WIJESUNDERA
v.
WIJEKOON

COURT OF APPEAL.
A. DE Z. GUNAWARDANA, J.,
C.A. 15/86,
M. C. KEKIRAWA No. 21/86(F.C.),
JUNE 5 AND 6, 1990.

Evidence — Child born during the continuance of a valid marriage - Presumption of legitimacy under section 112 of the Evidence Ordinance -What is the standard of proof required to rebut the said presumption ? - Meaning of "access" - Wife living in adultery has no right to claim maintenance from her husband.

The learned Magistrate of Kekirawa dismissed the application made by the Applicant-Appellant, for maintenance for herself and her child. At the inquiry marriage was admitted but paternity of the said child was denied by the Respondent-Respondent. Applicant-Appellant's case was that she lived with the Respondent-Respondent from January 8, 1981, the day of the marriage, upto the end of March 1982, when she was brought back to her parents' house as she was pregnant. She gave birth to the said child on May 7, 1982. The Respondent - Respondent's position was that on the night of the day of marriage he found that the Applicant - Appellant was not a virgin. Thereafter he made a complaint to the Grama Sevaka of his village. The Applicant-Appellant's statement was also recorded by him, where she explained how she lost her virginity. Soon afterwards Applicant-Appellant was brought back to her village, and handed over to her parents. After making a statement to the Grama Sevaka of that village, the Respondent-Respondent went back to his village. Since then the Respondent - Respondent had nothing to do with the Applicant-Appellant.

Held :
(i) that a high degree of proof is required to rebut the presumption created under section 112 of the Evidence Ordinance.
Per Gunawardana, J., "Thus it appears that the presumption of legitimacy is rebuttable only by adducing cogent, clear and convincing evidence. This would in effect mean, that the man must prove, on evidence, which would not admit of any reasonable doubt, that he had no access."

(ii) That the word " access" means not only actual intercourse but also personal access under circumstances which raise the presumption of actual intercourse.

(iii) That the falsity of the allegation made by the Applicant-Appellant would tend to corroborate the denial of paternity by the Respondent-Respondent.

(iv) That section 4 of the Maintenance Ordinance denies a wife living in adultery, the right to claim maintenance from her husband.

Cases referred to:

(1) *Pesona v. Babonchi Bass 49 NLR 442, 444.*
(2) *Hargrave v. Hargrave 2 Beav. 552, 50 ER 457, 458.*
(3) *Head v. Head 1823 Turn & R. 138, 141 : 37 ER 1049, 1050.*
(4) *Churchman v. Churchman 1945 2 All ER 190, 195.*
(5) *Jane Nona v. Leo 25 NLR 241 (PC).*
(6) *Ranasinghe v. Sirimanne 47 NLR 112 (PC).*
(7) *Karapaya Servai v. Mayandi AIR 1934 PC 49.*
(8) *Banbury Peerage Case (1823) Turn & R 138, 140, 37 ER 1049, 1050.*

APPEAL from an order of the Magistrate of Kekirawa.

L.C. M. Swarnadhipathy for applicant-appellant.

Respondent-respondent absent and unrepresented.

Cur. adv. vult.

July 31, 1990.

A. DE Z. GUNAWARDANA, J.

This is an appeal from a judgement dated 20.1.1986, of the learned Magistrate of Kekirawa dismissing the application made by the Applicant-Appellant (hereinafter referred to as appellant) for maintenance for herself and her child named Wimal Dilruksha.

At the inquiry the marriage was admitted but the paternity of the said child was denied by the Respondent-Respondent (hereinafter referred to as respondent).

The appellant's case, briefly, was that she married the respondent on 8th January 1981. She produced the marriage certificate marked P1. She was taken to the house of the respondent, on the same day, that they got married and lived with the respondent at his house in Pilimatalawa for one year and three months. When she was expecting the said child she was brought back to her parents' house towards the end of March 1982. The said child was born on 7.5.1982. The birth certificate of the said child was produced marked P 2. After she was brought back to her parents' house, the respondent did not come to see her, till after the child was born. The respondent did not come when he was informed of the birth of the said child. About three months after the birth of the child he had come one night and left early in the morning on the following day. Thereafter he had not come.

