

GUNAWATHIE

v

PRIYALAL

SUPREME COURT
SARATH N. SILVA, C.J.
SHIRANEE TILAKAWARDANE, J.
SOMAWANSA, J.
SC 81/2005
HC KANDY 1246/2003
MC 3150
APRIL 24, 2006
JULY 3, 2006

Maintenance Act No. 37 of 1999 – section 2(2) - Illegitimate child – Mother dumb – Reliability of the evidence – Corroboration required? – Evidence Ordinance, section 118, section 119.

The applicant-respondent-appellant filed action seeking maintenance from the respondent claiming that he is the father of the child born to her 'dumb' daughter. The mother of the child who was dumb gave evidence through an interpreter; the paternity of the child was put in issue by the respondent. The Magistrate's Court delivered its order in favour of the applicant-appellant. The High Court, in appeal reversed the said order. The respondent before the Supreme Court challenged the testimonial reliability and trustworthiness of the dumb witness on the purported infirmities in the interpretation and translation of her communications before Court.

Held:

- (1) In a claim for maintenance of an illegitimate child, the burden of proof with respect to paternity vests in the party asserting such claim. Paternity must be proved through cogent evidence.
- (2) Under the Maintenance Act, clear convincing and coherent evidence given by the claimant to establish the fact of paternity to the satisfaction of the Magistrate would suffice in establishing paternity as claimed by the claimant.

Per Shiranee Tilakawardane, J.

"Unlike under the old Ordinance the present Maintenance Act does not require additional corroboration of the mother's evidence, if the Magistrate is satisfied on the issue of paternity, based on evidence led to that effect by the claimant."

- (3) The reliability of evidence adduced by a dumb witness must be considered in the light of the facts and circumstances of each case. There exists no general standard or straight jacket formula applicable to such cases.
- (4) Under the Common Law, it is accepted that a person who is deaf and dumb is not incompetent, if he or she can be made to understand the nature of an oath and if intelligence can be conveyed to and received from him or her by means of signs. He or she may be examined through a sworn interpreter who understands her signs.
- (5) The evidence that has been recorded discloses that the unfolding of the narrative of events that had occurred by the said witness was clear, convincing, concise and in a manner which could lead to clear conclusions.

Per Shiranee Tilakawardane, J.

"It is not the job of the Court to privilege certain terms of communications over others. Court will not raise a negative presumption against the understanding and intelligence of a witness based on the method of communication chosen by that witness or come to any unfounded assumptions on such evidence and to do so would be inequitable".

- (6) In the instant case it is evident on an analysis of the evidence on record that the dumb witness-mother more than satisfies the criteria laid down in section 118 and her testimony is in accordance with the provisions of section 119.
- 7) The impartiality and independence of the interpretation has not been challenged at any stage of the proceedings. There is no evidence to prove improper conduct or any act of partiality or interest which could undermine the reliability of the interpretation in this case.

APPEAL from a judgment of the High Court of Kandy.

Cases referred to:

- (1) *Venkattan v Emperor* 1972 13 CrCJ 27.
- (2) *Somasunderam v The Queen* (1971) 76 NLR 10.

David Weeraratne for appellant respondent appellant.

T.G. Herath for respondent-appellant-respondent.

Cur. adv. vult.

March 16, 2007

SHIRANEE TILAKAWARDANE, J.

This appeal has been preferred against the Judgment of the High Court Kandy dated 01.08.2005. The applicant-respondent-appellant filed an application for maintenance, against respondent-appellant-respondent before the Magistrate's Court of Kandy, praying *inter alia* -

- (d) that the respondent is the father of the child Pradeep Sasanka Kumara born to her disabled (dumb) daughter on 21.04.2000.
- (c) that a monthly payment of Rs. 1500 be paid as maintenance against the respondent for the illegitimate child born to her daughter.
- (f) for costs etc.

In his submissions the respondent has denied the paternity claimed by the appellant. The evidence tendered to Court included the testimony of Sriyani Pushpalatha a dumb witness who was the mother of the child whose paternity was in question. Her evidence was recorded with the assistance of the interpreter Mrs. Victoria de Cruz. The learned Magistrate delivered order dated 08.09.2003 in favour of the appellant.

The respondent preferred an Appeal against this Order to the High Court Kandy. The High Court allowed the respondent's appeal setting aside the order of the Magistrate, by its judgment dated 01.08.2005.

This appeal has been preferred against this judgment of the learned High Court Judge of Kandy by applicant respondent-appellant. Leave to appeal was granted on 27.02.2006 on the question of -

"Whether the High Court erred in law in setting aside the order of the Magistrate made in favour of the applicant, which is based on an evaluation of the evidence that was recorded".

