Present : **Wijayatilake, J. and Malcolm Perera, J.**

T. M. SITA KUMARI TENNEKOON, Applicant-Appellant *and* T.N.R.B. TENNEKOON, Defendant-Respondent

S.C. 766/72—M.C. Mahawa 23920

Maintenance Ordinance Section 6—Corroboration of mother's evidence—" at or about the time " of sexual intimacy.—S. 157 of the Evidence Ordinance.

Evidence—Impeaching the credit of a witness—Proof of former statements—Evidence Ordinance sections 145, 155.

Held : (1) When section 6 of the Maintenance Ordinance speaks of corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognized by our law at the time when the applicant's evidence is given.

The words 'at or about the time' when the fact took place must mean that the statement must be made at once or at least shortly thereafter when a reasonable opportunity for making it presents itself.

The rule laid down in *Dona Carolina v. Jayakoddy* 33 N.L.R. 165 that corroboration can in no case be afforded by happenings that occur after the cessation of sexual intimacy commented on.

(2) What is meant by saying that the mother's evidence must be corroborated is that there must be some evidence in addition to her evidence which she has given in court " which in some degree is consistent with her version and inconsistent with the innocence of the defendant "—that is to say, there must be evidence that implicates the defendant or connects the defendant or tends to connect him with the birth of the child. From the very nature of the case it will be impossible to have direct corroborative evidence of sexual connection. Thus the evidence in corroboration will, in almost all cases, be of a circumstantial character.

(3) Section 145 of the Evidence Ordinance requires that if it is intended to rely on a previous statement to contradict a witness, his attention must be called to those parts of the statement which are to be used for contradicting him. The witness must be afforded every opportunity to address his mind to the relevant portions of the statement to enable him to explain or reconcile his statement.

Appeal against the order of the Magistrate.

E. R. S. R. Coomaraswamy with *Fritsz Kodagoda* and *S. C. B. Walgampaya* for the applicant-appellant.

Nimal Senanayake with *Rohan Perera* for the defendant-respondent.

MALCOLM PERERA, J.—

In this case the applicant-appellant sued the defendant-respondent for maintenance of an illegitimate male child named Ratna Bandara Tennekoon who was born to her on 24th March, 1972. Briefly, the appellant's case was that from the beginning of the year 1969, there was an association between herself and the defendant-respondent, who is her cousin. He used to visit her house regularly till the 15th of November, 1971. On the 28th of June, 1971, the defendant had sexual relations with her for the first time promising to marry her. Thereafter, the defendant has had sexual relations with her on ten or fifteen occasions in her house.

It would appear that the appellant's father was employed at Galgamuwa and came home only for the week-ends, and her mother, for the most part of the day, was away from home almost daily during the relevant period as the applicant's sister was ill and warded in hospital. It is the appellant's case that her love affair with the defendant was carried on without the knowledge of her parents. It is her evidence that when she found that her menstruation had not occurred in the month of July, 1971, she forthwith brought it to the notice of the defendant and he swore that if a child were to be born he would admit paternity. He had further promised to attend to everything that would become necessary to be done.

The appellant, in her evidence, has stated that from the beginning of 1969 the defendant had sent letters to her either by post or through the hand of her younger sister. In June, 1970, she had received about fifteen letters, and she continued to say that when two or three letters got collected he used to recover them from her and remove them. The appellant had sent her letters through her younger sister. The last letter from the defendant was received in March, 1971. The defendant, when he visited the appellant, used to open her suitcase and remove the letters. The last letter, too, was likewise taken away by him.

Witness Dingiri Banda, giving evidence for the appellant, has stated that in October, 1971, the defendant requested him to meet the parents of the appellant and obtain their consent for the defendant to marry the appellant. Dingiri Banda, however, had advised the defendant to pursue the matter in consultation with his parents and elders. In November, 1971, the defendant had repeated his request to Dingiri Banda, and thereupon Dingiri Banda met the appellant's mother at her house and conveyed the defendant's request. The appellant's mother rejected the proposal. This evidence has been wholly supported by the testimony of the appellant's mother.

The learned Magistrate, who saw the witness and heard him, has stated in his order that Dingiri Banda may be giving trustworthy evidence.

The defendant gave evidence and denied paternity of the child. He stated that he had never visited the appellant's house. He had not even spoken to her though she lives only 70 fathoms away from her house and for some time went to the same school that the defendant had attended. He denied that he wrote any letters to the appellant. He stated that the parents of the appellant had never met his parents to discuss the question of his marriage with the appellant. His evidence was supported by the testimony of his father.