The respondent's position was that he is not the father of the said child, although he admitted that there is a legally contracted marriage. According to him he took the appellant to his house at Pilimatalawa on 8.1.1981, the day of the marriage itself. That day he had sexual intercourse with the appellant in the night and he found that she was not a virgin. When he questioned her she had explained that she had a relationship with a person by the name of Wanasinghe, who was working in the workshop of one Ratnayake Aiya, and that she lost her virginity due to that relationship. On 17.1.1981 the respondent had gone with the appellant to the Grama Sevaka of his village and made a complaint, which was produced marked V x 3. On that occasion the said Grama Sevaka had recorded the statement of the appellant also, which statement was produced marked V x 4. In that statement she has stated how she lost her virginity prior to marriage, as explained by her to the respondent. Thereafter the respondent had brought back the appellant to her parent's house on 19.1.1981 and made a complaint, that day, to the Grama Sevaka of that village viz. Negampaha. This statement was produced marked X4. In that statement he had recalled what happened upto then and stated that he has handed over the appellant to her parents that day, and that he intends to get the marriage dissolved. After making the statement he had gone back to his village, leaving the appellant with her parents, and thereafter had nothing to do with her.

In a case such as this, where marriage is admitted and the birth of the said child during the continuance of the marriage is proved, the question that arises for consideration is whether the respondent has shown that he had no access to the mother at any time when the said child could have been conceived because the provisions of section 112 of the Evidence Ordinance would be applicable in such a situation. Section 112 of the Evidence Ordinance states :

> "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."

In view of the said presumption created by section 112 of Evidence Ordinance the appellant is entitled to rely on it to prove the paternity of the

said child. The burden is on the respondent to disprove the said presumption. According to section 112 it is conclusive proof that respondent is the father of the said child because the said child was born during the continuance of a valid marriage, unless respondent shows that he had no access to appellant at the time the said child could have been begotten or that he was impotent. Section 4(3) of the Evidence Ordinance defines conclusive proof as :

> "When one fact is declared by this Ordinance to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

Although conclusive proof is defined in that manner in the Evidence Ordinance, section 112 itself permits evidence to be given for the purpose of disproving that the child is the legitimate child of that man. What then is the standard of proof required to rebut the presumption of legitimacy under section 112 ? The words used in the section are "unless it can be shown". Basnayake, J. (as he then was) has stated in the case of *Pesona v. Baborichi Bass* (1) that,

> "I think the word "shown" has been advisedly used by the draftsman who appears to have avoided in this context the better known expression "proved" .....

The word "shown" is a familiar expression and is a word which has a wide range of meaning according to its context. As it is not defined in the Evidence Ordinance it should be given a meaning appropriate to the context. In view of the very strong presumption on the other side, I think it should be construed in the sense of "to convince", "to make clear".

Lord Langdale in *Hargrave V . Hargrave* (2) with reference to the degree of proof required has pointed out that –

> "Throughout the investigation, the presumption in favour of legitimacy is to have its weight and influence, and the evidence against it ought, as it has been justly said, to be strong, distinct, satisfactory and conclusive."

It is to be noted that such high degree of proof in regard to non-access is insisted upon for reasons of public policy as well. For the sake of orderly society, public policy requires that the legitimacy of a child born out of

wedlock should not be lightly disturbed. Lord Chancellor Eldon in *Head v. Head* (3) set down the correct approach to that question as follows :-

> "Whenever it is necessary to decide that question great care must be taken, regard being had to this, that the evidence is to be received under a law, which respects and protects legitimacy, and does not admit any alteration of the *status et conditio* of any person, except upon the most clear and satisfactory evidence."

