1962 *Present :* **Sri Skanda Rajah, J.**

P. SATHASIVAM, Appellant, *and* V. MANICKARATNAM, Respondent

S. C. 510/1962—M. C. Kalmunai, 4625

Maintenance—Application by wife—Husband's offer to wife to come and live with him—Requirement of bona fides*—Quantum of maintenance—Means of wife not relevant—Maintenance Ordinance (Cap. 91), ss. 2, 3, 4.*

Judge—Power to intervene and question a witness.

Where a husband, on being sued by his wife for maintenance, offers to maintain the wife on condition of her living with him, the Court must consider whether the offer is made *bona fide*. If the offer is not genuine, the defendant is liable to pay maintenance.

The income of the wife should not be taken into acccount when maintenance is awarded to her under section 2 of the Maintenance Ordinance.

The position of a Judge, when he hears a case, is not merely that of an umpire. When a witness gives palpably false evidence, it is open to the Judge to intervene and make the witness speak the truth.

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

Colvin R. de Silva, with *Miss Suriya Wickremasinghe*, for Defendant-Appellant.

S. Sharvananda, for Applicant-Respondent.

November 23, 1962. SRI SKANDA RAJAH, J.—

This is an application for maintenance by the wife from her husband. The provisions that are applicable are Sections 2, 3 and 4 of the Maintenance Ordinance, Chapter 91. The relevant portions of Section 2 run thus ;

" If any person having sufficient means neglects or refuses to maintain his wife, ... the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife . . . . . at such monthly rate, not exceeding a hundred rupees . . . . . "

Section 3 and Section 4 must be reproduced in full.

Section 3 : " If such person offers to maintain his wife on condition of her living with him, the Magistrate may consider *any grounds of refusal stated by her*, and may make an order under Section 2, notwithstanding such offer, if the Magistrate is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty. "

Section 4 : " No wife shall be entitled to receive an allowance from her husband under Section 2 if she is living in adultery, or if, *without any sufficient reason refuses to live with her husband*, or if they are living separately by mutual consent. "

It is also necessary for the purpose of the decision in this case to refer to the actual income of the applicant as well as that of the defendant. The applicant is a teacher who has an income of Rs. 212/- per mensem. The defendant himself is a teacher and his monthly income is Rs. 254/-.

It would appear that the defendant became a teacher in 1952 ; but, from 1953 till the end of April, 1959, he was a teacher at the Rye Government School at Aliarawa in Balangoda. In front of this school lived Kirihamy and his four unmarried daughters. The defendant was a paying-guest in Kirihamy's house. The evidence is overwhelming that he became intimate with one of Kirihamy's daughters, namely Kusumawathie, though the defendant himself has made very unsuccessful but deliberate attempts to deny this.

On 30.4.1959 he was transferred to a school in Haputale. When he was teaching at Haputale he got married to this applicant, who was a teacher at Karativu, in the Kalmunai area. On 1.9.1959 the defendant was transferred to Mandur, also in the Kalmunai area. The parties lived together till 15.3.1960. But even during this time, he appears to have been anxious to get away from the school at Mandur. He told his wife that he was going to Colombo to work up a transfer from Mandur and he obtained money from his wife for that purpose. Thereafter, after going to Colombo he went to Balangoda on his way to Mandur. He sent a telegram, admittedly, from Balangoda to the wife to re-direct a registered letter. That registered letter was written by Kusumawathie to the defendant.

Undoubtedly, in this case certain inadmissible evidence has been led, e.g., the anonymous letter P3A and another letter P2A. In my view, that has not caused material prejudice and the provisions of section 167 of the Evidence Ordinance would apply. They only served to unfold the narrative.

The result of the intimacy between Kusumawathie and the defendant is shown even by the photograph that has been produced in this case, viz., P 3B, the negative of which P3C, has been produced by calling the Manager of the Studio. This photograph was taken on 10. 6. 1960.

I am constrained to remark that the defendant is such a brazen faced liar as to deny all relationship between him and Kusumawathie. He had even been the informant about the birth of the child on his lap in the photograph P3B. Kusumawathie and her sister are the other two in it. He tried to make out that he did not know about the registration of the birth of that child till he tried to get the birth certificate for the purpose of this case though he was the informant (vide P9). Ultimately he got the transfer back to Balangoda on 1.1.1961 to the Rye School. One has to ask oneself : What was the magnetic attraction for him to get back to Balangoda but his mistress Kusumawathie and his child ? Of course, there is no direct evidence that this man was still continuing, at the time of this application, to live in adultery with Kusumawathie.

It is submitted that, at best, it can be said that there is only proof that till June, 1960, he was carrying on an illicit relationship with Kusumawathie.

The Headmaster of, and another teacher in, the same school were called to show that this man was continuing to live in adultery ; but, it appears to have been difficult for the Headmaster and the other fellow-teacher to let down their colleague. One can understand their reluctance to speak the truth. But, are there sufficient circumstances to indicate that this defendant is still living in adultery with Kusumawathie?

Mr. Sharvananda cited the case in 22 N. L. R. page 310 *Ebert v. Ebert* [1] where certain quotations from two English cases have been referred to, to show that there was adultery between the parties in those cases. In that case, the question whether the parties were " living in adultery " was not considered. It was in subsequent cases that the words " living in adultery " were interpreted to mean "continuing to live in adultery ".

