31,956

No. 45 of 1955.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF THE ISLAND OF CEYLON.

BETWEEN

KALIKUTTY KANAPATHIPILLAI (Defendant) *Appellant*

AND

VELUPILLAI PARPATHY (Applicant) . . *Respondent.*

Case for the Appellant.

RECORD.

1. This is an Appeal from a Decree of the Supreme Court of the Island of Ceylon dated the 23rd day of August 1951 rejecting on a preliminary point the Appellant's appeal from a Judgment of the Magistrate's Court of Batticaloa delivered on 31st January 1951 whereby it was adjudged and ordered that the Appellant was the father of an illegitimate child born to the Respondent on 24th May 1950 and that he should pay the Respondent Rs.30 a month by way of maintenance for the child. pp. 36-37. pp. 28-34.

2. The main issue in this Appeal is as to the effect in bastardy proceedings of the provision contained in section 112 of the Evidence Ordinance of Ceylon, which is as follows :—

> " The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, unless it can be shown that that man had no access to the mother at any time when such person could have been begotten or that he was impotent."

A subsidiary issue arises as to whether certain evidence was rightly admitted by the learned Magistrate pursuant to the provisions of section 157 of the Evidence Ordinance.

p. 1. 3. Proceedings were taken by the Respondent before the Magistrate at Batticaloa pursuant to an affidavit dated the 7th June 1950 whereby she affirmed that the Appellant was the father of her child Villiammai, then thirteen days old, and prayed for maintenance.

p. 3. pp. 3–9. 4. The hearing began on the 21st October 1950 at the Magistrate's Court, Batticaloa. The Respondent herself gave evidence that she had been married to one Mylvaganam about nine years ago, but after living with her for about two years her husband left her; since that time he had been living at a village called Annamalai with another woman by whom he had three children. When asked in cross-examination how she knew these matters, she said that she did not know them of her own knowledge but had been told them. After her husband had left her she said that she had lived with her uncle, one Veeracutty, at Kallar, which she put at four miles from Annamalai, across the ferry, though in cross-examination she agreed this distance at three miles. After living with her uncle for two months she went to work in the Appellant's house, which was about two houses away. The Appellant, she said, was a cousin of hers and wanted someone to help his wife in the house. During her four years' stay at the Appellant's house she said she became sexually intimate with him; on two occasions, when her menses had ceased, he had given her medicine which resulted in her menses starting again. At some time (which, according to the Appellant, was in about 1946) about a week after the Appellant's daughter had gone as a boarder to Vincent's High School at Batticaloa, the Respondent said that she also went there as a cook. She said that the Appellant obtained her this work on the pretext that she could be of help to the daughter. She did not, however, attempt to explain why the Appellant, having, according to her version, successfully kept her as his mistress in the same house as his wife for four years, should suddenly wish to send her twenty miles away during the school terms. She said that she returned to the Appellant's house during the holidays, the last time being in August 1949 when she stayed for about twenty to thirty days. It was during this period that she alleged that the material intimacy took place. It is perhaps noteworthy that in her statement to the headman (P.1) the Respondent gives a graphic description of how she was seduced on this occasion against her will. Yet there is no suggestion of this in her evidence. On returning to the school the Respondent said she noticed signs of pregnancy, but continued her work till Christmas time. During the term she said the Appellant visited her about once a week at the school and she told him that she was pregnant; he had given her some more medicine, but she had not taken it. At Christmas time the Appellant came for his daughter, but did not take the Respondent, saying he would return for her in three days' time. When he came back in three days time, he took her, she said, and went in search of a house near the school. She knew a woman called Sonnamma who supplied hoppers to the school and at the Respondent's suggestion they went to her house and the Appellant arranged that she should stay at Sonnamma's house and in fact he stayed with her there for three days. She said that the Appellant had told Sonnamma that he and the Respondent were married; in cross-examination she said that later Sonnamma questioned her as to how she got married to the Appellant while working at the school, whereupon she had told her the truth.

p. 5, l. 40–p. 6, l. 3.

p. 5, l. 37.

p. 23, ll. 4–11.

p. 49, ll. 1–4.

p. 7, ll. 16–19.

While she was at Sonnamma's house, the Respondent said that until April the Appellant visited her about once a week, supported her, and, when he was unable to give her money, personally, sent it by means of one Saverimuthu. Some time towards the end of this month she had gone to the hospital and stayed there for three days. She admitted in cross-examination that she had been questioned by the hospital authorities as to who was the child's father, but apparently she did not tell them it was the Appellant. She said they also asked the name of her husband and she told them. Later, her uncle Veeracutty (who was not called as a witness) came and questioned her, and she told him the Appellant was the father of the child. Thereupon on 1st May Veeracutty took her back to Kallar, where both she and Sonnamma made statements to the headman of the village. Shortly afterwards on 24th May the child had been born at her uncle's house.

p. 6, ll. 21–25.