It must be mentioned here that another reason why such high degree of proof is insisted upon is because the proof of non access by the man would necessarily mean attributing an adulterous union to the woman, consequentially the bastardisation of the child born out of that illicit union.

In such a situation it is only fair that courts would require the same standard of proof as in a matrimonial offence. In the case of *Churchman v. Churchman* (4), Lord Merriman in discussing the proof required in a matrimonial offence has observed that –

> "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called."

Thus it appears that the presumption of legitimacy is rebuttable only by adducing cogent, clear and convincing evidence. This would in effect mean that the man must prove, on evidence, which would not admit of any reasonable doubt, that he had no access.

The word "access" has been the subject of interpretation in several cases. In *Jane Nona v. Leo* (5) it was held to mean "actual intercourse". However in *Ranasinghe v. Sirimanne* (6) following the Privy Council decision in *Karapaya Servai v. Mayandi* (7) it was interpreted as meaning no more than opportunity of intercourse. It appears that while the Full Bench of the Supreme Court in *Jane Nona v. Leo* attributed a restricted meaning, the Privy Council in *Karapaya's* case gave a wide interpretation to the word access. In my humble a view, Lord Eldon in *Banbury Peerage case,* (8) has given a balanced exposition of the word "access". He states:-

> "I take them to have laid down, so as to give it all the weight which will necessarily travel along with their opinion, although not a judicial decision, that where access according to the laws of nature, by which

they mean, as I understand them, sexual intercourse, has taken place between the husband and wife, the child must be taken to be the child of the married person, the husband, unless on the contrary it be proved, that it cannot be the child of that person. Having stated that rule, they go on to apply themselves to the rule of law where there is personal access, as contradistinguished from sexual intercourse, and on that subject I understand them to have said, that where there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actually sexual intercourse, and that that presumption must stand till it is repelled satisfactorily by evidence that there was no such sexual intercourse."

Having considered the above observation of Lord Eldon, Basnayake, J. (as he then was) in *Pesona v. Babonchi Bass* at page 455 has expressed the view that–

"It appears from the above statement that the word "access" connotes that not only actual intercourse but also personal access under circumstances which raise the presumption of actual intercourse. Mere opportunity of intercourse, under circumstances which do not raise the presumption of actual intercourse, in my view, is not "access" within the meaning of section 112."

The said observation of Basnayake, J. (as he then was), in my view, aptly sums up the correct approach to the interpretation of the word "access". Such an interpretation, I believe, would enable equity and good sense to prevail, as is required in the context of such a situation.

I would now venture to consider the evidence in the case in the light of the legal principles enumerated above. Although there is no burden on the appellant to go further and prove paternity, other than to adduce evidence necessary to bring the presumption under section 112 into operation, it is nevertheless necessary to consider her evidence in order to assess the weight that should be attached to her allegation that respondent is the father of the said child. For, in my view, if the allegation is proved to be false, it would support the denial of paternity by the respondent.

The learned Magistrate had disbelieved the appellant and rejected her evidence for several reasons. He has pointed out that the appellant has

given false evidence. When she was shown letter marked V1, at first, she has admitted that the hand writing was her's, and that it had been addressed to her father. In reply to a question by court she has confirmed that it was her handwriting. Soon thereafter, she has said that it was a mistake and that she does not know anything about the said letter. In consequence of an objection taken by the counsel for the appellant, the said letter was given to the appellant to read it fully. Having read the letter she has again stated that she does not know anything about the letter or the handwriting in it. She has also admitted in evidence that she at first accepted that the handwriting of the said letter V 1 was her handwriting, but that later she denied that fact. Although in cross examination she had said that she did not know anything about the said letter V 1, in re - examination she has changed her position and stated that the respondent abused her and got her to sign a paper having held her by her neck. She added that she did not read the said letter V 1 and that the respondent got her to sign it by force.

