JONATHAN JOSEPH
V.
JUNE DE SILVA

COURT OF APPEAL,
GOONEWARDENE, J. (P/CA) AND WEERASEKERA, J.,
C. A. No. 593/79 F : D.C. COLOMBO 1316/M,
MAY 28, 1990.

Seduction on promise of marriage – Inference from failure of defendant to give evidence – Corroboration. – Section 6 of the Maintenance Ordinance.

The plaintiff claimed that the defendant deflowered her on the promise of marriage but failed to marry her. She was a virgin at the time of such defloration. The defendant failed to give evidence. The question was raised, apart from other defences, that it was not open to treat the failure to give evidence as corroboration.

Held :

A seduction case must be decided on the preponderance of evidence. The failure of the defendant to refute on oath the testimony of the plaintiff given on oath can be treated as corroboration depending on the circumstance of the particular case, *e.g.* where there is no evidence of sexual promiscuity on the part of the plaintiff.

Semble :

Further whether a fact is considered proved or not is dependant upon the belief of evidence. Where on the uncorroborated evidence of the plaintiff if the Court is satisfied she is speaking the truth, and the allegation of sexual intimacy seems probable such as to make it prudent to accept its existence, it can be held to be proved depending on the circumstances of the case.

Cases referred to :

(1) *Cracknell v. Smith [1960] 3 ALL ER 569, 571*
(2) *Moore v. Hewitt [1947] 2 ALL ER 270*
(3) *Harvey v. Anning (1902) 87 LT 687*
(4) *Tikiri Menike v. Dingiri (1930) 3 C.A.R. 98*
(5) *Jagadamba v. Boya [1947] 3 SALR 283*
(6) *Grange v. Perera (1929) 31 NLR 85*
(7) *Vedin Singhe v. Mency Nona 51 NLR 209*
(8) *Karunasena v. The Republic of Sri Lanka 78 NLR 63, 66*
(9) *The King v. Themis Singho 45 NLR 378*

APPEAL from judgment of the District Judge of Colombo

Faiz Mustapha, P.C. with *H. Withanachchi* and *A. Panditharatne* for defendant-apellant.

Romesh de Silva, P.C. with *Harsha Amarasekera* and *Geethanka Gunawardena* for plaintiff-respondent.

Cur. adv. vult.

July 17, 1990

S. B. GOONEWARDENE, J. (P/CA)

The plaintiff-respondent came to the District Court seeking to recover a sum of Rs. 25,000 as damages on the basis that she, a virgin at the material time, had been deflowered by the defendant-appellant upon a promise of marriage, a promise he failed to fulfil.

Her case was that there was an association between herself and the defendant, that this association developed to a point where the defendant promised to marry her and that at her home on a day thereafter when she was alone and her mother was out of the house, he was sexually intimate with her and ended her maidenhood. She contended that the defendant went back on his promise to marry her thus compelling her to come to Court. The defendant's position in the Trial Court had been largely an attempt to show that there was no such promise although there was also a denial of sexual intimacy.

At the conclusion of the trial the District Judge however accepted the case of the plaintiff that there was a promise of marriage upon which she had been deflowered and ordered the payment of a sum of Rs. 15,000 as damages and hence this appeal.

At the hearing before us Counsel for the appellant while not fully conceding that there had been a promise of marriage, submitted that there had been only what he termed a 'conditional promise'. Since he presented no material in support of that position, suggesting a breach of any alleged condition, I would conclude that he was not arguing the case of the appellant on the basis of an absence of a promise of marriage. In any event I think the evidence in the case, that is the plaintiff's testimony to that effect augmented by the contents of the letters written by the parties to each other, was more than adequate to hold that there was such a promise.