5. The next witness was Sonnamma. She deposed that it was on 26th December that the Respondent and the Appellant came to her house asking for accommodation. She had told them that there was no room at her place as she was expecting her children home for Christmas. She had, however, finally been persuaded to let them have a room at Rs.10 a month, which the Appellant paid. The Appellant had told her that he was married to the Respondent, and in cross-examination she added that it was not for 2 or 3 months after the Respondent had been there that she, Sonnamma, had been told the truth. After staying with her for three days, the Appellant had left the Respondent but had visited her from time to time till April. In April the witness said that she had written a letter to the Appellant at the Respondent's request, but received no reply. Then Veeracutty had come; after telling the witness that he was the Respondent's uncle, he questioned the Respondent and had been told that the Appellant had brought her there. The Respondent had agreed to go back to Kallar with Veeracutty and the witness had accompanied them. She explained that she had done this because the Respondent had been brought to her house by the Appellant and she did not know Veeracutty. On reaching Kallar she had made a statement to the headman of the village and had been satisfied by him that Veeracutty was the Respondent's uncle.

p. 9, l. 21–p. 12, l. 10.

p. 11, ll. 15–18.

In cross-examination the witness admitted that she had been divorced from her husband in 1947 on the grounds of her adultery, a maintenance order in her favour having previously been cancelled for the same reason. In the course of that case she had given evidence which had been disbelieved. She was, however, now living with her divorced husband.

p. 10, l. 25–p. 11, l. 8.

6. It was then suggested on behalf of the Appellant by his advocate that a blood test should be made; the trial was adjourned for six weeks so that this could be arranged, but it does not appear whether the test was ever in fact made, or, if so, what was the result.

p. 12, ll. 12–21.

7. The hearing was continued on 2nd December 1950 when Poopalapillai, the headman of Kallar, gave evidence. He said that to his knowledge the Respondent had been living at the Appellant's house,

p. 13, l. 15–p. 17, l. 10.

although she was married to a man from Annamalai, which he said was four miles distant across the ferry. He had never seen the Respondent with her husband. He also confirmed Sonnamma's story of the Respondent having been handed over to Veeracutty on the 1st May 1950 in his presence.

p. 17, l. 8. He produced the statements made at the time by Sonnamma and the Respondent (P.1) which he had entered in his books, and, in spite of

p. 48.
p. 14, ll. 1–4. objection on behalf of the Appellant to the admission of them made by Sonnamma, these were admitted in evidence by the Magistrate under section 157 of the Evidence Ordinance. In cross-examination it emerged that on the householders' list for the Appellant's household (D.1 and D.2) which the headman was responsible for verifying and had in fact verified, the Respondent was not entered as an occupant at all. She was, however, entered as an occupant of the Appellant's father-in-law's house which was situated in the same compound. The witness's explanation of this, which the Magistrate accepted as reasonable, was that, being a cultivator, the Appellant was not allowed a rice ration but only flour, that the Respondent wanted to have a rice ration and, as the Appellant's father-in-law had a rice ration, she was accordingly entered as being a member of his household.

p. 17. 8. The final witness called on behalf of the Respondent was Saverimuttu. He said that he knew Sonnamma, her house being about three houses away from his. He said that he had seen the Respondent at Sonnamma's house in the previous December and following months and had seen the Appellant going there. On three occasions, he said, the Appellant had given him money to be given to the Respondent amounting in all to Rs.60/–, although he admitted in cross-examination that he had never met the Appellant before seeing him at Sonnamma's house, and that there was no reason why the Appellant should have trusted him.

p. 18–p. 20, l. 10. 9. The first witness for the Appellant was S. Thoronachari, village headman of Annamalai. He said that the Respondent's husband whom he had known since boyhood was still living at Annamalai which, according to Thoronachari, was only about two miles distant from Kallar. He said he had seen the Respondent at Annamalai about twice a month at the house of her husband's sister and on the road, the last occasion being in about

p. 32, ll. 25–32. June 1949 ; he had, however, never seen her with her husband. The Magistrate stated that he was not impressed with this witness's evidence and that his story appeared to be very artificial. It may, however, be observed that if this witness was in fact procured to give false evidence, one would have expected him at least to say that he had seen the Respondent in the company of her husband at Annamalai. Furthermore, the

p. 28, ll. 12–15. Magistrate accepted his evidence that the Respondent's husband and his mistress were acknowledged in the village as husband and wife and had been living happily together with their three children.

