1958 *Present:* **H. N. G. Fernando, J., and Sinnetamby, J.**

U. SOMASENA, Appellant, *and* U. KUSUMAWATHIE, Respondent

S. C. 158—D. C. Avissawella, 7,676

Seduction—False denials made by defendant—Weight as corroborative evidence—Evidence Ordinance, s. 157.

In an action for seduction the defendant's false denial of irrelevant matters does not constitute corroboration of the plaintiff's story.

The defendant falsely denied in cross-examination that his handwriting appeared in an exercise book. But there was no proof whatever that the book belonged to the plaintiff or had ever been in her possession.

Held, that the false denial did not amount to corroboration.

Held further, that a false denial by the defendant of his receipt of a letter from the plaintiff would not be corroboration if it was written after the time of conception and after intimacy had admittedly ceased. Such a letter cannot be considered as a former statement of the writer for purposes of section 157 of the Evidence Ordinance.

APPEAL from a judgment of the District Court, Avissawella.

H. W. Jayewardene, Q.C., with *T. Parathalingam*, for the defendant-appellant.

Neville de Jacolyn, for the plaintiff-respondent.

Cur. adv. vult.

November 18, 1958. H. N. G. FERNANDO, J.—

The learned District Judge has, in this action for seduction, been much impressed by the evidence of the plaintiff, but I am reluctantly compelled to interfere with the finding in her favour.

The corroboration that is required in a case of this nature is either independent testimony, or some circumstance, showing or tending to show that the allegation of the plaintiff is true. "The corroboration required must, in my opinion, be corroboration in some material particular, that is to say, (*a*) by evidence as to some fact or state of things pertaining to the view that the relationship or conduct of the parties supports

the allegation of the plaintiff that it resulted in sexual intercourse, or (*b*) by evidence as to conduct or action on the part of the defendant which constitutes an acknowledgment by him that the situation and relationship between him and the plaintiff was such as the plaintiff deposes to.[1]" I should like to observe in passing, that in cases where the law requires corroboration, Judges of first instance should endeavour to specify the matters in evidence which are relied upon as being corroborative and to state whether or not these matters have been established at the trial. In the present case, two matters appear to have been regarded by the learned Judge as constituting corroboration.

The plaintiff had alleged that she used to visit the defendant's house for the purpose of receiving tuition in Arithmetic from him; this was of course denied by the defendant. In the course of cross-examination he was shown an exercise book in which sums had been worked out, and he denied the suggestion that the book had been used for the purposes of teaching the plaintiff and that it contained his writing. The book was admitted and marked despite objection by counsel for the defence. This exercise book (P2) had not been produced or referred to by the plaintiff nor any of her witnesses, nor had it been included in the list of documents relied on by the plaintiff. Hence the finding of the learned Judge that the book contained items in the defendant's handwriting cannot help the plaintiff's case, for the reason that there is no proof whatever that the book belonged to the plaintiff or had ever been in her possession. So long as such proof was wanting, the question whether the defendant had or had not written in it was irrelevant, and his denial, however false, of an irrelevant allegation, could not worsen his position. I must hold therefore that the book (P2) is not a document which corroborates the plaintiff's story.

The other matter regarded by the learned Judge as being corroborative is of a somewhat strange nature. At an early stage of her cross-examination, the plaintiff stated positively that she had not written any letter to the defendant; a while later, when she was shown a letter D1 she said that neither the handwriting on it nor the signature was hers. On the next date of trial, however, the plaintiff said that she had written one letter to the defendant and claimed that D1 was that letter. The first line of D1 indicates that it is a letter written to one Sirisoma, and not to the defendant, but the plaintiff gave an explanation to the effect *inter alia*, that D1 was only the third page of the letter she had written. The Judge accepted this explanation and came to the conclusion that the defendant had interpolated Sirisoma's name in a letter written to himself. It is not necessary for me to examine the correctness of this finding of fact, because, even if that finding was sound, D1 does not constitute proper corroboration. On the plaintiff's own version, D1 was written after the alleged intimacy had ceased and after the defendant had denied paternity of the child which the plaintiff was carrying.

Even if a letter alleging intimacy between the writer and the recipient can be considered as being a former statement of the writer for the purpose of Section 157 of the Evidence Ordinance, such a former statement

[1] *Per* Fisher, C.J., in *Grange v. Perera* (1929) 31 N. L. R. 85 at page 86.

would not be corroboration if made after the time of conception and after intimacy had admittedly ceased; *Ponnammah v. Seenitamby* [1]. It is clear from the plaintiff's evidence that if she did write D1 to the defendant she did so only after her mother had discovered the pregnancy and the defendant had rejected the suggestion of a marriage.