Instead, the direction of Counsel's argument was to assail what he contended was the erroneous approach adopted by the District Judge. That approach was, in his submission, the wrong inference drawn from the failure of the defendant to give evidence from the witness box which failure the District Judge seemed to think (Counsel claimed) relieved the plaintiff of the need to place before Court evidence independently corroborating her case. Counsel contended that properly, in a case such

as this, there should have been independent corroboration in material particulars of the testimony of the plaintiff regarding the act of seduction, in the presence of which evidence only, could it have been said that there was, so to say, a case the defendant had to or was called upon to meet. He contended therefore that the District Judge by his wrong approach to the question which emphasised the failure of the defendant to give evidence, misdirected himself, thus resulting in his coming to the wrong conclusion in the case. In support, he relied strongly on the judgment of the Queens Bench Division in *Cracknell v. Smith* (1) in particular upon a passage which (at page 571) reads thus :–

> "But here, if I am right, there was no corroboration at all, and, in those circumstances, I am quite clear that the failure of the appellant to go into the witness box cannot of itself afford corroboration".

That was an appeal by way of Case stated with respect to an order made against the putative father from whom payment of maintenance was sought in respect of a male bastard child. The facts there showed that the claimant mother had admitted sexual intimacy with the brother of the putative father as well, and the point taken on appeal revolved around the question whether there was adequate corroboration within the requirement of the Affliation Proceedings Act, 1957 (apparently a requirement akin to what is contained in Section 6 of our Maintenance Ordinance that the evidence of the mother must be corroborated in some material particular by other evidence to the satisfaction of the Court). In deciding against the mother on the appeal, the Court made the pronouncement referred to earlier that the failure of the alleged father in the circumstances of that case to get into the witness box could not of itself afford corroboration. Lord Parker, C.J., there making reference to two earlier cases *Moore v. Hewitt* (2) and *Harvey v. Anning* (3), apparently to distinguish them from the case before him, had occasion to comment that in both such cases there was evidence, unlike in the case before him, that the mother of the child was not intimate with or associating with anybody else. (Interestingly in a local case, that of *Tikiri Menike v. Dingiri* (4) it had been held that evidence which shows by a process of elimination that the defendant had exclusive opportunities of intercourse with the mother would tend to satisfy the requirement of corroboration). That factor of sexual promiscuity of the mother, as I understand the judgement read as a whole, played no small part in influencing Parker, C.J., to take the view that in such circumstances the failure of the appellant to go into the witness box could not of itself afford

corroboration. The conclusion he reached in these circumstances to be fully appreciated must I think be viewed against the background of the statutory requirement of corroboration in as much as the evidence must tend to raise the probability not only that the mother bore an illegitimate child but also that the man sought to be made responsible to support such a child by way of payment of maintenance is the father of such child.

Our attention was also drawn to the following passage (at page 284) from the judgment of Hathorn, J.P., in the South African case of *Jagadamba v. Boya* (5) –

> "A seduction case is a civil case. Therefore it must be decided upon the balance of probabilities, but the special rule that the evidence of the plaintiff requires corroboration applies. The process of balancing the probabilities takes place after all the evidence has been led. If the balance is against the plaintiff she loses the case. If it is in her favour and there is no corroboration she also loses. If it is in her favour and there is corroboration she wins".

How does one understand this passage ? I think one can do well in that regard to refer to a statement from the judgment of Fisher, C.J., in a local case, that of *Grange v. Perera* (6) containing reference to the Roman-Dutch Law authorities :

> "It seems to be clear that under Roman-Dutch Law an action for seduction, where, as in the present case, the seduction was denied on oath by the defendant cannot succeed unless the plaintiff's evidence is corroborated. In Nathan's Common Law of South Africa Vol. III (1906), Section 1638 at page 1679, the law on the subject is stated to be as follows :-
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> '1638. In cases of seduction, where the defendant alleges that the girl whom he is alleged to have seduced was not a virgin at the time when carnal intercourse took place, the presumption will be that she was a virgin, and the defendant must prove that she had actually had sexual intercourse with another man (XLVIII.5,4). On the other hand, the general rule laid down by the Roman-Dutch authorities is that in an action for seduction or affiliation (*i.e.* for maintenance of a child of whom the defendant is the father, or for the lying-in expenses of the plaintiff) the plaintiff's oath that the defendant is her seducer or the father of her

