PERERA *v.* PODY SINHO.

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November 19

P. C., Colombo, 7,481.

Maintenance—Ordinance No. 19 of 1889—Order under s. 3—Appeal therefrom—Married woman—Presumption of paternity—Evidence Ordinance, s. 112—Moral impossibility of access.

BONSER, C.J.—Under section 3 of the Ordinance No. 19 of 1889, the Magistrate may make two orders, an order for maintenance or an order dismissing the application. In either case, the order may be appealed from.

The decision in *Fernando v. Iamperumal*, and *Selestina v. Perera, 2 C. L. R. 88*, is not an authority to be followed on the above point.

To bring a case of paternity within the exception of section 112 of the Evidence Ordinance. it must be proved either that the husband was impotent, or that it was impossible for him to have had intercourse with his wife at the time the child was begotten.

Evidence of the moral impossibility of access on the part of the spouses is not admissible.

Pavistina v. Aron, 3 N. L. R. 13, questioned.

Podina v. Sada, 4 N. L. R. 109, to be read by the light of the present case.

THE facts of the case and arguments of counsel appear in the following judgment of the Chief Justice.

Bawa, for complainant, appellant.

Jayawardene, for accused, respondent.

19th November, 1901. BONSER, C.J.—

This case raises two interesting questions, one, as to the construction of Ordinance No. 19 of 1889, and the other as to the construction of section 112 of the Evidence Ordinance.

The appeal is by the mother of an illegitimate child, who claimed from the respondent maintenance for that child, as being its father. The Police Magistrate dismissed the application on the ground that she was a married woman, and that there was not sufficient evidence to rebut the presumption of paternity established by section 112 of the Evidence Ordinance.

When the appeal was called on, counsel for the respondent took the objection that no appeal lay, relying on a case reported in *2 C. L. R. 88*. Section 17 of Ordinance No. 19 of 1889 provides that " any person who shall be dissatisfied with any order made " by a Police Magistrate under section 3 or section 14 may appeal " to the Supreme Court, and every such appeal shall be subject to " the provisions of section 407 of the Criminal Procedure Code, " 1883." Section 3 provides that " if any person having sufficient

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"means neglects or refuses to maintain his wife, or his legitimate "or illegitimate child unable to maintain itself, the Police "Magistrate may, on proof of such neglect of refusal, order such "person to make a monthly allowance for the maintenance of "such child at such monthly rate, not exceeding fifty rupees, as "the Magistrate thinks fit, and to pay the same to such person "as the Magistrate may from time to time direct. Such allowance "shall be payable from the date of the order." And section 14 provides that "upon application being made for such order or "warrant as aforesaid, the Magistrate shall commence the "inquiry by examining the applicant on oath or affirmation, and "such examination shall be duly recorded. If after such "examination there is in the judgment of the Magistrate no "sufficient ground for proceeding, he may make order refusing to "issue a summons."

The respondent's counsel argued that there was no order under section 3, because the only order contemplated under that section was an order for maintenance. The result of that would be that, although the applicant might appeal to this Court if the Magistrate refused to issue summons, yet if the Magistrate issued a summons, heard the case, and decided against her, there would be no appeal, although if he decided in her favour there would be an appeal. Now, I think that would be an extraordinary provision for any Legislature to enact. No reason could be given for it. The decision of the Magistrate is to be unappealable if it is one against the applicant, but it is appealable if it is in her favour. If, for instance, he decides that the applicant and respondent were never married, and, therefore, she had no claim on him for maintenance, that decision is to be final. She is to have no opportunity of showing that the decision is wrong; but, if he decided that they were married, and that the respondent is bound to maintain her, the respondent is to have the opportunity of showing that the decision is wrong.

It seems to me that under section 3 the Magistrate may make two orders. He may either make an order for maintenance or an order dismissing the application. It seems to me that in either case there is an order under section 3 which may be appealed from.

But, as I said before, the respondent relied upon what he alleged was the decision of a Full Court, which would be binding on me, holding that no appeal lay in a case like the present. But, on examination of this case, it will be seen that it is of no authority. What happened was this. The late Chief Justice and Mr. Justice Lawrie sat together to hear the appeal. They

were unable to agree upon the admissibility of the appeal, and, instead of the case being referred to a Full Court for argument and decision, counsel on both sides agreed to leave the matter to the arbitrament of the third judge. The third judge, after reading the case, but without hearing any argument, expressed the opinion that an appeal did not lie. It is quite evident that that expression of opinion of the third judge could have no binding effect on the parties unless they had agreed to accept it. That being so, it is of no use citing it as an authority, and I cannot understand why any reporter should have thought fit to report it. It seems to me that the judgment which Mr. Justice Lawrie was prepared to give, and which will be found at page 89 of the report, was the better opinion. I am quite prepared to adopt every word of that judgment, for I think that it states concisely and clearly the law on the point.

Then, we come to the other question raised in the case. The Police Magistrate was of opinion that the circumstances of the case were insufficient to rebut what he calls the presumption raised by section 112 of the Evidence Ordinance. The appellant relied upon a judgment of Withers, J. (*3 N. L. R. 13*), and argued that inasmuch as both parties were living in adultery it was in the highest degree improbable—so improbable as to amount to a moral impossibility—that the husband and wife should have had sexual intercourse with one another. Section 112 of our Evidence Ordinance is 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 remaining unmarried, " shall be conclusive proof that such person is the legitimate son of " that man, unless it can be shown that that man had no access to " the mother at any time when such person could have been " begotten, or that he was impotent."

Now, in the case before Withers, J., it seems to have been assumed that the law as enacted by that section is identical with the law prevailing in England. But I have come to the conclusion that that is not so. According to English Law, the legitimacy of a child born in wedlock is mere presumption, which may be rebutted by any evidence showing circumstances from which it may be inferred that the husband and wife had not sexual intercourse at the time the child could have been begotten. In the *Banbury Peerage Case*, Lord Redesdale said: " The presumption of " the birth of a child in wedlock may be rebutted both by direct "and presumptive evidence—first, by direct evidence, as impotency " and non-access, *i.e.*, impossibility of access; secondly, by all the

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"circumstances having the effect of raising the presumption that "the child was not the issue of the husband." Now, it is remarkable that the first part of the definition of the evidence admissible to rebut the presumption is almost word for word the same as the words of our Ordinance. The two things that our Ordinance allows to be shown are non-access and impotency. Lord Redesdale defines what non-access means, *i.e.*, impossibility of access. Our Ordinance does not go on to say that the second class of evidence spoken by Lord Redesdale is admissible, viz., evidence to show what I may call a moral impossibility of access. It seems to me that our Ordinance is designedly drawn so as to exclude a certain class of evidence which would be admissible according to English Law. It may further be observed that it is not a mere presumption of legitimacy which is to be rebutted, but what our Ordinance terms "conclusive proof" of legitimacy. It seems to me, therefore, that you must, before you can bring the case within the exception, establish one of two things: either that the husband was impotent, or that it was impossible for him to have had intercourse with his wife at the time the child was begotten. For instance, that he was at a place so distant that it was physically impossible for him to have had intercourse with his wife, or that he was confined in jail, in a lunatic asylum, or something of that kind. It seems to me that it is not open to parties if they are living in the same place where they may have opportunities of sexual intercourse to discuss the question whether it was likely that they would have had sexual intercourse. Therefore, the appeal fails and must be dismissed.

My attention was called to the case of *Podina v. Sada* decided by me in 1900. (*4. N. L. R. 109.*) If there is anything in that case inconsistent with what I have said to-day, it must be treated as over-ruled to that extent.