due to the grave prejudice it would have caused to the defendant owing to the acceptance of such material by the Magistrate. In support of this argument learned Counsel cited the case of *Regina v. Pinhamy*[3] where it had been stated that there was no authority in support of the proposition that Counsel is entitled to read to the Jury extracts

from treatises on medical jurisprudence which have not been properly admitted in evidence. In my view, this rule would apply with greater force to a Magistrate, whose function is to come to a finding on the material available in the case. Therefore, as submitted by Counsel, the Magistrate was in serious error to have considered material that was not available in the case to disregard the strong impact of the evidence of Dr. Nadesan on the veracity of the applicant's evidence.

If the learned Magistrate considered the evidence given by Dr. Nadesan without disregarding it, as it was done in this case, it would have made the evidence of the applicant most unacceptable. In addition as was referred to earlier, the contradictions marked in the evidence of the applicant showed that her evidence was not consistent. Therefore in my view, under these circumstances, the evidence of the applicant appears to be very unsatisfactory and unreliable. In such a situation the question of corroboration does not arise. (*Turin v. Liyanora*[4]) However, as referred to earlier the evidence presented by the applicant in regard to corroboration cannot even be acted upon.

The learned Counsel for the applicant-respondent has strenuously argued that the order of the learned Magistrate should stand. However, having regard to the reasons set out above, I am unable to agree with this submission. Therefore, I set aside the finding of the learned Magistrate and allow the appeal.

Appeal allowed.