It should be noted here that it was important for the appellant to deny the writing of the letter V 1 because if she admitted it, it would have directly corroborated the position taken up by the respondent. Because letter V1 describes in detail the circumstances under which she lost her virginity, which is the reason why, the respondent did not want to continue with the marriage.

In another instance she has directly admitted, that she uttered a falsehood, when she denied having written any letters to the respondent prior to marriage, she stated as foilows :-

It is to be seen that her evidence is inconsistent and has changed her position regarding certain matters from time to time. In regard to letter V 1 , she had at one stage admitted that the said letter was in her handwriting but has later denied that position. In respect of the circumstances under which the said letter was signed she has given different versions. When the letter dated 14.7.90 (marked X2) was shown to the appellant at first she admitted the handwriting as her's but later denied having written a letter like that.

In addition the evidence of the appellant has been contradicted by her own witnesses. According to her the respondent did not come to see her

after she was brought back to her parents' house in March 1982, till after about 3 months of the birth of the said child. She does not mention anything about the respondent working the fields with her father after she was brought back to her house. However witness Tikiribanda, who is an uncle of the appellant, has stated that the respondent came and worked in the fields when the appellant was at her parents' house, expecting the child. Witness Ranbanda who was called by the appellant, also stated that the respondent worked the field with her father. The respondent helped in the threshing of the paddy in April 1982. He had seen the respondent in the house of appellant's parents at the time she was pregnant. The appellant's father also has stated that the respondent came with the appellant and worked the fields with him. After the paddy was harvested and sold he took the money and went away. The respondent had come back a few days afterwards and had gone away before he came back from the pola.

The evidence of the appellant is further contradicted by the evidence of witness Jayaweera Rajapakse, the Grama Sevaka of Arambewela. Although the appellant has stated that statement marked V x 4 was not read to her and she asked to sign the statement by the Grama Sevaka stating that it was for the transfer of the pension card and kerosene card, the Grama Sevaka has categorically denied this position. The appellant claimed that she lived in the house of the respondent till March 1982, but the said Grama Sevaka in his evidence has stated that, during that period he had been to the respondent's house, at least on two occasions, but has not seen the appellant there. He has denied that he tricked the respondent to sign the statement. When one examines the contents of the statement made by respondent to the said Grama Sevaka (marked V x 4) and the letter V 1 one can not help but notice the remarkable similarity in regard to the details of the incident in which she has lost her virginity. It is hard to believe that the respondent or the said Grama Seveka contrived such a story. There is corroboration of the said statement (marked V x 4) and letterV 1 in the evidence of appellant herself, where she has admitted in her evidence, that she has a relation by the name of Ratnayake who had a workshop at that time, as he was building a house. Furthermore the appellant has not made any suggestion or led any evidence to show that the said Grama Sevaka's evidence should not be believed. In any event it is clear that he has attended to this matter purely in his official capacity and there is no reason to doubt his credibility.

Thus it is seen that the evidence of the appellant is unreliable and unsatisfactory and the learned magistrate was right in disbelieving her

and rejecting her evidence. Although the falsity of the allegation made by appellant would tend to corroborate the denial of paternity by the respondent, the burden nevertheless still remains with the respondent to rebut the presumption under section 112 of the Evidence Ordinance, on cogent and convincing evidence. Therefore I will now examine the evidence adduced by the respondent.

The respondent giving evidence on his own behalf has denied that he is the father of the said child, and that after he handed over the respondent to her parents on 18.01.1981, after making the statement (marked x 4) to Grama Sevaka of Negampaha, he had nothing to do with the respondent. It is important to note that in the said statement itself he has stated that he handed over the respondent to her parents on 18.01.1981. He has further stated that he had stopped having sexual relations with respondent since the night of the day of marriage. In his earlier statement (Marked Vx3) too, which he has made to the Grama Sevaka of his village, Arambewela, on 17.01.1981, he has taken up the same position, that he has stopped sexual relations with the respondent after the first night. This position has been admitted by the appellant in her statement to the Arambewela Grama Sevaka on 17.01.1981, which was produced marked V x 4 . Hence it is hard to believe that having made all these statements and after bringing the appellant back to her parents' house, the respondent would have taken back the appellant to his village again, to live as husband and wife, as suggested by the appellant.