The learned Magistrate rejected the evidence of the appellant on the following grounds:—

(*a*) That in D1 and D2 the appellant had stated that she had handed over her letters to the defendant at the conference held between the parents of the two parties. In her evidence she had stated that when two or three letters were collected the defendant used to take them away.

(*b*) That the defendant took the letters, when he came to her house, from her suitcase.

(*c*) That the last letter was received in March, 1971, but the defendant came to her house for the first time in June, 1971.

The learned Magistrate stated that the applicant was unable to say which of the versions is the correct one. Further, the learned Magistrate went on to state that the evidence of the applicant's mother with regard to the visits of the defendant was contradictory and that the evidence of witness Wijesekera, far from corroborating her evidence, contradicted the applicant.

Now, considering (*a*) and (*b*), it would be appropriate at this stage to examine the legal provisions with regard to impeaching the credit of a witness by proof of former statements which are inconsistent with any part of his evidence. Section 155 of the Evidence Ordinance provides that the credit of a witness may be impeached, inter alia, by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. However, that section is silent as to the manner in which the former statement is to be proved or the procedure to be adopted. The mode of proof of such a written statement, when it is sought to be tendered in evidence for contradicting a witness, is found in section 145 of the Evidence Ordinance.

Section 145 (1) reads as follows :

> "A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant matters in question without such writing being shown to him or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Section 145 requires that if it is intended to put such writing to contradict a witness, his attention must be called to those parts of the statement which are to be used for contradicting him. The witness must be afforded every opportunity to address his mind to the relevant portion of the statement and every occasion given to him to explain or reconcile his statements. If such an opportunity is not given to the witness, the contradictory writing cannot properly be admitted in evidence. The witness must be treated with fairness and should be afforded every opportunity of explaining the contradictions after his attention has been drawn with clarity and in a reasonable manner. It is a question of fact in each case whether there has been a substantial compliance with the requirements of section 145.

On a careful examination of the evidence of the applicant and the documents D1 and D2, it would be seen that the requirements of section 145 have not been as strictly followed as the circumstances of this case demand. When the appellant denied having made certain statements to the Grama Sevaka, those particular passages were not specifically put to her. Hence, she has been denied the opportunity to explain or reconcile the statements alleged to have been made by her.

With regard to (c) I am constrained to state that the learned Magistrate has completely misdirected himself on the facts. It is the clear and unambiguous evidence of the applicant that the

defendant had been regularly visiting her home from 1969 till the 15th November, 1971. Therefore, the learned Magistrate has erred on the facts when he states in his order that the defendant came to her nouse for the first time in June, 1971. What the appellant did say was that the defendant had sexual relations with her for the first time in June, 1971. Further, the learned Magistrate says that the applicant's evidence contradicts the testimony of her mother with regard to the defendant's visits. On a careful examination of the evidence of the mother and the daughter, I cannot say that there is any contradiction between the two on this matter.

With regard to the learned Magistrate's assessment of Wijesekera's evidence, I cannot agree that it conflicts with the testimony of the applicant. Wijesekera's evidence, briefly, is that he is the son of the applicant's mother's younger sister. He is a carter, and in the course of his normal work he has to pass the applicant's house which he did almost daily. His younger sister was living in the house of the applicant in order to go to school, and it was usual for him to drop in at the applicant's house to see his sister. On certain occasions he had seen the defendant in the house of the applicant when her parents were not in the house. This being the evidence, I fail to see how the learned Magistrate is able to state that Wijesekera's evidence does not support the applicant's case, but contradicts the applicant's testimony.

After carefully analysing the evidence I am of the view that the learned Magistrate is not justified in rejecting the evidence of the applicant.

The next question that I have to examine is whether there was 'other evidence' to corroborate the applicant in some material particular, as required by section 6 of the Maintenance Ordinance in order to justify a claim for maintenance.

The relevant portion of that section reads as follows: "..... and 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." What is meant by saying that the mother's evidence must be corroborated is that there must be some evidence in addition to the applicant's evidence which she has given in Court "which in some degree is consistent with her version and inconsistent with the innocence of the defendant". That is to say, there must be evidence that implicates the defendant or connects the defendant or tends to connect him.

What is meant by corroboration in some material particular? The vital fact to be proved in an application for maintenance of an illegitimate child is that that child has been begotten as a result of sexual intimacy with the defendant. From the very nature of the case, it will be impossible to have direct corroborative evidence of sexual connection. Thus, the evidence in corroboration will, in almost all cases, be circumstancial evidence of the main fact, namely, sexual connection. In this case the applicant-appellant relied on the statement she had made to her mother in December, 1971, namely, that she was pregnant and the defendant was the father of the child. This statement was admittedly made some weeks after the defendant had ceased to visit the applicant.