p. 20, l. 12–
p. 26, l. 7. 10. The Appellant himself then gave evidence and on all material particulars denied the story told by the Respondent. He said that he had been married for the past eighteen years and that he and his wife had lived happily together with their three living children, a daughter aged 14, a son aged 11 and another son aged 3. He denied that the Respondent had ever lived in his house, asserting that the householder's list was correct

in recording her as having lived in his father-in-law's house where she was employed doing odd jobs. He himself had a servant girl to assist his wife. He admitted that the Respondent was employed at Vincent's High School as a cook, but denied the allegation that he had got her the post. He admitted that he went to see his daughter once or twice a month, but denied that on the pretext of seeing his child he went to speak to the Respondent. He denied that he had kept the Respondent as his mistress for a number of years at his house ; the house, he said, consisted of two small rooms, a kitchen and hall ; during the rainy season his wife and children slept in one of the rooms and he the other ; for the rest of the year they used the hall. He denied that he had had intercourse with the Respondent ; he also denied that he had ever met Sonnamma or Saverimuttu before the present case. He asserted that it was quite untrue that he had sent money through Saverimuttu.

11. The Magistrate, in the Judgment dated the 28th January 1951 and delivered by him on 31st January 1951, accepted the evidence for the Respondent and held that the evidence of Sonnamma and Saverimuttu, if accepted, and he saw no reason why it should not be, provided very strong corroboration of the Respondent's story. Accordingly he found the Appellant was the father of the child and ordered maintenance at the rate of Rs.30/– a month. p. 28. p. 30, ll. 30–35.

12. So far as the evidence of Sonnamma was concerned, it is respectfully submitted that this was by no means above suspicion. There was no doubt that the Respondent had stayed at her house, but what had impressed the Magistrate was that Sonnamma had gone 20 miles to give her account to the headman at Kallar. Yet the reason she gave for going was somewhat curious ; she said that the Respondent had been brought by another man, i.e., the Appellant ; she did not know who Veeracutty was so she went all the way to Kallar to be satisfied by the headman. Veeracutty apparently told her that he was the Respondent's uncle and one would have thought that the simplest way of verifying this would have been to ask the Respondent herself. Furthermore, it was quite clear that by that time Sonnamma had been told, so she said, that the Respondent was not the Appellant's wife but merely someone who had been seduced by him. What better person, therefore, could there be to entrust the Respondent to than Veeracutty ? On the other hand, if in fact the Respondent and Sonnamma had concocted their story, the journey to Kellar by Sonnamma was just the sort of embellishment that might have been thought by them to add verisimilitude to their account. There was also, of course, no doubt that Sonnamma was a woman of low moral character. p. 30, ll. 20–29. p. 10, ll. 10–25. p. 11, ll. 24–30.

13. The evidence given by Saverimuttu was, it is submitted, equally dubious. Here was a man whom the Appellant had never met before save, so he said, at Sonnamma's house, and whom he had no reason to trust. Yet apparently having met him at Kalmunai, whether by chance or appointment is not known, he was content to entrust him with Rs.20/–. The second and third occasions are even more obscure ; it would seem most

curious that Saverimuttu should come all the way to Kallar to take the money ; it would have been so much simpler to send it by post. Indeed the absence of any letters passing between the Appellant and the Respondent, or indeed any suggestion that there had been any such letters (apart from the one mentioned by Sonnamma) is, it is submitted, a significant feature of the case.

p. 32, ll. 5–19.

14. The Magistrate found the Appellant's account of the matter unsatisfactory in that it gave no explanation on a number of matters :

(A) Why the Respondent had lived with his father-in-law when her own maternal uncle Veeracutty lived close by. The same observation might however have been applied with equal force to the Respondent's account, since even on her own story she had not become the Appellant's mistress before she had gone to live in his house as a helper to his wife. And in any case the Appellant did give a reasonable explanation which fits in with her own statement that when her husband left her she had no income ; namely that she did odd jobs for her living in his father-in-law's house.

p. 4, ll. 3–4.

p. 20, ll. 36–38.

(B) How the Respondent had found employment 20 miles from her village in the same school where the Appellant had had his daughter admitted as a boarding student only a short time before the Respondent had gone to the same school as a cook. The Appellant was evidently not prepared to speculate about this, beyond suggesting that someone in the village, whom he named but could not call to give evidence, was responsible for obtaining the post.

p. 23, ll. 20–27.