In regard to the making of the statement both Grama Sevakas have corroborated the respondents. The statements having being produced in the case shows that the contents of them bears out the position taken up by the respondent. The very act of going to the Grama Sevaka shows that the respondent intended to terminate this relations in a positive way. It can be in a sense said to be a mental severance of the union, and he intended to have it recorded by a legally competent authority. The act of taking the appellant to her parents' house shows that he intended a physical separation. This has resulted in a physical inability of access, as the residences of the parties are separated by a considerable distance.

The cause for the failure of the marriage appears to be the distrust the respondent had developed towards the appellant, after he came to know her reprehensible conduct, prior to her marriage. It is in this context that the contents of the letter V 1 plays an important role. It is also significant to note that what is stated in the statement (marked V x 4) to Grama

Sevaka Arambewela by the appellant, materially corroborates the details as given in letter (V1) as to how she lost her virginity. Therefore the cause for the failure of the marriage and the subsequent separation of the parties as alleged by the respondent is corroborated by the said letter (V1) and the statement marked (V x 4).

As regard the assertion by the appellant that she lived in the house of the respondent from the day of the marriage upto March 1982, till she was brought back to her parents' house, we have her dismal performance in the witness box, which showed that she did not know even the names of the brothers' and the sisters' of the respondent. She did not know the name of the village and the name of the village temple. The learned Magistrate has pointed out that she was unaware that even the mother of the respondent was dead. Furthermore the Grama Sevaka of Arambewela, the village of the respondent, has stated that he had occasion to visit the respondent's house at least on two occasions during the relevant time but he did not see the appellant there. All these go to show that the appellant did not live with the respondent in his house, during the relevant period.

Having carefully considered all these items of evidence, I am of the view that the respondent has proved beyond reasonable doubt that, he had no access to the appellant during the period at which the said child could have been conceived. Accordingly I hold that the respondent has successfully rebutted the presumption of paternity as contemplated under section 112 of the Evidence Ordinance. Therefore the claim for maintenance made from the respondent on behalf of the said child should be dismissed.

However the claim for maintenance by the wife stands on a different footing, because a valid marriage is still subsisting between the appellant and the respondent, as evidenced by the marriage certificate (marked P1) and admitted by the parties. The Counsel for the appellant submitted that, therefore, even if the claim for maintenance of the child is dismissed, the wife's right to claim maintenance will prevail. It is to be seen that section 2 of the Maintenance Ordinance, per se, gives a wife the right to claim maintenance from her husband. But, section 4 imposes certain restrictions on that right, in the following manner :-

"No wife shall be entitled to receive an allowance from her husband under section 2 if she is living in adultery, or if, without any sufficient

reason, she refuses to live with her husband, or if they are living separately by mutual consent."

It is clear from the above provision that a wife living in adultery is denied the right to claim maintenance from her husband. This provision accords with maintaining public morals and the sanctity of marriage. I have made a finding earlier, that the respondent had no access to the appellant during the time when the said child could have been begotten. It is implicit in that finding that the appellant has had an adulterous union. This would mean that the appellant is living in adultery and therefore would not be entitled to claim maintenance from the respondent. Hence I hold that the claim for maintenance made by the appellant for herself, from the respondent, should also be dismissed.

Since I have decided to dismiss the appeal on the grounds stated above, it is not necessary to go in to the validity of the objection taken by the respondent to the affidavit filed by the appellant in the Magistrate Court in this case.

Accordingly the appeal is dismissed without costs.

Appeal dismissed.