The appellant has claimed maintenance under section 2 (2) of the Maintenance Act, No. 37 of 1999. This section provides that:

"Where a parent having sufficient means neglects or refuses to maintain his or her child who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such child at such monthly rate as the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the child".

Importantly, the proviso to this subsection stipulates clearly that:

"... no such order shall be made in the case of a non-marital child unless parentage is established by cogent evidence to the satisfaction of the Magistrate."

In a claim for maintenance of an illegitimate or non-marital child, the burden of proof with respect to paternity vests in the party asserting such claim. The statute prescribes that paternity must be proved through cogent evidence, to the satisfaction of the Magistrate in order for such a claim to succeed. .

The term 'cogent evidence' as defined by the Blacks Law Dictionary contemplates evidence, which is "compelling or convincing". An instruction that evidence must be cogent denotes that it must be clear, constraining, impelling, or convincing. The evidence must be sensible and logical . It is the power to compel assent or belief.

To establish with 'cogent evidence' is to establish therefore convincingly, persuasively, clearly and with lucidity the fact so claimed. Therefore under the Maintenance Act, clear, convincing, and coherent evidence given by the claimant, to establish the fact of paternity to the satisfaction of the Magistrate would suffice in establishing paternity as claimed by the claimant.

It is important to note that unlike under the old Ordinance, the present law of maintenance does not require additional corroboration of the mother's evidence, if the Magistrate is satisfied on the issue of paternity, based on cogent evidence led to that effect by the claimant.

In the instant case, the dumb mother in her testimony has clearly identified the respondent as the father of the child born to her on 21.04.2000. The learned Magistrate, who had the opportunity to observe the demeanor of the witness and her response to questions, was satisfied that the evidence brought out in her testimony, clearly established the paternity of the respondent and has succinctly referred to the same in the findings of the Order.

The respondent has challenged the testimonial reliability and trustworthiness of the dumb witness merely on purported infirmities in the interpretation and translation of her communications before

Court. It is common ground that the dumb witness has received no formal education or training in sign language. Based solely on this fact, the respondent seeks to cast doubt upon the reliability and credibility of her testimony before Court. The respondent claims that the Court should assume that her lack of formal training in sign language would have seriously impaired and hindered the capability of the witness to properly understand the questions posed to her through the trained interpreter and effectively communicate her responses in Court.

Therefore on this assumption alone, it is the respondent's contention that the dumb mother's testimony, which identifies him as the father of her child, is unreliable and therefore the applicant has failed to produce cogent evidence before Court in support of their claim. The learned High Court Judge, evidently convinced by these arguments of the respondent, held in favour of the respondent in the judgment dated, 01.08.2005.

The reliability of evidence adduced by a dumb witness must be considered in the light of the facts and circumstances of each case. There exists no general standard or straightjacket formula applicable to such cases. Section 119 of the Evidence Ordinance, which deals with the evidence of dumb witnesses, provides that;

"A witness who is unable to speak may give his (or her) evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs in open Court. Evidence so given shall be deemed to be oral evidence".

Under the common Law it is accepted that a person who is deaf and dumb is not incompetent, if he or she can be made to understand the nature of an oath and if intelligence can be conveyed to and received from him or her by means of signs. He or she may be examined through a sworn interpreter who understands his or her signs. [Vide, E.R.S.R. Coomaraswamy, "The Law of Evidence", 498].

Whereas a dumb witness could testify in open Court in the manner prescribed above, he or she must be a competent witness as contemplated under section 118 of the Ordinance. The section stipulates that;

"All persons shall be competent to testify unless the Court considers – that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

Therefore, in order to be reliable, the dumb witness must possess the requisite degree of intelligence to understand and answer the question in a rational manner. If she cannot understand the question or make her meaning intelligible, she cannot be examined as a witness. (Vide, *Venkattan v Emperor*.⁽¹⁾) It follows that if a witness is so deaf and dumb that it is impossible to make him or her understand the questions put in cross-examination, that witness cannot be considered to be a competent witness.

In evaluating such evidence an essential prerequisite would be to ascertain and determine whether testimony given by the said witness, was understood with clarity and whether such question was answered logically. Importantly the Court must be satisfied as to whether the interpreter sufficiently understood the witness and was able to communicate in a like manner the evidence that was conveyed through him without distortion, so that such is recorded by the Court.

The evidence that has been recorded discloses that the unfolding of the narrative of events that had occurred by the said witness was clear, convincing, concise and in a manner which could lead to clear conclusions. The record does not reflect that there had been any breakdown in the communications between the witness and the interpreter. Indeed the details of the questions that have been answered and communicated to the Court through the interpreter reflect that there has been a clear line of communication through the interpreter. It is to be noted that the veracity of the interpreter has not been challenged on the ground of partial, biased or prejudicial interpretation.

