1947 *Present : Dias J.*

SELLIAH, Appellant, *and* SINNAMMAH, Respondent.

375—M. C. Jaffna, 1,997.

Maintenance—Evidence Ordinance, s. 112—Meaning of "access to the mother"—Legitimacy of child born during subsistence of marriage—Civil nature of maintenance proceedings—Fact of wife's living in adultery—Burden of proof is on husband—Maintenance Ordinance (Cap. 76), ss. 2, 3, 4, 14.

Where a wife sued the husband for maintenance for herself and a child and the Court found as a fact that, although the applicant and the defendant were living apart at the time when the child could have been begotten, there were both the possibility of and opportunities for intercourse—

Held, that the word "access" in section 112 of the Evidence Ordinance meant no more than opportunity of intercourse and that the defendant was, therefore, liable to maintain the child. In view of the decision of the Privy Council in *Karapaya Servai v. Mayandi* (*A. I. R. 1934 P. C. 49*) the judgment of the Full Bench in *Jane Nona v. Leo* (*1923*) *25 N. L. R. 241* could no longer be regarded as binding authority.

Held, further, (i) that proceedings under the Maintenance Ordinance are not criminal but civil in their nature ;

(ii.) that before the defendant was heard, it was not the duty of the applicant to have proved, as part of her case, that she was not living in adultery. When allegation is made under section 4 of the Maintenance Ordinance that the wife is living in adultry, the burden is on the husband to prove that fact.

Vidane v. Ukkumenika (*1946*) *48 N. L. R. 256* doubted.

APPEAL against an order of the Magistrate's Court, Jaffna.

H. W. Thambiah, for the respondent, appellant.

No appearance for the applicant-respondent.

Cur. adv. vult.

June 16, 1947. DIAS J.—

This appeal was pressed on two points. It was urged in the first place that the Full Bench decision in *Jane Nona v. Leo*[1] has not been overruled by the decision of the Privy Council in *Karapaya Servai v. Mayandi*[2] and that, therefore, the Magistrate's order condemning the appellant to pay maintenance in regard to the child Saraswathie is bad inasmuch as at the time that child could have been begotten the appellant and his wife, the applicant, were living apart and he had established under section 112 of the Evidence Ordinance that during that period he had no "access" to his wife in the sence that no actual marital relations had taken place between them. It was contended in the second place that the order of the Magistrate condemning the appellant to pay maintenance to the applicant cannot be justified because the burden of proving that she was not living in adultery under section 4 of the Maintenance Ordinance (Chap. 76) was on the woman, and that the onus of affirmatively proving that she was living in adultery was wrongly placed on him. In support of the latter proposition, the case of *Vidane v. Ukkumenika*[3] was cited. For both these reasons it was argued that the Magistrate's order must be set aside.

In *Jane Nona v. Leo*[1] the word "access" in section 112 of the Evidence Ordinance was held to mean "actual intercourse" and not "possibility of access". In *Ranasinghe v. Sirimanna*[4] Howard C.J. said

[1] *(1923) 25 N. L. R. 241.*
[2] *A. I. R. (1934) P. C. 49.*
[3] *(1946) 48 N. L. R. 256 ; 34 C. L. W. 21.*
[4] *(1946) 47 N. L. R. 112.*

"In the case of *Karapaya Servai v. Mayandi*[1] it was held by their Lordships of the Privy Council that the word 'access' means no more than 'opportunity of intercourse'. It had been suggested in that case by counsel for the appellant that the word implied 'actual cohabitation'. In view of this decision the judgment of the full Bench in *Jane Nona v. Leo*[2] that the word 'access' in section 112 of the Evidence Ordinance is used in the sense of 'actual intercourse' and not 'possibility of access' or 'opportunity for intercourse' can no longer be regarded as a binding authority." In a recent case I followed the decision in *Ranasinghe v. Sirimanna* (*supra*). I am unable to agree with the contention that the observations of the Privy Council in *Karapaya Servai v. Mayandi*[1] are mere *obiter dicta*, and, therefore, not binding. The Magistrate has found as a fact that, although the applicant and the appellant were living apart at the time the child could have been begotten, there were both the possibility of and opportunities for intercourse. I am unable to disturb the findings on this point. The first contention of the appellant, therefore, fails.