(C) Why the Respondent's three witnesses should give false evidence against him when according to him he came to know Sonnamma and Saverimuttu only after this case came up for enquiry. But these two witnesses were friends of the Respondent and the fact that, according to the Respondent, Sonnamma was owed money for giving her accommodation might be an incentive to support the Respondent in fathering her child on a man with the Respondent's means.

(D) Why the Respondent should have chosen to " father " her child on him. The fact however that according to the Respondent the Appellant's income was Rs.300 per month and Rs.150–200 according to the Appellant, may possibly have had something to do with this.

15. The question of law which arises in this Appeal is as to the effect of Section 112 of the Evidence Ordinance which has been set out above. By reason of the opening words of the section the fact that the Respondent was at all material times married to Mylvaganam was " conclusive proof " that her child was the legitimate child of Mylvaganam

unless it could " be shown that that man had no access to " the Respondent at any time when the child Villiammai could have been begotten or that Mylvaganam was impotent. It was not suggested that Mylvaganam was impotent but the Respondent did seek to show that he had had no access to her at any material time. The question therefore was—had it been " shown that that man had had no access to " the Respondent at any material time ? In the Courts of Ceylon there has been controversy as to whether, for the purposes of this closing provision of the section, " access " means " actual intercourse " or merely " possibility of intercourse." In 1923 this question came up for decision before a full Bench in *Jane Nona* v. *Leo* (1923), 25 N.L.R. 241, and it was decided that the word meant " actual intercourse." Subsequently, however, it was decided by Howard, C.J., in *Ranasinghe* v. *Sirimanna* (1946), 47 N.L.R. 112 that in view of the decision of the Privy Council in *Karapaya Servai* v. *Mayandi*, A.I.R. (1934), P.C. 49, this decision of the full Bench could no longer be regarded as binding authority and that the true interpretation was " possibility " or " opportunity " of intercourse ; and this decision was followed by Dias, J., in *Selliah* v. *Sinnammah* (1947), 48 N.L.R. 261. Later, however, Basnayake, J. (obiter) in *Pesona* v. *Babouchi Baas* (1948), 49 N.L.R. 442 and Swan, J., in *Kiri Banda* v. *Hemasinghe* (1951), 52 N.L.R. 69, seem to have swung back again to the full Bench decision. It is submitted that the decision of the Privy Council in *Karapaya's* case, based, as it was, on section 112 of the Indian Evidence Act which is in precisely similar terms to the provisions of section 112 of the Ceylon Evidence Ordinance, is of the highest persuasive authority when considering the law of Ceylon.

16. In the present case the Magistrate said : " I am not going to presume to venture an opinion on the various opinions expressed by eminent Judges on the meaning of ' access ' in the various Judgments cited by Counsel. What I would say, however, is that even if access meant opportunity of sexual intercourse, what their Lordships had in mind by opportunity of sexual intercourse was not a mere physical possibility of approach to each other by the spouses (depended—*sic : quære*) dependent entirely on the distance that separated them at the time of the conception in question. In my opinion what their Lordships did mean has been clearly expressed by them in the Privy Council decision in *Alles* v. *Alles* (1950), 51 N.L.R. 416—an extract from which Swan J. has quoted in the course of his judgment. In that judgment their Lordships have stated that the issue which the Court had to decide is whether on the whole of the evidence made available to the Court it can safely be concluded that there was no access at the time when the child could have been conceived." It is respectfully submitted that by drawing this passage from the judgment delivered by Lord Radcliffe entirely out of its context the Magistrate has given it a distorted meaning. In *Alles* v. *Alles* the evidence was conclusive—because both spouses agreed on it—that apart from the night of 9th/10th August 1941 there was no access in fact, and no opportunity of access, between the 19th April 1941 and the 21st August 1941, and the question was whether it was established by the medical evidence that the full time child born on the 26th March 1942 could have

p. 33, l. 25.

been the result of the only relevant intercourse on the 9th/10th August 1941. It was entirely in that context that the Judicial Committee defined the issue before them in the language quoted by the Magistrate : they were not, it is submitted, purporting to lay down any general rule applicable to all cases, still less to a case such as the present. The decision which, it is submitted, was entirely on all fours, was Howard C.J.'s decision in *Ranasinghe* v. *Sirimanna*, because that also was a case where, on her own story, the Applicant's husband was at the material time living in a nearby village. As Howard C.J. said : " Even if her evidence and that of her witnesses is accepted, it merely shows that after 1936 she was living with the Defendant in another village and not with her husband at Madampe. This testimony does not establish that there was no opportunity of intercourse."

p. 34, ll. 2–15.

