1936 *Present :* **Abrahams C.J.**

WIJEYSINGHE *v.* JOSI NONA

528—P. C. Matara, 70,701.

Maintenance—Application for cancellation of order—Proof that the wife is living in adultery at the time—Ordinance No. 19 of 1889, s. 6.

Cancellation of an order for maintenance can be made under section 6 of the Maintenance Ordinance only on proof that at the time of the application for cancellation the wife is living in adultery with some person or is living a life of prostitution.

***Isabelahamy v. Perera* (3 C. W. R. 294) followed.**

APPEAL from an order of the Police Magistrate of Matara.

L. A. Rajapakse, for defendant, appellant.

J. R. Jayawardana, for applicant, respondent.

Cur. adv. vult.

October 20, 1936. ABRAHAMS C.J.—

The appellant who had been living separately from his wife was paying money under an order of Court for the maintenance of the wife and their child. He eventually moved the Police Magistrate to cancel the order of maintenance under section 6 of the Maintenance Ordinance, 1889, on the ground that she was living in adultery.

At the hearing he called evidence to prove that since their separation she had given birth to another child of which he contended he was not the father. He stated that he had not had access to his wife since the date of their separation, and that the child was born on a date which showed that he could not have been the father of it. He called witnesses in support of his allegation that he had not had access to his wife, and he also called a woman who gave direct evidence from which it could be

[1] *I. L. R. 3 Mad. 48.* [2] *I. L. R. 29 Bom. 449.*

inferred that the wife had committed adultery. This woman, however, in cross-examination stated that she was entirely at a loss to understand how the appellant knew that she was prepared to give evidence as she had had no communication with him. She repeated this in re-examination. The Magistrate recalled the appellant who said that he had received information from this woman of the evidence which she could give, and he had served a summons upon her to bring her to Court, and he said that she was speaking falsely when she said that she had not given him this information. The Magistrate then and there dismissed the application, stating that the evidence led was so utterly false that it was unnecessary to say anything more; that an attempt was made to prove that the wife was living in adultery and that her second child was not the child of the appellant. He held that the appellant and his witnesses had perjured themselves in, what he calls, an utterly disgusting manner.

In my opinion the Magistrate was too precipitate in disposing of the case in such a summary fashion, merely because the female witness above referred to had said that she had had no communication with the appellant, and the appellant said that she had communication with him. It appears obvious that the Magistrate treated as absurd the woman's statement that she had not had communication with the appellant, and presumably he called the appellant to give him a chance of rebutting that statement. It was not material to the appellant's case that this witness had made a communication to him. She was evidently cross-examined in order to discredit her, and why because she was discredited the appellant should be presumed to have brought her into Court to tell a false story is more than I can understand. The Magistrate no doubt was quite right if he concluded that the whole of the woman's evidence was unreliable, but he had no right to assume that it was necessarily false because he could not rely upon it, much less to assume that it was false to the knowledge of the appellant. Further, he seems to have considered that he was driven to conclude that the whole of the case for the appellant was false and that all the witnesses perjured themselves. He gave no reasons for this thorough-going denunciation, and on the record it does not appear to me that he was justified in coming to that conclusion.

If the issue to be tried in this case had merely been whether the child whose paternity the appellant repudiated is his child or not, or whether the wife had committed adultery, there would have been ground for a new trial, but the issue was whether in terms of section 6 of the Maintenance Ordinance the wife was living in adultery. The words of the section are plain, "On proof that any wife in whose favour an order has been made . . . . is living in adultery . . . . the Magistrate shall cancel the order." The meaning is equally plain: the wife at the time that the application for cancellation of the order was made must be cohabiting with some other man or living a life of promiscuous immorality. Manifestly all that the appellant in this case could have proved, if the case had been heard out, was that the child was not his, and inferentially that his wife had about a year previous to his application committed adultery with some man. He could not have proved thereby more than a single act of adultery, and if he could have done, he could not have proved that the adultery was going on at the date of

his application. This is not the first case of its kind. The cases of *Isabelhamy v. Perera*[1] and *Rammalhamy v. Appuhamy*[2] have been cited on behalf of the respondent. This case does not seem to me really to need any authority, for the words are too plain to require interpretation.

I dismiss the appeal.

Appeal dismissed.