Proceedings under the Maintenance Ordinance are not criminal but civil in their nature. This has been laid down in a long chain of decided cases. In *Subaliya v. Kannangara*[3] Bonser C.J. held that the foundation of the Magistrate's Court in matters of maintenance is the civil liability of the father already existing under the Roman Dutch Law wherein the mother can compel the performance of this duty by civil action, and that Chapter 76 merely provided a simpler speedier and less costly remedy. In *Letchiman Pillai v. Kandiah*[4] Drieberg J. following *Subaliya v. Kannangara*[3] said that a wife's claim to maintenance is on the same footing, and that it has been held that the common law right of action does not now exist and she can claim relief only under the Maintenance Ordinance. In *Jane Nona v. Van Twest*[5] Dalton J., after reviewing all the decided cases, said that they lead one to conclude that maintenance proceedings are of a civil nature. Therefore inculpatory statements made by the man to a police officer can be proved against him in a maintenance proceeding for he is not an accused—*Bebi v. Tidiyas Appu*[6]. Maintenance proceedings not being criminal in their nature can be decided by a decisory oath—*Eliza v. Jokinu*[7]. In criminal trials before a Magistrate the prosecution cannot lead evidence in rebuttal, but in mantenance cases the applicant can do so, because the proceedings are civil by nature and not criminal—*Aja Umma v. Hameedu*[8].

In a criminal trial the right to begin is fixed by law. The accused being presumed to be innocent, and, because if no evidence was led on either side, the prisoner would be entitled to be acquitted by reason of the presumption of innocence, therefore the prosecution must begin—see section 101 Evidence Ordinance, *Illustration* (*a*). In all other proceedings unless the burden of proof is by law *expressly* placed on a particular person, the right to begin is laid down by section 102 of the Evidence Ordinance. The burden of proof in a suit or proceeding lies on that person who would

[1] *A. I. R. (1934) P. C. 49.*
[2] *(1923) 25 N. L. R. 241.*
[3] *(1899) 4 N. L. R. 121.*
[4] *(1928) 30 N. L. R. at p. 281.*
[5] *(1929) 30 N. L. R. at p. 451.*
[6] *(1914) 18 N. L. R. 81.*
[7] *(1917) 20 N. L. R. 157.*
[8] *(1939) 10 C. L. Rec. 73.*

fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person—section 103, Evidence Ordinance.

Under the Maintenance Ordinance, section 14 provides that before *summons is issued on the respondent* the Magistrate shall commence the inquiry by examining the applicant on oath or affirmation. If after such examination there is in the judgment of the Magistrate no sufficient ground for proceeding, he may make order refusing to issue a summons. What has the applicant to prove at this preliminary *ex parte* proceeding? Under section 2 of the Ordinance she must satisfy the Magistrate *prima facie* that she is the wife of the respondent or the mother of his illegitimate child, that the respondent having sufficient means either neglects or refuses to maintain her, or that the illegitimate child is unable to maintain itself. I do not think she has to prove anything more. If the Magistrate is satisfied on these points he will issue process.