Section 157 of the Evidence Ordinance provides that a former statement of a witness relating to a fact which is the subject of a subsequent judicial inquiry, if made at or about the time when the fact took place, may be proved for the purpose of corroborating the evidence of that witness.

No doubt, the Evidence Ordinance is later in date to the Maintenance Ordinance. However, when the section speaks of corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognised by our law at the time when the applicant's evidence is given. No doubt, the corroborative value of the statements depends upon the circumstances of each particular case. The party seeking to prove the statement must establish by clear and unequivocal evidence the proximity of time between the happening of the fact and the making of the statement. In this regard a hard and fast rule cannot be drawn, but a deciding fact would be whether the statement was made as early as can reasonably be expected in the given situation of a case and before there was an opportunity for fabricating or tutoring.

The words 'at or about the time' must mean that the statement must be made at once or at least shortly thereafter when a reasonable opportunity for making it presents itself. The section does not contemplate the admission of a statement made long after the happening of the event. What is a reasonable time, of course, would depend on the circumstances of each case. Thus, in India it has been held that an entry in a Vaccination Register which includes a statement by a woman that a person bearing the name of the alleged father of an illegitimate child was the father of the illegitimate child, made three years after its birth, does not satisfy the terms of section 157 of the Evidence Ordinance and is not, therefore, admissible in evidence—vide *Kanniappan v. Kullammal*, A.I.R. 1930 Madras 194.

Mr. Rohan Perera, learned Counsel for the defendant-respondent, drew our attention to the fact that the statement was made by the appellant in this case to her mother in December, 1971. It was his contention that this statement would not amount to corroboration as it was belated and hence not made ' at or about the time '.

I have given this argument the anxious consideration that it well deserves, and I must confess that I cannot assent to it in the light of the facts of this case.

In the case of *Angohamy v. Kirinelis Appu,* 15 NLR 232, where it was proved that within a few months after conception the parents of the mother discovered her condition and then she gave the name of the defendant as the father of the child, Wood Renton, J. held : " In the present case the evidence shows that within a few months after conception, and when her condition was discovered, the respondent made a statement to her parents, who, on their part, complained to the Police Vidane. Under these circumstances it may fairly be said that the previous statement was made at a point of time sufficiently near to the fact, which the Court had to ascertain to make it admissible under section 157. " (At page 233). This case was considered by a Full Bench of three Judges in the case of *Ponnammah v. Seenithamby,* 22 NLR 395. Bertram, C. J., in considering section 157, referred to the case of *Anghohamy v. Kirinelis Appu* and stated thus : " In that case the evidence showed that within a few months of conception and when her condition was discovered, the woman made a statement to her parents. Wood Renton, J. observes that the words ' at or about ' were relative terms. Of course, in any case, it must be a question of fact whether one event is at or about the time of another. Personally, I feel a difficulty in following this pronouncement that a statement made by a woman within a few months after conception is made ' at or about the time ' of the material fact under consideration, namely, the alleged sexual intimacy between the parties, *unless, of course, if it were shown that the sexual intimacy continued after conception and down to about the time of the complaint.* "

Now, what are the relevant facts of the present case ? They are—that the first act of intercourse was in June, 1971 ; that conception took place in July, 1971 ; that the defendant, on being informed of the condition of the applicant, promised to admit paternity and do everything necessary ; that after conception it was brought to his notice that the applicant had conceived, the defendant continued to visit her, and that since June, 1971, he has had sexual intercourse with the applicant on ten or fifteen

occasions ; that the defendant continued to visit the applicant till the 15th of November. Surely, these facts disclose " that sexual intimacy continued after conception and down to about the time of the complaint ".

I think at this point I should refer to the case of *Dona Carolina v. Jayakoddy,* 33 NLR 165, where Garvin S.P.J., held that a statement made by the mother of an illegitimate child as regards its paternity after cessation of sexual relations with the alleged father is not corroboration of her evidence. In that case the Magistrate went on the applicant's own evidence that the statement was made after cessation of sexual relations. Thus, it was a case in which it was possible to show that sexual intimacy did not or could not have continued down to or about the time of the making of the statement which is intended to be proved.

