1969 *Present :* Alles, J.

S. SAMARAPALA, Appellant, *and* W. MARY, Respondent

S. C. 683/68—M. C. Kegalle, 69367

Evidence Ordinance—Section 112—Child born during continuance of a valid marriage—Presumption of legitimacy—Rebuttal—Requirement of proof beyond reasonable doubt.

The applicant-respondent, a married woman, sued the defendant-appellant for the maintenance of a child born to her 264 days after she had left her husband and matrimonial home and lived with the defendant. She alleged that the defendant was the father of the child.

Held, that proof beyond reasonable doubt is necessary in order to rebut the presumption of legitimacy created by Section 112 of the Evidence Ordinance in regard to a child born during the continuance of a valid marriage. In the present case "personal access" which raises the presumption of actual intercourse was not rebutted by cogent evidence.

APPEAL from a judgment of the Magistrate's Court, Kegalle.

M. M. Kumarakulasingham, for the defendant-appellant.

Miss C. M. M. Karunaratne, for the applicant-respondent.

Cur. adv. vult.

October 23, 1969. ALLES, J.—

The applicant-respondent successfully obtained an order of maintenance from the defendant-appellant, who was not her husband, in respect of a male child called Gunapala born to her on 12th August 1967. The respondent was married to one Sumanapala on 29th May 1963 and had two children by him, one of whom died and the other Lakshman Aranayake being born on 10th April 1966. According to the respondent four months after the marriage she became intimate with the defendant

and this intimacy continued even after the birth of Lakshman. Sumanapala was aware of this association and in 1965 he made a complaint to the Grama Sevaka, who advised the respondent to give up her friendship with the defendant. In spite, however, of the advice of the Grama Sevaka, her parents and Sumanapala, the respondent continued her association with the defendant until she left the matrimonial home with the defendant for his village, where they continued to live until the birth of the child. The respondent, defendant, and Sumanapala have made statements before the Grama Sevaka on 27th November 1966 (P2, P3 and P4) in which they all state that the date of departure from Sumanapala's house was on the 21st of November. The respondent stated that thereafter she had no sexual intercourse with her husband and only met him on 28th January 1967, when the child Lakshman was handed to him at the Kegalle Police Station. When the child Gunapala was born she claimed maintenance from the defendant on the ground that he was the father of the child. In the birth certificate (P1) however she did not give the defendant's name as that of the father.

The crucial question that arises for consideration in this case is whether the presumption under Section 112 of the Evidence Act has been rebutted that Sumanapala could not be the father of the child. Sumanapala in evidence stated that just before the birth of Lakshman he did not have intercourse with his wife and this evidence appears to have been accepted by the learned Magistrate as corroborative of the respondent's version that her husband was not the father of the child. This evidence, however, is considerably weakened by the evidence of the respondent in re-examination that before leaving Sumanapala she could not remember when she last lived with Sumanapala as husband and wife and that she could not remember the last time she had sexual intercourse with Sumanapala before she left. One would have imagined that since her case was that the defendant was the father of the child and since she admitted that conception took place, according to her, in November 1966, she would have been more definite about the dates of her association with her husband. Furthermore, since Sumanapala admits that he had intercourse with his wife even after he became aware of her intimacy with the defendant and also admitted that Lakshman was his child, his bare denial that he had no access to the respondent at the time Gunapala was conceived is not very convincing. It is only if it can be established by incontrovertible evidence that the conception took place after 21st November 1966 can it be proved that the presumption under Section 112 has been rebutted.

Section 112 of the Evidence Act creates a presumption of legitimacy in regard to a child born during the continuance of a valid marriage, and its illegitimacy can only be established, if it can be proved beyond reasonable doubt that the husband had no "opportunity of intercourse" with the wife at the time the child could have been begotten. It has now been authoritatively held by the Privy Council that the word "access" in Section 112 means not actual intercourse but "opportunity of

intercourse"—Vide *Karapaya Servai v. Mayandi* [1] followed by Sansoni J. in *Andris Fonseka v. Alice Perera* [2]. The child Gunapala having been born 264 days after the respondent left the house the "opportunity of intercourse" was available to the husband and could only be rebutted by convincing evidence that in fact he had no intercourse with his wife at the time the child was begotten. It has been submitted by Counsel for the respondent that the sworn testimony of the husband that he had no intercourse with his wife would be admissible, even if he had the opportunity of intercourse, provided such evidence can be established to the satisfaction of the Court. In support she cited the case of *In re Kasi Amma* [3], but can it be said that the Court can be satisfied that the husband had no access to the wife having regard to the facts and circumstances of the instant case ?

In those cases in which the Courts have held that the husband had successfully rebutted the presumption under Section 112 the evidence was of a very conclusive and cogent nature and the degree of proof established was that required in a criminal case—proof beyond reasonable doubt.