I have now to consider an argument based upon the findings of the learned Magistrate, *firstly* that the defendant had falsely denied his handwriting on the exercise book P2, and *secondly* that he had interpolated the name of some third party in the paper D1 in order to suggest that the third party was the father of the plaintiff's child. The argument is that this conduct of the defendant, brings the case within that class referred to by Rose C.J. in *D. D. Somapala v. Muriel Sirr* [2], where "any false denial by the defendant may properly be considered to lend some corroboration to the woman's story".

Reference was made in that judgment to an earlier observation of Basnayake, J. (as he then was) in the case of *Vedin Singho v. Mency Nona* [3] "that even a false statement by the defendant may in certain circumstances afford the necessary corroboration". It would seem that the observations which I have just cited are often relied upon in seduction and maintenance cases, for which reason it is interesting to refer back to earlier decisions upon which these observations appear to have been based. Both Rose C.J. and Basnayake J. referred to the South African case of *Poggenpoel v. Morris, N.O.* [4]. In that action there was independent testimony that the man had been seen alone with the woman in an unoccupied house on more than one occasion. This testimony, coupled with the defendant's false denial of its truth, was held to be sufficient corroboration of the woman's version of the seduction. The decision was reached without difficulty upon the authority of *Van der Merwe v. Nel* [5] in which the whole question of corroboration was fully examined. De Waal, J.P. first referred to the well-known observations as to the meaning of corroboration expressed in the English cases of *King v. Baskerville* [6] and *Thomas v. Jones* [7]. He said thereafter "it is quite clear from the authorities that opportunity for seduction taken by itself is no corroboration", and referred to the Scottish case of *Dawson v. McKenzie* [8] from which he cites the following observations of Lord Kinnear :—

"I think we reach the question whether the bare statement of the pursuer herself, coupled with evidence of opportunity in the sense that both were together in circumstances in which connection was not impossible, is sufficient to prove the pursuer's case. It is not proved that they were alone together in such circumstances as to give rise to suspicion or reproach, and there is no evidence of opportunity in any other sense than that it was not physically or morally impossible that connection might have taken place, and the result therefore is that there is no evidence on which the Court can proceed other than the pursuer's own statement, which, of course, is not enough."

[1] *(1921) 22 N. L. R. page 395.*
[2] *(1953) 55 N. L. R. 247.*
[3] *(1948) 51 N. L. R. 209.*
[4] *(1938) C. P. D. 90.*
[5] *1929 T. P. D. 551.*
[6] *1916 2 K. B. 58.*
[7] *1921 1 K. B. 22.*
[8] *45 S. L. R. 473.*

The effect of a false denial of an opportunity for intimacy was thus stated by Lord Dunedin in the same case :—

"Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and the locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made." It would appear that Lord Dunedin was here stating a principle enunciated in the earlier Scottish case of *Macpherson*[1]. De Waal, J.P., held that there had been an opportunity for intimacy on a certain day, that the false denial by the defendant of that opportunity amounted to corroboration and that all the incidents taken together and viewed in the light of the incident on that particular day forced one to the conclusion that the plaintiff's story is to be believed.

The case of *Florence v. Smith*[2], another Scottish case, was also referred to by de Waal J.P. In that case, there was no direct corroboration of the pursuer's version of intimacy at or about the time of conception, but there was independent corroboration of an act of gross familiarity between the parties at a date six weeks after the date of conception. The false denial of this subsequent intimacy taken together with the evidence of that intimacy itself was held to be sufficient corroboration. Lord Dundas had said in that case : "Now there is a series of recent decisions to the effect that where a defender falsely denies some fact bearing materially upon the crucial issue in dispute, that denial may turn the scale against him, in an otherwise doubtful case, by giving a complexion to the case different from that which the Court might but for such denial have put upon it." Although that observation is made in general terms one should I think take note of the fact that it was made in a case where the false denial in question was as to a highly relevant matter, namely a subsequent act of familiarity established by independent testimony. More precisely, the false denial of the act of gross familiarity justified the inference that the familiarity led to intercourse on the subsequent occasion, which intercourse would be corroboration of the pursuer's evidence of the prior intercourse.