But, in the instant case, as I mentioned earlier, the defendant continued to visit the applicant till the 15th of November, that is, for about four months after conception. Thus, the statement of the applicant-appellant to her mother in December, in the circumstances of this case, I think, was made about the time of sexual intimacy. In the case of *Dona Carolina v. Jayakoddy* (*supra*), it was further held that the conduct of the mother with reference to the scenes created in the presence of the respondent after sexual relations had ceased does not amount to corroboration of her evidence. Garvin, S.P.J., stated : " These incidents took place many months after conception and after sexual relations, if they ever did exist, had, on the applicant's own evidence, ceased. Any designing woman may create such a scene at the house of the man she desires to accuse as the person responsible for her condition, and it is manifestly unsafe to treat such conduct as sufficient corroboration of her evidence as to paternity Such evidence does not, in my opinion, satisfy the requirements of section 7 of Ordinance No. 19 of 1889 as to corroboration ".

I find myself unable to regard that case as laying down a rule with such inflexibility as to say that corroboration can in no case be afforded by happenings that occur after the cessation of sexual intimacy. In my view, section 6 of the Maintenance Ordinance does not in any way place any limits as to the type or the nature of evidence corroborative of the mother of the child. What that section requires is that there must be corroboration of the mother's evidence which is given in Court by her by some other evidence in some material particular which satisfies the Magistrate. In the case of *Gooneratne v. Babie,* 50 NLR 23, Basnayake, J. (as he then was) said : " In regard to certain

incidents which occurred after the conception, I think, I should refer to the case of *Dona Carolina v. Jayakody* which learned Counsel cited. That case cannot, in my view, be regarded as laying down a rigid rule that corroboration can in no case be afforded by incidents which take place after sexual relations ceased ".

In the case of *Thomas v. Jones,* 1921 1. K. B. 22, section 4 of the Bastardy Laws Amendment Act of 1872 came up for consideration. That section provides that the Justices " shall hear the evidence of such woman and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said Justices, they may adjudge the man to be the putative father of such bastard child ".

Scrutton, L. J., in his dissenting judgment (at page 39) said : " What is meant by corroboration in some material particular—that is, in a material fact ? The vital fact to be proved in a bastardy case is that a child has been born to the applicant as a result of sexual connection with the man. From the nature of the case it is almost inevitable that there will never be any direct corroboration of sexual connection. The evidence in corroboration must always be circumstantial evidence of the main fact, that is to say, evidence from which it may be inferred that the main fact happened. For instance, the fact that the man has had sexual connection with the woman and a child has resulted, is sometimes inferred from evidence of previous affection, that they have been seen together, showing affection to each other. Sometimes, it is inferred from the fact of subsequent affection—that the man and woman are seen together showing signs of affection. Sometimes, it is inferred from the fact that the man has done acts which may be treated as recognising responsibility for the child as his child, statements that he will provide for the child, payments for the child, all facts from which, as a matter of inference and probability, it is more probable that intercourse did take place than not. I quite agree with what Bankes, L. J. has said that if the fact is such that the probabilities are equal one way or the other, an inference cannot legitimately be drawn from it one way or the other ".

After considering the above-mentioned portion of the judgment of Scrutton, L. J., De Waall, Judge President adopted it in the case of *Van Der Merwe v. Nel,* 1928 to 1929 T. P. D. 551 and said : " Corroboration may therefore be evidence as to what took place at the time of the alleged seduction. It may be that of

an eye-witness. That, of course, would be conclusive corroboration of the evidence of the woman. It may be evidence as to the incidents that happened prior to the alleged seduction, or which happened after the alleged seduction. One such instance of an incident happening after the alleged seduction is to be found in the case of *Jacob v. Henning* to which I have already referred, where the only evidence of corroboration which was found by the Court to be sufficient was that the defendant, on being remonstrated by the parents of the plaintiff, said nothing and hung his head. The Court, holding that that was sufficient corroboration in law, justified it in finding for the plaintiff ".

This view of De Waall, J. P. prescribes the precise bounds of corroborative evidence that may be adduced by an applicant in an application for maintenance under our Maintenance Ordinance. In the case of *Gooneratne v. Babie,* Basnayake, J., referring to the case of *Van Der Merwe v. Nel,* had this to say : " The case of *Van Der Merwe v. Nel* contains a full discussion with reference to English, Scottish and South-African decisions on the question of corroboration in proceedings for maintenance. The view expressed by De Waall, J. P., in that case that corroboration may be afforded by evidence as to the incidents at the time of the alleged sexual intimacy, prior to it, or after it, in my opinion, lays down the true limits of corroborative evidence that an applicant under the Maintenance Ordinance may rely on ".