In *Alles v. Alles* [4] the Privy Council laid down the proposition that "the issue remains whether on the whole of the evidence made available it can safely be concluded that there was no access at a time when the child could have been conceived". In that case the main issue centred round the question whether the child could have been born as a result of a coitus that took place on the 9th August 1941, when the husband had an opportunity of access. Reversing the judgment of the Supreme Court the Privy Council held that, in the face of a strong body of medical evidence which established that this could not be the case and a strong finding of fact by the District Judge, who disbelieved the wife when she endeavoured to maintain that the child was legitimate, the husband had successfully rebutted the presumption under Section 112 of the Evidence Act.

In *Fonseka v. Perera* (supra) Sansoni J. made the following observations :—

> "The learned Magistrate carefully considered the question whether there was intimacy between the applicant and the defendant at the time relevant to the application, and there can be no doubt that on the evidence before him the learned Magistrate came to the only possible conclusion on that matter. But since the child was born during the continuance of a valid marriage between the applicant and her husband, the more important question which requires consideration is whether the applicant has discharged the onus of rebutting the conclusive presumption created by s. 112 of the Evidence Ordinance. Unless the applicant has succeeded in doing so, the fact that she was intimate with the defendant has no bearing on the question of paternity."

[1] *A. I. R. (1934) P. C. 49.*
[2] *(1956) 57 N. L. R. 493.*
[3] *(1949) A. I. R. Madras 881.*
[4] *(1950) 51 N. L. R. 416.*

There was a conflict in the evidence as to when the parties separated and the child being born during the continuance of a valid marriage, Sansoni J. held that the presumption had not been rebutted. In the present case the facts are much stronger, inasmuch as the wife was living under the same roof with her husband at the time the child could have been begotten.

In *Kanapathipillai v. Parpathy* [1] the Privy Council held that the facts warranted a finding of no access within the meaning of Section 112. That was a case in respect of an illegitimate child born to the applicant on 24th May 1950. The applicant was married to one M about nine years before the hearing. M left her after a few years and went to live with another woman at a village called Annamalai some three or four miles from Kallar, where the applicant was living at all material times. For 5 or 7 years before the hearing, the applicant and her husband had been living apart and during this time three children were born to M's mistress. In August 1949, the applicant was living at Kallar where she had sexual intercourse with the defendant in his house in which she was residing with him, his wife and daughter. At this time, M was living with his mistress at Annamalai some 3 or 4 miles distant, but the applicant had never seen him from the time he left her. Having rejected the bare geographical possibility of the parties visiting each other during the relevant period, the Privy Council held that "no access" would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been "personal access" of husband to wife. The Privy Council approved of the definition of Lord Eldon in *Head v. Head* (1823) Turn. L. R. at p. 140 with reference to the opinion of the Judges in the *Banbury Peerage case* "that when there is personal access, under such circumstances that there might be sexual intercourse, the law raises the presumption that there has been actual intercourse and that the presumption must stand, till it is repelled satisfactorily by evidence that there was not such sexual intercourse."

The Privy Council also gave its mind to the burden of proof when it said—

> "that though the presumption arising from personal access is, as has been said, a rebuttable one, it is in the nature of things that *nothing less than cogent evidence ought to be relied on for this purpose.*"

In my view on the facts of the present case "personal access" which raises the presumption of actual intercourse has not been rubutted by cogent evidence.

Although it will be open to a trial Judge, as a Judge of fact, to accept the bare statement of the husband that he had no intercourse with his wife during the relevant period, even if he had the opportunity of

[1] *(1956) 57 N. L. R. 553.*

intercourse, that evidence must be carefully analysed in relation to the facts and circumstances of the particular case. In spite of such a careful anaylsis of the facts by the Magistrate in *Fonseka v. Perera* (supra) the Supreme Court held that the presumption had not been rebutted. In the Indian case referred to earlier the husband's evidence was supported by two witnesses and the Court was satisfied that the husband had no intercourse with his wife during the relevant period. The facts of the present case cannot be equated to the facts established in *Alles v. Alles* or *Kanapathipillai v. Parpathy* and the evidence of the husband that he had no intercourse with the respondent after April 1966 is subject to two infirmities. Firstly it is admitted that the husband and the wife were living under the same roof at the relevant period and that the husband had previously had intercourse with his wife in spite of the knowledge of her infidelity and secondly the wife's evidence creates a reasonable doubt as to whether or not intercourse did take place until the date when the wife left the matrimonial home. I appreciate that such a finding may sometimes cause hardship to an innocent husband, but in my view the greater interests of the child should prevail and every assumption should be made in favour of the legitimacy of the child.

In the circumstances of this case, I am of opinion it has not been established beyond reasonable doubt that the conclusive presumption of legitimacy under Section 112 has been rebutted. I would therefore set aside the order of maintenance and allow the appeal. In view however of the unsatisfactory nature of the evidence of the defendant, which has been adversely commented upon by the learned Magistrate, I would deprive the appellant of his costs in appeal.

Appeal allowed.