In the instant case it is evident on an analysis of the evidence on record that the dumb witness, the mother of the non-marital child, more than satisfies the criterion set out in section 118 of the Evidence Ordinance and her testimony is in accordance with the provisions in section 119 of the Evidence Ordinance. The witness

has intelligently and intelligibly provided evidence before Court with regard to the paternity of the respondent. The witness has also clearly identified the respondent to the satisfaction of the learned Magistrate.

The primary and only requirement of any witness is to furnish evidence. Such evidence can be produced through the movement of lips, the production of a document, or in the case of a dumb witness through the medium of signs. What is important is that the evidence so furnished provides coherent, lucid, logical and persuasive evidence, a record of an unfolding of the narrative of events as known to the witness. It is not the job of the Court to privilege certain forms of communication over others. The Court will not raise a negative presumption against the understanding and intelligence of a witness based on the method of communication chosen by that witness or come to any unfounded assumptions on such evidence and to do so would be inequitable.

It is worthy to reiterate that when considering – the evidence of a dumb witness, it is important that the witness be capable of understanding and communicating responses to questions put, in examination and cross-examination. This can be comprehended from the record of the evidence. It is also worth noting that any inability or incapacity to comprehend communications before Court on the part of the witness or the interpreter can be easily and contemporaneously brought to the notice of the Court. The presiding Judge would also have the independent opportunity to apprehend such a state through his or her own observation of the witness.

In my view, it follows that in the absence of any such communication, and in the absence of any apprehension in the mind of the Magistrate hearing the case, the Court cannot raise a presumption against the comprehension and capability of the dumb witness, based solely on an assumption which is not borne out by the facts in the instant case. Any inference originating from such an assumption would not be a finding on facts. Therefore an inference on such an assumption or a finding that there was an improper understanding between the witness and the trained interpreter would not be tenable in the circumstances of this case.

As admitted even by the respondent in his submissions, there is no doubt that the witness is certainly a competent witness and fully capable of communicating successfully with those around her. Section 119, Evidence Ordinance refers to communication through any other manner including signs. The Ordinance does not specify that such a testimony in order to be accepted by Court, must subscribe to any standard form of sign language. The interpreter must be skilled in the form of communicating through signs, understanding and expressing and translating the views of a dumb witness. Given that a significant number of dumb people in Sri Lanka do not have access to formal training in sign language, any rigid interpretation of section 119 would deny access to Court, to a large number of such litigants merely due to an artificial standard, that is not inclusive of their right to Justice, rights that equally belong to all those who are differently abled (disabled) or physically challenged in their speech.

I am of the opinion that despite the obvious and reasonable constraints on communication, the witness, Sriyani Pushpalatha was fully capable of comprehending the questions put to her and of communicating her responses through signs, despite her lack of formal training in sign language. This can be observed with much clarity in the manner, content and tenor of her evidence which is on record. Therefore in the absence of any evidence to the contrary I find that the learned High Court Judge erred in his assessment of the reliability of the evidence produced by the dumb witness, the claimant's mother against the respondent, based almost entirely on a lack of qualifications or expertise.

Apart from the capability of the witness, a further point of significance when assessing a dumb witness's, testimony is the impartiality and reliability of the interpreter. The interpreter must be skilled and sworn. The Court must establish that such person does not have any interest in the outcome of the case. In *Somasundaram v The Queen*⁽²⁾ relied on by the respondent, the decision of the Court in rejecting the evidence of the dumb witness was influenced largely by the apparent partiality of the interpreter based on his close involvement in the case.

In the instant case, the impartiality and independence of the interpreter have not been challenged at any stage of the

proceedings. There is no evidence to prove improper conduct or any act of partiality or interest which could undermine the reliability of the interpreter in this case.

It is significant and a matter of importance in this case that the trial Judge had the opportunity to observe the demeanor of the witness and had the opportunity to also comprehend the evidence placed at the trial. The learned Magistrate was able to fully observe and analyze, directly, the competency of the witness and the cogency of her evidence. Even on an analysis of the evidence on record it is apparent that the witness comprehended the questions and that her responses were, clearly understood. The evidence given by her during cross-examination both reveals that not only did she comprehend the questions but that her answers were understood and that no prejudice whatsoever was caused thereby to the respondent.

In light of the evidence on record, it can with certainty be concluded that the Magistrate rightly determined that sufficient evidence had been adduced to establish the paternity of the respondent. In light of the above findings I set aside the judgment dated 01.08.2005 of the learned High Court Judge of Kandy, and affirm the order of the learned Magistrate, Kandy dated 08.09.2003. The Appeal is allowed. I order the payment of costs in a sum of Rs.5000/- by the respondent to the appellant.

S.N. SILVA, C.J. - I agree.

SOMAWANSA, J. - I agree.

Appeal allowed.