

OBEYSEKERA
v.
CHANDRA

COURT OF APPEAL.

GRERO J.

C.A. 181/88(M).

M.C. RATNAPURA 54741.

JULY 28, 1992.

Maintenance – Paternity of illegitimate child – Corroboration – Maintenance Ordinance s. 6.

The love letters written by the respondent and produced at the inquiry some of which refer to his embracing the applicant, the complaint which the applicant made to the Ratnapura Police over an incident which took place when she visited the house of the respondent because he suddenly stopped visiting the applicant, the birth certificate of the child, the evidence of the applicant's mother that she had seen and knew about the respondent visiting the applicant's house and the applicant's visit to the respondent's house are all circumstantial evidence which tend to support the version of the applicant that after a longstanding love affair with the respondent she had sexual relations with him which resulted in the birth of the child whose paternity respondent now denied.

The evidence of the applicant's mother regarding the applicant's statement to her that she had conceived a child by the respondent is not corroborative evidence but there was ample other circumstantial evidence to corroborate the applicant's evidence. It cannot therefore be said that there was no independent evidence to corroborate the evidence of the applicant as contemplated in s. 6 of the Maintenance Ordinance. Such corroboration can be afforded by circumstantial evidence.

Cases referred to :

1. *Ponnammah v. Seenithamby* 22 NLR 395.
2. *Carolina v. Jayakkody* 33 NLR 165.
3. *Tennakoon v. Tennekoon* 78 NLR 13.

APPEAL from a judgment of the Magistrate of Ratnapura.

Anil Obeysekera with *J. Wijemanne* for appellant.

P. Kenneth E. Perera for applicant-respondent.

Cur. adv. vult.

March 26, 1993.

ANANDA GRERO, J.

This is an appeal made to this Court by the respondent-appellant (hereinafter called as the respondent) against the order made by the learned Magistrate of Ratnapura, who held that he is the father of the child named Nadika Puspakanthi born to the applicant-respondent (hereinafter called the applicant) on 20.4.83, and ordered him to pay Rs. 350 per month from the date of the application.

Briefly the applicant's case was, that the respondent being a neighbour developed a love affair with her in the year 1980. He started visiting her house and also wrote several love letters to her. As time went on they became so intimate that on 30.3.82 for the first time they lived as husband and wife and the respondent gave a promise to marry her. This incident took place at her house when her parents had gone to tap rubber and her brothers and sisters had gone to school. Thereafter on several occasions they had sexual relations and later, she realised that she had conceived. When she informed the respondent that she had conceived, he had given her some medicine to abort the fetus, but it was unsuccessful. She then requested him to marry her, and he promised to do so on 25.11.82. According to her he came to her house till 18.11.82. As he did not come after the 18th she had gone to the house of the respondent on 24.11.82 and there she met him. On that day there had been a quarrel between the applicant and the mother of the respondent. Over this quarrel there had been a case filed by the Ratnapura Police against her in the Magistrate's Court of Ratnapura and it was settled on the date

of the trial and she was discharged. On 27.11.82 she made a complaint to the Ratnapura Police against the respondent. The respondent admitted that he had a love affair with the applicant, but he said that after sometime he gave it up. He had also admitted that he wrote several love letters to the applicant during the period they carried on their affair. Letters marked P1, P2, P3, P5, P6 and P7 have been admitted by him as letters written by him. He denied that he had sexual relations with the applicant. He stated in his evidence that the members of his house had not visited the house of the applicant. He denied the paternity of the child in question.

It was the contention of the learned Counsel for the respondent that :-

- (1) The letters marked and produced as P1 to P8 and
- (11) The evidence of the applicant's mother Karunawathie, cannot be considered as corroborative evidence of the applicant's evidence as required under Section 6 of the Maintenance Ordinance.

In support of his contention he cited Section 157 of the Evidence Ordinance, and also two decisions of the Supreme Court in *Ponnammah vs. Seenithamby* ⁽¹⁾ and *Carolina vs. Jayakoddy* ⁽²⁾.

As far as the said letters are concerned, he contended that they were not written by the respondent to the applicant at or about the time the sexual intimacy took place between the parties. Some of the letters that were produced were written in the year 1980. The applicant had admitted in her evidence that no letters were exchanged after 1981. The learned Counsel for the respondent contended that as these letters were not written during the period that the alleged sexual intimacy took place (30.3.82 and thereafter) they do not have any evidential value to corroborate the evidence of the applicant.

Undoubtedly these letters were written by the respondent during the period when both of them had their love affair. Some of the verses contained in such letters indicate that the respondent embraced her on many a day. In fact the learned Magistrate in his order referred to some of such verses. The evidence of the applicant was that when they started the love affair he began to visit her house. The respondent denies that he visited her house. If he did not visit her house

how then could he embrace her on many occasions as revealed in some of the verses? The inference that can be drawn is that he had been visiting her house and on such occasions that he had embraced her.

The verses in P2 and P7 corroborate the evidence of the applicant that he began to visit her house after they started their love affair. P2 reveals (verse No. 4) how he embraced her and the satisfaction he got as a result of such act.