After the respondent appears the *inter partes* inquiry begins. The applicant has already begun when she gave her *ex parte* evidence. She will now be recalled and repeats and amplifies her evidence, if necessary, and submits herself for cross-examination. After that she calls her witnesses. When the respondent appears he may under section 3 offer to maintain his wife on condition that she lives with him. If the lady refuses to do so and establishes to the satisfaction of the Magistrate that he is living in adultery, or that he has habitually treated her with cruelty, the Magistrate can make an order for maintenance under section 2 notwithstanding the respondent's offer to live with her. Clearly the burden of proving that the respondent is living in adultery or that he had habitually ill-treated her lies on the applicant, because the law will neither presume that he is an immoral man nor that he is a cruel husband. He has not to prove that he is not living in adultery or that he has not ill-treated her. The legal presumption of innocence makes it unnecessary for him to establish these facts which must be proved by the person making these allegations and who wishes the Court to believe in their existence—*ei incumbit probatio qui dicit, non qui negat.*

Assume, however, that the husband makes no offer to resume married life, but contests the applicant's claim and, while admitting that she is his wife, alleges under section 4 that she is living in adultery, surely it is for him to prove that fact? There is a presumption of innocence not only in regard to the commission of a crime, but also in regard to any allegation of wrong doing or immoral conduct. Take the allegation of fraud in a civil action. The Privy Council has held that fraud must be established by the party alleging it beyond all reasonable doubt—*Narayanan Chettiar v. Official Assignee High Court, Rangoon*[1]. The reason is because there is a presumption against any form of wrong doing or immorality. Therefore, the burden is on the person who alleges fraud or immorality to prove it. It is not for the applicant in a maintenance case to prove that she is not living in adultery. How is she to prove this *negative*

[1] *A. I. R. (1941) P. C. 93* and see *Coomaraswamy v. Vinnayamoorthy (1945) 46 N. L. R. at p. 249.*

fact ? Section 4 of the Maintenance Ordinance does not say that the woman must prove that she is not living in adultery. All that section 4 enacts is that she should not be entitled to maintenance if it is proved that she is living in adultery. Section 4 does not place the onus on her.

With respect, therefore, I find it difficult to concur in the principle laid down in *Vidane v. Ukkumenika*[1] where it was held that "no order can be made against the defendant as section 4 of the Ordinance states expressly that a wife who makes an application for an order against the husband must be one who is not living in adultery and must not be living separately from her husband by mutual consent. *All these facts have to be first established by the wife,* and the learned Magistrate was, therefore in error in calling upon the defendant to establish his case before the applicant's case was placed before the Court in accordance with law". I respectfully agree that it would be improper for the Magistrate to call upon the husband to establish his case before the applicant's case was placed before the Court. If the procedure provided by the Ordinance is followed, that could not happen. It is a condition precedent to the issuing of process that the Magistrate should be *prima facie* satisfied that a case for inquiry exists. Even after the husband has appeared, the initial onus is still on the applicant to establish her case before the husband is called upon for his defence. But I cannot assent to the proposition that *before the respondent is heard, it is the duty of the applicant as part of her case to establish by proof that she is not living in adultery.* There is no necessity for a person to prove that she is not living in adultery when the law presumes that she is living a chaste life. The burden of proving adultery under section 4 is on the person who asserts it, in the same way as the burden of proving that the husband is living in adultery under section 3 is cast on the wife.

It was laid down in *Ebert v. Ebert*[2], which was a maintenance case, that "it is not possible to lay down any general rule, or to attempt to define what circumstances would be sufficient and what would be insufficient upon which to infer the fact of adultery. Each case must depend on its particular circumstances. It would be impracticable to enumerate the infinite variety of circumstantial evidentiary facts which of necessity are as various as the modifications and combinations of events in actual life". The Magistrate has found that the appellant has not led any specific evidence of the fact that the applicant is living in adultery. I have read through the evidence, which merely shows that the husband and wife parted because the lady displayed a tendency to talk to members of the opposite sex. That, *per se,* is totally insufficient to establish adultery, and there is no other evidence.

I see no reason to interfere with the Magistrate's assessment of the quantum of maintenance payable by the appellant.

The appeal is dismissed.

Appeal dismissed.

[1] *(1946) 48 N. L. R. 256 ; 34 C. L. W. 21.*

[2] *(1921) 22 N. L. R. 312.*