

1973

Present : G. P. A. Silva, S.P.J.

A. A. WIMALARATNE, Appellant, and M. R. MILINA,
Respondent

S. C. 191/72—M. C. Galle, 50058

Maintenance Ordinance—Section 6—Nature of corroborative evidence which is required thereunder.

In an application for maintenance of an illegitimate child, evidence of any number of witnesses who had heard from the applicant's mouth that the defendant was the father of the child would not constitute independent corroboration of the story of the applicant as to paternity.

Held further, that if the evidence of the mother of the child is unreliable the question of corroboration does not arise.

A PPEAL from a judgment of the Magistrate's Court, Galle.

D. R. P. Goonetilleke, for the defendant-appellant.

John Kitto, for the applicant-respondent.

September 14, 1973. G. P. A. SILVA, S.P.J.—

The application for maintenance by the applicant-respondent against the defendant-appellant in this case has had a somewhat chequered career. The applicant-respondent earlier brought an action for maintenance in case No. 17468 on 20th May, 1961. At this time she had only one child Wimalakanthi and the application was in respect of that child. During the proceedings of that case on 7.12.63, she stated to Court :

“I have no evidence to prove the paternity of the child for whom I claim maintenance. I therefore move to withdraw this case”.

On 12.8.67 she filed the present application for maintenance in respect of two children, Wimalakanthi aged 9 years, on whose behalf the earlier application was made, and Wimalakantha, aged 6 years. The learned Magistrate dismissed this application on 9th December, 1968, and she appealed from that order. At the hearing of the appeal this Court, without interfering with the dismissal of the application regarding the first child made order sending the case back for a fresh trial in respect of the second child Wimalakantha. The present appeal is from the judgment of the Magistrate at the trial held in consequence of that order made in the earlier appeal to this Court. On behalf of the applicant she herself gave evidence and also called two witnesses, one being Kusumawathie, the divorced

wife of the appellant, whom he had married shortly before the first application for maintenance was filed by the respondent, and the other, a carter by the name of Martin. The respondent's own evidence teemed with contradictions on several material points and she has also been contradicted by earlier statements made in the course of the first application for maintenance which I referred to earlier.

In considering her evidence, it must be remembered that she had to contend with the statement made by her to the Magistrate at the earlier trial on oath that she had no evidence to prove the paternity of the child. It seems to me that in the circumstances of this case it was a very serious hurdle which she had to clear before her evidence was accepted. For, the defence in the case was that it was the brother of the respondent-appellant, one Kularatne, who was the father of the children in respect of whom maintenance was claimed, in which event one can attribute an important meaning to her earlier evidence that she had no evidence to prove the paternity of the child. In addition to this there was a very significant item of evidence in the testimony of Kusumawathie who was called as a witness for the applicant-respondent that the respondent had told her that both the appellant and his brother, Kularatne were keeping her as their mistress. It is not permissible to disregard this evidence as it came from the respondent's own witness. In the light of this evidence of Kusumawathie, the respondent's application to the Magistrate in the earlier case to withdraw it because she had no evidence to prove the paternity of the child would assume great significance for the reason that if both brothers were keeping her, she could not have said on oath as to who was the father of the child for whom she was claiming maintenance. This same consideration will apply equally in the present case even in respect of the other child for whom maintenance is being claimed.

While this ground alone is sufficient for the purpose of allowing the appeal I should like to deal with the other submission of counsel for the appellant that the learned Magistrate misdirected himself when he treated the evidence of Kusumawathie as corroboration of the story of the applicant-respondent. I think there is substance in this contention. Kusumawathie was deposing before the Magistrate to facts which she had heard from the applicant herself and this surely is not corroboration in the eye of the law. Corroboration must consist of an independent item of evidence which shows or tends to show that the evidence of the applicant was true to the extent that the appellant was the father of the child for whom maintenance was

claimed. The evidence of any number of witnesses who had heard that the appellant was the father from the respondent's mouth would not constitute independent corroboration.

Had the learned Magistrate not misdirected himself on this matter he could obviously not have held that the evidence supporting the allegation of paternity was overwhelming on the evidence of the carter Martin alone. On this matter too I am inclined to agree with the contention of counsel for the appellant that Martin was hardly a witness who could corroborate the evidence as to paternity.

Counsel has urged there were a number of other witnesses who would have been acceptable to court like the Grama Sevaka and members of the family of the applicant who could have been called to support her story, and, further, that Martin had not been cited by her as a witness in the earlier application. It seems to me that these criticisms of Martin as a witness are not without substance in the circumstances. In this state of the evidence, I think that a court should lean favourably towards the appellant and not the respondent.

Counsel has also cited in his favour the case of *Turin v. Liyanora* ' 53 N. L. R. 310 in which Basnayake, J. expressed the view that if the evidence of the mother was unreliable the question of corroboration of the mother by any other witness did not arise and that the applicant could not in such a case succeed. If that standard is to be applied in the present case, it cannot for the reasons I have already stated be said that the applicant-respondent was by any standard a reliable witness. Basnayake, J. went on to say—

“What the statute provides is that no order for maintenance of an illegitimate child should be made unless a mother who has given convincing evidence is corroborated in some material particular. If the mother's evidence does not convince the Judge the question of corroboration does not arise”.

In making this observation he has of course been interpreting section 6 of the Maintenance Ordinance which states :

“No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by other evidence to the satisfaction of the Magistrate.”

This case has also made reference to the case of *Le Roux v. Neethling* reported in Juta (1891-1892) page 247 in which De Villers, C. J. laid down the principle in regard to the need for

¹ (1951) 53 N.L.R. 310.

corroboration and the type of corroboration that is needed in a case of seduction. He observed :

“ I think it may be laid down as a general rule that the plaintiff who seeks to fix the paternity of an illegitimate child on a man must clearly prove it, and must be corroborated by some independent testimony ; and in case of doubt judgment must be given in favour of the defendant. ”

I would with respect agree with the observations made in these two cases and hold that the applicant-respondent has not proved the paternity of the child in respect of whom she claimed maintenance to the degree of satisfaction that the Court is entitled to expect in this type of case.

I accordingly allow the appeal and set aside the order of the learned Magistrate granting maintenance and dismiss the application of the respondent made in this regard. I make no order as to costs.

Appeal allowed.