Although these letters were not written at or about the time that the sexual intimacy took place between the parties, yet they cannot be completely ignored and one cannot come to the finding that they have no evidential value at all. These letters no doubt were written prior to the acts of sexual relations, between the parties. But they taken together with other material evidence indirectly corroborate in some measure the evidence of the applicant that they lived as husband and wife. The evidence of the applicant that their love affair started in the year 1980 and finally it culminated with sexual relations, is to some extent strengthened or indirectly corroborated by these letters. In other words the effect of these letters is that they indirectly corroborate the evidence of the applicant in regard to the sexual intimacy she had with the respondent, and such corroboration is not repugnant to the corroboration required under Section 6 of the Maintenance Ordinance, provided, that there is other corroborative evidence available to corroborate the evidence of the applicant.

In the instant case, there is the complaint made by the applicant to the Ratnapura Police on 27.11.82, marked P9. This complaint was made by her against the respondent as he had committed a breach of promise of marriage.

Her evidence reveals that when she was conceived and at her request he promised to marry her on 25.11.82, but as he did not visit her after 18.11.82, she had gone to his house on 24.11.82. At his house an incident had taken place between the applicant and the mother of the respondent. After she realized that the respondent failed to honour the promise given to her she had made the complaint P9 to the police. The date he had promised to marry her was 25.11.82. She made the complaint P9 on 27.11.82 as he did not marry her according to the promise given to her. Thus P9 falls within the ambit of Section 157 of the Evidence Ordinance. P9 corroborates the

evidence of the applicant in so far as the promise given to her by the respondent to marry her on 25.11.82.

Her evidence reveals that he promised to marry her when she told him she was expecting a child. She expected him to honour the promise given by him. But when she came to know that he was not going to marry her, then on 27.11.82 she had made this complaint to the police. Her suspicion arose when he stopped visiting her after 18.11.82. She had even gone to see him on 24.11.82 to his house. Thus P9 throws much light on the appellant's evidence and it highlights the promise of marriage given by the respondent which in turn reflects on what circumstances he had promised to marry her.

The authorities cited by the learned Counsel for the respondent and several other authorities were considered by Malcolm Perera, J. in *Tennekoon v. Tennekoon* ⁽³⁾. Perera J. followed the decision of the Supreme Court (Full Bench) in *Ponnamah's case* (supra) which says that statements made by the mother to third persons some months after conception, and some months after intimacy had ceased was not corroboration, as the statements were not made at or about the time of the intimacy. Perera J. following the views expressed by Bertram CJ in the aforesaid case, held that if sexual intimacy continued after conception and down to about the time of the complaint (i.e. she carries a child due to the alleged father) then a statement made to a third party at once or shortly thereafter comes within Section 157 of the Evidence Ordinance. It appears from the evidence of the applicant that her mother came to know for the first time that she is expecting a child on 24.11.82 and that was after the incident that took place at the respondent's house. The applicant had disclosed to her parents on that day that she was conceived as a result of sexual intimacy she had with the respondent. The applicant's mother too had stated in her evidence that on 24.11.82 she came to know from her daughter that she was conceived. Applying the aforesaid decisions of the Supreme Court, such statements (both the applicant's and her mother's) cannot be treated as statements made at or about the time of the intimacy, and therefore no evidential value accrues in so far as the said two statements are concerned although the learned Magistrate had treated them as corroborative evidence. But the applicant's mother's evidence discloses the fact that the respondent had been visiting her house for a considerable period of time. There had been days when

she was at home he had come to her house. Although she was not aware of the fact that the daughter was conceived till 24.11.82, yet she was aware that the respondent had been coming to her house. This evidence corroborates the applicant's evidence that he was visiting her house.

The learned Counsel contended that there was no independent evidence to corroborate the applicant's evidence that he was coming to her house. This Court is of the view that an analysis of her mother's evidence reveals that she had seen him coming to her house on many days and she was aware that he was visiting her house during her absence. As stated earlier some of the letters produced at the inquiry when assessed with the evidence of the applicant bear testimony to the fact that he had visited her house and on many such occasions he embraced her.

In *Tennekoon v. Tennekoon* (supra) Perera J held that 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.

In the instant case, the letters produced at the inquiry, the complaint of the applicant P9, the birth certificate of the child P10, the evidence of the mother of the applicant regarding the fact that she had seen and knew about the respondent visiting the house of the applicant and the applicant's visit to the house of the respondent on 24.11.82, are all circumstantial evidence which tend to support the version of the applicant that after a longstanding love affair with the respondent she had sexual relations with him which resulted in the birth of the child in question.

The learned Magistrate after a careful consideration of the respondent's evidence has rejected his evidence on the basis that he deliberately gave false evidence. This Court perused his evidence and I am of the view, that the Magistrate has formed an accurate opinion about the evidence of the respondent.

Although the learned Magistrate was not correct in treating the evidence of the applicant's mother as corroborative evidence regarding the applicant's statement made to her on 24.11.82, that she was conceived due to sexual relations she had with the respondent, yet,

even excluding that part of the evidence, there is ample circumstantial evidence to corroborate the evidence of the applicant with regard to sexual relations she has had with the respondent.

For the aforesaid reasons, I am unable to agree with the contention of the learned Counsel for the respondent that there was no independent evidence to corroborate the evidence of the applicant as contemplated in Section 6 of the Maintenance Ordinance.

In the circumstances, I see no reason to set aside the order of the learned Magistrate and hence his order is hereby affirmed, and the appeal of the respondent is dismissed subject to costs fixed at Rs. 450.

Appeal dismissed.