Now, this defendant, though he was transferred to Mandur from 1.9.1959, had gone back to Kusumawathie on the pretext of going to Colombo, and then he got a transfer back to the same school in front of which Kusumawathie lives with the child born to this man. He also speaks of Kusumawathie now being married and carrying a child. But Kusumawathie's father Kirihamy in his evidence says that Kusumawathie is not married. The defendant tried to make out that she was now married to one Ponnusamy. No such question was put to Kirihamy. These are all circumstances tending to show, on the balance of probability, that this defendant is living in adultery with Kusumawathie.

But, even on the footing that he was not living in adultery at the time he made this offer to the applicant to come back to him and live with him, one has to consider whether the offer was bona fide. Now, it is submitted that Section 3 of the Maintenance Ordinance, which I have quoted above, refers to an offer and it would not be proper to import bona fides into the word 'offer '. In fact, at the resumption of the argument today, I referred to Sections 3 & 4 and indicated that the question of bona fides of the offer may arise and invited arguments on this aspect. Thereafter, Mr. Sharvananda brought to my notice the case of *Thangachy v. Mohamed Latiff* [2], which is a decision of Justice Akbar, decided on 31st March 1930. I pointed out to the words " any grounds of refusal stated by her " in Section 3 and to the words " without any sufficient reasons " in Section 4. The case decided by Akbar J. was a case in which the husband, who was sued for maintenance, offered to maintain her on condition of her living with him and the learned Judge pointed out that the offer must be tested to find out whether it is a bona fide offer. In my view the word " offer " in the section should be a bona fide offer and, if it is not genuine, then the defendant cannot successfully resist the claim for maintenance. In order to test whether the offer is bona fide or not, one has to examine all the circumstances of the case. Undoubtedly, in the report of the case decided by Akbar, J. the facts of the case are not given. But in this

[1] *(1921) 22 N. L. R. 310.* [2] *3 Criminal Appeal Reports (Ceylon) 43.*

case the facts I have related so far, show that the defendant was anxious to get back to his mistress and child and was even unwilling to go and see the applicant when she gave birth to a still-born child and his having refused 3 attempts on 3 successive days by the applicant to get him back, his having made no attempt whatsoever till after he was sued in this case for maintenance to get the wife back, all go to prove that this offer is a mere attempt to get over the difficult situation in which he finds himself, because of the illicit intimacy between him and Kusumawathie. His past conduct was that of a blackguard. In my view, the offer was not made bona fide. " A defendant who offers to take the wife back should provide a fitting abode for the wife and should be prepared to maintain her with the dignity and consideration which befit a wife "—at page 44, 3 Criminal Appeal Reports (Ceylon). These are not referred to in that Section. These are also, like bona fides, implied in the word " offer " used in Section 3. Therefore in my view, this is not a bona fide offer and the defendant is liable to pay maintenance to the applicant.

I was addressed on the quantum of maintenance. I have already indicated the income of each of the parties. Mr. Sharvananda refers me to the case of *Mrs. S. V. Fernando v. J. R. I. Fernando*[1], where it was held that the Court should not take into account the means of a wife, when fixing the quantum of maintenance payable under Section 2 of the Maintenance Ordinance. The learned Judge who decided that case has considered the Divisional Bench case of *Sivasamy v. Rasiah*[2]. In that case the Magistrate had dismissed the application on the ground that the wife had sufficient means. That case was sent back to the Magistrate to fix maintenance as he thought fit, having regard to the means of the husband. There, the learned Judges did not indicate that the income of the wife also should be taken into account. In my view Rs. 50/- is not too large an amount.

Before I part with this case, I wish to refer to a matter which transpired on the first day of the argument, namely, the submission that the Magistrate had " descended into the arena ". Reference was made to para G of the petition of appeal and Kirihamy's evidence in re-examination regarding the Magistrate forcing him to speak the truth. At that stage of the argument I intervened and said that a Judge is not bound to take the position of an umpire. This view which I have always taken is supported by the following passage in the judgment of Sir Anton Bertram, C.J., with whom another eminent Judge, Justice Garvin, agreed : S. C. 441, D. C. Negombo No. 15956, S. C. Minutes 2.7.24 :—[3]

> " It is a great pity I think that Judges, when they see two sides fencing with one another and manœuvering for position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party. "

[1] *(1961) 62 N. L. R. 550.* [2] *(1943) 44 N. L. R. 241.*
[3] *(1924) 65 C. L. W. 1.*

In this connection, I would like to quote an eminent Jurist, who, as far back as 1906, in his address at the Annual Convention of the American Bar Association " On the Causes of Popular Dissatisfaction with the Administration of Justice ", made certain observations. The eminent Jurist I refer to is Dean Roscoe Pound of the Harvard Law School. Said he :

"A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of Justice, the " instinct of giving the game fair play ", as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it, for a fundamental legal tenet. But it is probably only a survival of the days when a lawsuit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law ; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial adminstration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the Court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to 'get error into the record' rather than to dispose of the controversy finally and upon its merits. It turns witnesses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations 'to affect credit', which have made the witness stand 'the slaughter house of reputations'. It prevents the trial court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice. It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another innings in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, What do substantive law and justice require ? Instead the inquiry is, Have the rules of the game been carried out strictly ? If any material infraction is discovered, just as the football rules put back

the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.

The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the Courts, instituted to administer justice according to law, are made agents or abettors of lawlessness. "

In this case, the Magistrate has not acted improperly in making Kirihamy, who was giving palpably false evidence favourable to the defendant, speak the truth.

I dismiss the appeal with costs.

Appeal dismissed.