1931

Present: **Garvin S.P.J.**

DONA CARLINA *v.* JAYAKODDY.

293—P. C. Colombo, 14,408.

Maintenance—Corroboration of mother's evidence—Former statement—Cessation of sexual relations—Maintenance Ordinance, No. 19 of 1889, s. 3—Evidence Ordinance, s. 157.

A statement made by the mother of an illegitimate child as regards its paternity, after the cessation of sexual relations with the alleged father, is not corroboration of her evidence.

The conduct of the mother with reference to scenes created in the presence of the respondent, after sexual relations had ceased, does not amount to corroboration of her evidence.

APPEAL from an order of the Police Magistrate of Colombo.

H. V. Perera, for appellant.

E. G. P. Jayatilleke (with him *Chelvanayagam*), for respondent.

November 9, 1931. GARVIN S.P.J.—

This is an appeal from an order made under section 3 of Ordinance No. 19 of 1889 directing the appellant to pay a sum of Rs. 10 per mensem for the maintenance of a child alleged to be his illegitimate child. The appellant denied paternity. It is urged on his behalf that the evidence of the applicant and her witnesses is unworthy of credit and should not have been accepted. But the main ground upon which the appeal is pressed is that the evidence of the applicant has not been corroborated. By section 7 of Ordinance No. 19 of 1889, it has been provided that " 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 Police Magistrate ". A few circumstances spoken to by witnesses who purport to have observed them have been given in evidence. But these neither individually nor collectively amount to such corroboration. They certainly do not show that the relations between the applicant for maintenance and the appellant were such as in any way indicates him as the father of the child.

The Police Magistrate has considered two statements made by the applicant and recorded in the Police Information Book one marked P1 and made on January 28, 1930, and the other marked P2 made on January 31, 1930, and has accepted the latter of these statements as sufficient corroboration to satisfy the requirement of section 7. He added " Her own conduct at the house itself was corroboration ".

The fact to be proved in a proceeding of this nature is that a child was born to the applicant as the result of sexual relations with the appellant. Corroboration must relate to this fact. What is required is other evidence which shows or tends to show that the story of the applicant that sexual relations existed between her and the appellant as the result of which the child was born is true.

In this case the only evidence relied upon as corroboration is a former statement made by the applicant herself. There is a judgment of this Court—*vide Ponnammah v. Seenitamby* [1],—which is an authority for the proposition that a former statement of the applicant as to paternity which would be admissible under section 157 is corroboration of her evidence in a material particular by other evidence within the meaning of section 7 of Ordinance No. 19 of 1889. There may well be a difference of opinion as to whether a former statement of a mother is corroboration of her own evidence within the meaning of section 7 of Ordinance No. 19 of 1889. But the judgment in *Ponnammah v. Seenitamby* (*supra*) is by a Bench of three Judges and is binding on me.

Now the statements which are admissible under section 157 of the Evidence Act are former statements relating to the same fact made (*a*) at or about the time when the fact happened or (*b*) before any authority legally competent to investigate the fact. Paternity is inferred from the existence of sexual relations between the parties at or about the time when the child was conceived. It would seem, therefore, that a former statement must relate to the existence of relations at or about the time when the child was conceived and will only be admissible if made (*a*) at or about the time when such conception took place or (*b*) before any authority legally competent to investigate the question.

The cases in which a legally competent authority is called upon to investigate questions of paternity or the existence of sexual relations between persons are not many nor is there as a rule much difficulty in ascertaining whether evidence of a former statement as to the same fact is admissible on the ground that it was made at such an investigation.

The evidence which is tendered as corroboration usually consists of former statements of the mother as to paternity which it is contended are admissible under the first part of section 157. The statements contemplated are former statements made contemporaneously with the fact. The fact being the existence of sexual relations between the mother and the person charged at or about the time when the child was conceived, former statements made by the mother at or about that time would be admissible under section 157 and under section 7, if the ruling in *Ponnammah v. Seenitamby* (*supra*) is right. But evidence is often tendered of statements made by the mother several months after conception had taken place and long after she became aware of her condition and it is claimed that these also are admissible as statements made during the continuance of sexual intimacy. For this proposition reliance is placed on the same case and on the following passage in the judgment of Bertram C.J.—

> "Personally I feel a difficulty in following the 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 it were shown that the sexual intimacy continued after conception and down to about the time of the complaint."

[1] *(1921) 22 N. L. R. 395.*

The material fact under consideration, it seems to me, is not the existence of sexual intimacy but the existence of such intimacy at a time when paternity can reasonably be attributed to the person alleged to be the father of the child. However that might be, there is no indication in the judgment as to the evidence by which the continuance of sexual intimacy " after conception and down to about the time of the complaint is to be determined ".

The conditions upon which a former statement of the mother may be admitted being the proof of the continuance of sexual intimacy from the time of conception up to about the time when such former statement was made, presumably the existence and continuance of such intimacy must be proved by evidence proceeding from others and independent of her. If such evidence is available it is the strongest possible corroboration and the requirements of section 7 are satisfied and there is no necessity to admit the former statement of the mother. It would be anomalous to admit and act on the mother's evidence as to " the continuance of sexual relations from the time of conception up to about the time when the former statement was made " as a foundation for admitting in evidence a former statement made by her as to existence of such relations for the purpose of complying with the requirement of section 7 as to corroboration. If her evidence can be acted upon as to the " continuance of sexual relations from the time of conception " the matter is at end since the fact in issue is established. But there are cases in which it is possible to show that sexual relations did not or could not have continued down to or about the time of the making of the statement which it is sought to give in evidence. This is such a case. The Police Magistrate finds on the applicant's own evidence that the statement P1 was made after the cessation of such relations. The statement P2 is clearly not in any sense corroboration of her evidence. There is nothing in the statement as to the paternity of the child or as to the existence of sexual relations with the appellant. Moreover, it was not made to any authority legally competent to investigate the fact of paternity, or in the course of any such investigation. Lastly, it remains to consider whether the Judge was right in treating the mother's conduct as corroboration of her own evidence. The conduct referred to refers to certain incidents which took place on January 31. The applicant waited on the street outside the house of the appellant and as he came out on his way to work seized him and hung on to him. He went back to the house, the woman still clinging to him and not leaving the house till she was ultimately removed by the police. There was evidence of similar conduct on January 28 when she entered this house and had to be dislodged.

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 own 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. It is not necessary therefore to consider or

express any opinion on the general question how far if at all evidence of the conduct of the mother may be admitted and treated as corroboration of her own evidence as to paternity.

It is to be hoped that this and the other difficult questions to which I have drawn attention will be settled by a decision of the Full Bench when a suitable opportunity occurs. So far as this appeal is concerned it is possible to dispose of it on the ground that there is no corroboration such as is required by law of the evidence of the mother. The appeal is allowed and the order of the Police Magistrate set aside.

Appeal allowed