Another feature in the present case is the fact that the defendant, in giving evidence, stated that he never visited the house of the applicant-appellant though he was living only seventy fathoms away and he was a close relative of the applicant. I am not unmindful of the evidence that there was some family displeasure. He even stated that he had not at any time spoken to the applicant although they were for some time attending the same school contemporaneously. I must admit that I find it difficult to believe the defendant's evidence on this point. These statements of the defendant are, in my view, false.

Mr. Coomaraswamy submitted on behalf of the applicant-appellant that the false statements of the defendant should be taken as items of corroboration of the applicant's evidence. The question for consideration, therefore, is whether these false statements afford corroboration of the applicant's version. It cannot be the case that if the statements of a defendant were to be false, they could always be regarded as corroboration of the applicant's evidence. If that were the position, it might as well be said that the evidence of a defendant where he denied that he was the

father of the child would afford as corroboration, and, for that matter, any case presented by a defendant which is disbelieved may be regarded as corroboration of the mother's evidence.

Whether the defendant's conduct in making false statements will or will not amount to corroboration must depend upon the facts and circumstances of each case, as was stated by Lord Goddard L. C. J., *Credlan v. Knowler* (35 Criminal Appeal Reports 48) : " In other words one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told." (At page 55).

In the case of *Jones v. Thomas,* L. R. 1934 1 K. B. 323 at 327, Lord Hewart, C. J., stated thus : " .....the conduct of the alleged father may amount to corroborative evidence *where it appears that there is reason to infer from such conduct that the mother's story is presumably true,* as in *Mash v. Darley* and *Thomas v. Jones* and in the Scottish case of *Dawson v. McKenzie.* " In the case of *Dharmadasa v. Gunawathie,* 59 NLR 501, T. S. Fernando, J., had this to say of this concise statement of Lord Hewart : " If I may say so, with respect, the matter was put succinctly and correctly by Lord Hewart C. J. ".

The question whether false statements made by a defendant in a maintenance case amount to corroboration of the applicant's evidence came up for consideration in the case of *Warawita v. Jane Nona,* 58 NLR 111. The facts in regard to false statements have been set out as follows :

" But there is an aspect of the evidence given by the defendant, as compared with that given by the applicant, which seems to me to be decisively in the applicant's favour. It is clear that the defendant was not speaking the truth when he said that the applicant came to live on this land only in 1945, that it was to the applicant's sister and not to the applicant that he sent the written instructions regarding the working of the land in 1941, and that the applicant was known as Caroline and came to be known only later as Jane. In themselves these details were not very important, and if the defendant had spoken the truth in regard to them it might have been difficult to say that the relationship between him and the applicant was anything more than that of an employer and employee. Parlis' evidence might then have been merely of an equivocal nature and it might well have been argued that the evidence established only the mere opportunity for intimacy. The situation is different when it becomes clear that the defendant has been lying on these matters. He has attempted to disclaim any knowledge of the

applicant prior to 1945, obviously in order to render it impossible for him to be the father of the two elder children, and highly improbable that he is the father of the two younger children".

Sansoni, J., applied the principles enunciated in *Jones v. Thomas* and *Credlan v. Knowler* (*Supra*).

He said: "Applying these principles, I think, the false statements made by the defendant remove any doubt that may have existed on the question of corroborative evidence and I dismiss this appeal".

From the false statements of the defendant in the present case, is there any reason to infer that the applicant's story is presumably true ? Having carefully examined these false statements, I am of the view that they are of such a nature and made under such circumstances as to erase any doubt that may have existed in my mind on the question of corroborative evidence.

As was stated by Lord Bunedin in *Dawson v. McKenzie,* (1908 45 Scottish L. R. 473) quoted by Lawrence, J. in *Thomas v. Jones* (Supra): "It is not that a false statement made by a defender proves that the pursuer's statements are true, but it may give a proved opportunity a different complexion from what it would have borne had no false statement been made".

In the instant case, quite apart from the statement of the applicant to her mother and the false statements of the defendant above-named, I think, the unimpeachable evidence of Dingiri Banda, to which I have already referred, more than amply corroborates the applicant's evidence on material particulars.

In the result, this appeal must succeed. I therefore allow the appeal and set aside the order of the learned Magistrate and hold that the defendant is the father of the child Ratna Bandara Tennekoon. The applicant, in her application for maintenance has prayed for a sum of Rs. 40 per month as maintenance for her child. Accordingly, I order the defendant to pay a sum of Rs. 40 per month as maintenance for the child Ratna Bandara Tennekoon. The defendant is further ordered to pay costs in the Magistrate's Court in a sum of Rs. 50 and also costs of this appeal in a sum of Rs. 250.

WIJAYATILAKE, J.—I agree.

Appeal allowed.