

1946

*Present : Jayetileke J.*SARAM APPUHAMY *and* RANNIE.940—*M. C. Kegalla, 6,41?*.*Maintenance—Supposed resemblance of children to father—Evidence—Unsafe guide.*

It is not safe to decide paternity in a maintenance case on the alleged resemblance of the children to the respondent.

A PPEAL from an order of the Magistrate of Kegalla.

H. V. Perera, K.C. (with him *S. P. M. Rajendran*), for the defendant, appellant.

R. N. Illangakoon, for the applicant, respondent.

January 23, 1946. JAYETILEKE J.—

Mr. H. V. Perera contended that the Magistrate has erred on two points. He invited my attention to the following passages in the judgment :—

(1) “ According to the defendant’s evidence he states that he sent the petition D1 to the A. G. A., Kegalla, against PUNCHIETANA in which he makes allegations against PUNCHIETANA and wants the A. G. A. to punish PUNCHIETANA for the offence for which his brother UNDIYA had been mistakenly punished. The defendant states that it is after this petition that the applicant abused him in the Hettimulla Bazaar, that he filed a case against the applicant for the abuse and that this maintenance case was filed by the applicant after his case was filed. Unfortunately for the defendant the sequence of events according to him is not borne out by the dates. D1 is dated 5th August, 1944, and this maintenance suit was instituted on 30th June, 1944 ”.

(2) " I might also mention that at the closing stages of the trial, I looked at the faces of the two children and I am of opinion that there is a good deal in the features of these children that do not leave their paternity in doubt for long. Both children resemble the defendant "

He pointed out that D1 refers to a complaint dated April 12, 1944, and that the Magistrate had overlooked this fact. He submitted that the Magistrate's duty was to decide the case on the evidence before him and not on the supposed resemblance between the children and the defendant. I think the appellant is entitled to succeed on both points. I would set aside the order appealed from and send the case back for a fresh trial before another Magistrate.

Fresh trial ordered.