It is unfortunate that reports of the Scottish cases to which I have referred are not available to us, but the opinions expressed in those judgments have been approved in the English Courts as well and the opinion of Lord Dunedin which I have cited, was cited also by Lawrence J. in the Court of Appeal in *Jones v. Thomas* [3]. In that case the only item of evidence the Court of Appeal thought worthy of serious consideration as corroboration, was the proved fact that the appellant had spoken to the respondent (the woman) on two occasions shortly after

[1] *23 S. L. R. 785.* [2] *50 S. L. R. 776.*
[3] *(1934) 1 K. B. 323.*

the alleged act of intimacy, coupled with the false denial by the appellant to the respondent's father of the alleged meetings on those occasions. It was held however that the appellant's untruthful statement to the respondent's father as to meetings after the alleged time of conception cannot be regarded as corroboration within the dictum of Lord Dunedin. Lawrence J. in disposing of the matter said: "There is no doubt that any untrue statement by a person when accused of an offence gives rise to some suspicion, but there is no authority which suggests that every untrue statement by an alleged father is corroborative of the mother's evidence, and the Court of Session expressly disclaimed any such view" [1].

Lord Hewart L. C. J. after referring to the Scottish case of *Dawson v. McKenzie* [2] said: "It is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence". No attempt was made to define the nature of such an untrue statement or the circumstances in which it should be made. But I have little doubt that there cannot have been an intention to include *any* untrue statement, for in one of the Scottish cases, that of *Macpherson* [3], the Lord Justice Clerk had said: "No corroboration can be derived from the evidence of the defendant which shows he is not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether and the case be treated as if he had no tbeen examined". Indeed, this very aspect of the matter is referred to at the end of the judgment of Lawrence J. in *Jones v. Thomas* [4].

In *Warawita v. Jane Nona* [5] the defendant had falsely denied certain facts, established by independent testimony which showed the existence of an opportunity for intimacy. With respect I agree with Sansoni J. that the untruthful denial of facts which would otherwise have been merely equivocal gave those facts a different complexion. It is useful to consider why such a conclusion is valid. Evidence of a mere opportunity for intimacy, as distinct from evidence which creates a strong suspicion of intimacy, is not corroboration. It does not justify the inference that intimacy took place, because it is equally consistent with the "innocence" of the occasion. In such circumstances, if the defendant says in evidence: "I admit there was opportunity, but I deny any intimacy", then the adverse inference will not be drawn against him. But if instead he says "There was never an opportunity", and this denial is held to be false in the face of independent testimony, he can then not rely on the possibility consistent with his innocence, and there remains only the possibility consistent with guilt.

My examination of the decisions which have come to my notice shows that in fact the principle as stated by Lord Dunedin in *Dawson v. McKenzie*[2] has not been applied except in the particular type of case referred to in his dictum and with which he was concerned, namely the case where there is a false denial of an opportunity for intimacy. While it may well be that the principle can be properly extended to other false denials, I doubt whether such an extension has yet been made. In the recent case

[1] *(1934) 1 K. B. 323 at page 331.*
[2] *45 S. L. R. 473.*
[3] *23 S. L. R. 785.*
[4] *(1934) 1 K. B. 323.*
[5] *(1954) 58 N. L. R. 111.*

of *K. Dharmadas v. P. G. Gunawathy*[1] my brother Fernando declined to apply the principle in a situation where the defendant had adduced false evidence in an attempt to impute paternity to some other person. In the present case too, one of the matters relied upon is not substantially different; here the defendant gave evidence which was held by the learned District Judge to be false, in an attempt to show that the letter which he produced was written, not to him but to one Sirisoma. That letter was not corroboration because it was written far too late, and there was no independent testimony in support of the suggestion that the defendant had tampered with the letter. His denial of the receipt of it was therefore merely a contradiction of the plaintiff's evidence that she wrote the letter to him. Similarly, the exercise book was not corroborative, since it was not established that the book contained the plaintiff's writing or had ever been in her possession. If it had been proved to contain the writing of both parties it may have established at least an opportunity for intimacy, in which event the false denial by the defendant of his writing thereon may have been sufficient to bring the case within the principle I have considered. But as there was no proof that it contained the plaintiff's writing the book cannot in any sense be regarded as evidence even of an "innocent" visit by the plaintiff to the defendant's house. Hence the falsity of the defendant's evidence with regard to this book is of no consequence.

For these reasons I would set aside the judgment and decree and dismiss the plaintiff's action with costs in both Courts.

SINNETAMBY, J.—I agree.

Appeal allowed.

[1] (*1957*) *59 N. L. R. 501.*