illegitimate child must, if the defendant on oath denies the imputation of seduction or paternity, be corroborated by evidence *aliunde;* that is, by extrinsic evidence (XLVIII.5,6 Grot.,Int.III.,36,8; Van Leewan's Roman-Dutch Law IV.,37,6 ;2K 303). Failing such evidence aliunde, the man's oath will be entitiled to preference (*Classon v. Durrheim,* Buch 1868, p244) and the benefit of the doubt will be given in his favour (*Botma v. Retief,* Buch 1876, p120)'".

Counsel for the plaintiff-respondent referred us to several passages from the authorities on similiar lines. It would suffice here to refer to one of them. Maasdorp in his Institute of South African Law Book 3 at page 178 states thus –

"If the man under oath in the witness box absolutely denies the seduction, the burden of proof will be on the woman to establish it, and if she adduces no proof aliunde to lead the Court to doubt the man's oath, the man's oath must under our law be taken in preference to that of the woman's....."

The rival submission of Counsel for the plaintiff-respondent therefore was that the failure of the defendant-appellant to get into the witness box and give evidence on oath rendered it unnecessary for the District Judge to look elsewhere for corroboration of the plaintiff's assertion. I am of the considered view that this submission is a valid one. Indeed Basnayake, J.,(as he then was) in *Vedin Singho v. Mency Nona* (7) appears to have adopted a like view.

Whether a fact is considered proved or not is dependant upon the belief of evidence. In socalled sexual cases, a rule of caution requiring corroboration is applied, whether such cases be of a criminal or civil nature. The degree of proof required in criminal cases is known to be higher than in civil cases. Yet, even in ci; minal cases there have been instances where the view has been expressed that when the evidence of a prosecutrix relating to a sexual offence is believed there can be a resultant conviction even though the kind of corroboration usually required may be lacking. In the case of *Karunasena v. The Republic of Sri Lanka* (8) Srimanne, J. (with Wijesundera, J. and Ratwatte, J. agreeing) (at page 66) said :

"In cases of this type one can hardly expect direct evidence of corroboration, but there can be circumstances which support the prosecutrix".

Srimanne, J. added –

> "A proper direction (by the Trial Judge) would have been to tell the Jury 'that in a rape case it is not safe to convict on the uncorroborative testimony of the prosecutrix but that the Jury, if they are satisfied with the truth of her evidence may, after paying attention to that warning, neverthless convict".

The same principle had been adopted in the earlier case of *The King v. Themis Singho* (9).

If that be the position with respect to criminal cases then, in relation to sexual cases of a civil nature that principle should be capable of being more readily applied, so that any factor which makes an allegation of sexual intimacy seem probable such as to make one prudently accept its existence should I think be made to have that effect depending of course on the circumstances of the particular case. For example in certain contexts it has been thought that an assertion of intimacy without refutation by the man can have the effect of providing corroboration. In likemanner as I see it, an allegation of intimacy upon oath without denial likewise upon oath by the man must go towards meeting the requirements of the kind of corroboration which the law contemplates.

As pointed out by Hathorn, C.J., in *Jagadamba v. Boya* (Supra) this being a civil case where the process of balancing of probabilities after all the evidence had been led had to take place, I take the view that the failure of the defendant to refute on oath the testimony of the plaintiff given on oath regarding sexual intimacy between them had the effect of sustaining the case of the plaintiff sufficiently, so that the District Judge was correct in placing the emphasis he did upon that aspect of the matter and coming to the conclusion that the case of the plaintiff had been proved as required by law upon a 'preponderance of evidence', which expression, perhaps, rather than the alternative one of 'balance of probabilities', would highlight the significance of the absence of the defendant's evidence on oath of denial of intimacy. I would therefore affirm the judgment of the District Judge and dismiss this appeal with costs.

WEERASEKERA, J. – I agree.

Appeal dismissed.