17. On the test which he had adopted the Magistrate expressed his conclusion as follows : " On a careful consideration of the whole of the evidence led by both parties in this case, I hold that it can safely be concluded that there was no access between the Applicant and her husband Mylvaganam at or about the time that the child in question was conceived by the Applicant. My reason for so holding is that the evidence discloses that the Applicant and Mylvaganam had quarrelled and separated more than six years prior to this conception : and that thereafter Mylvaganam had found a mistress by whom he had three children and that he was living quite happily with his family ; that the Applicant for her part had found the Defendant who was keeping her as his mistress and she was quite happy with him. In these circumstances it seems to me unthinkable either that Mylvaganam would have approached his long discarded wife for the purpose of sexual intercourse or that the Applicant would have approached her long discarded husband for the same purpose." This shows, it is submitted, that the Magistrate was in fact applying the test of actual intercourse. He was also treating it as unthinkable that a man living happily with the mother of his children should seek intercourse with another woman ; yet that was precisely what he was regarding as established against the Appellant. Furthermore, he might perhaps have borne in mind the matrimonial history of the witness Sonnamma who was then reunited with a husband who had divorced her on the grounds of adultery and lived apart from her for the greater part of twelve years.

p. 10, ll. 26–30.

p. 48.

18. The other legal issue which arose was as to the admissibility of the statements made by the Respondent and Sonnamma (P.1). The Magistrate admitted them both as admissible under the provisions of section 157 of the Evidence Ordinance, which provides as follows :—

> " In order to corroborate the testimony of a witness, any former statement made by such witness, whether written or verbal, relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact may be proved."

It is respectfully submitted that this provision justified the admission of neither statement. As regards Sonnamma, she was not a witness whose

testimony required corroboration, and the section cannot have been intended to apply to anyone except such a witness ; were this not so, there would be no limit to the amount of hearsay evidence that might be admitted at a trial. Secondly, the reference to " the fact " must, it is submitted, be a reference to the fact in issue or a fact material to be proved in order to establish the case. The only fact contemporaneous with the statements was that Veeracutty had come to Sonnamma's house to collect the Respondent and that Sonnamma had accompanied them to Kallar ; but this proved nothing. So far as the Respondent's statement was concerned, the material fact was the alleged intercourse between the Respondent and the Appellant which occurred in August 1949. In *Ponnammah* v. *Seenitamby* (1921) 22 N.L.R. 395 statements made by the mother to third persons some months after conception, and some months after intimacy had ceased, were held not to be corroboration, as the statements were not made at or about the time of the intimacy. In this case the conception occurred nine months before and, even on the Respondent's account that she had had intercourse with the Appellant up to and including the seventh month of her pregnancy, intimacy had ceased a month before the statement was made. It is respectfully submitted that a statement made so long after the material fact had occurred is utterly valueless as evidence, and to admit it completely defeats the purpose of section 157. It is not altogether clear on what basis the Magistrate admitted the statements under section 157, but it is submitted that the headman, though constituted a peace officer for the purposes of the Criminal Procedure Code, had no legal competence at all to investigate the " fact " in issue, namely the paternity of the child, so that the statements were not admissible under the second limb of the section. In any event, even if admissible, the contents of the statements do not corroborate the evidence of Sonnamma and the Respondent in the sense that they show that it is true, but merely to the extent that these witnesses have given consistent accounts on two different occasions. In the matter of *Bomanjee Cowasiel* P.C. (1906) 34 C. 129, 145 which was a decision of the Privy Council on section 157 of the Indian Evidence Act in identical terms with section 157 of the Ceylon Evidence Ordinance.

19. But for his admission of Sonnamma's statement to the headman, which corresponded closely with her evidence in Court, it would seem quite likely that the Magistrate would not have accepted her evidence in view of her proven low moral character.

20. The Magistrate having found against the Appellant as above indicated, an appeal was filed in the Supreme Court of Ceylon, but when it came on for hearing before Jayetileke C.J. on 23rd August 1951 a preliminary objection was taken that the appeal had been filed out of time and this was upheld.

21. By Order in Council dated the 22nd day of February 1952 Her Majesty in Council granted the Appellant special leave to appeal from the decree of the Supreme Court rejecting the appeal.

22. The Appellant humbly submits that the decree of the Supreme Court dated the 23rd August 1951 and the order of the Magistrate made on the 31st January 1951 were wrong and ought to be set aside for the following amongst other

REASONS

(1) BECAUSE the word " access " in section 112 of the Evidence Ordinance means no more than opportunity or possibility of intercourse, and on all the evidence the Respondent had not rebutted the presumption of legitimacy by proving that there was no opportunity or possibility of intercourse with her husband ;

(2) BECAUSE the Magistrate, having misunderstood a passage from the case of *Alles* v. *Alles*, applied the wrong test in considering whether the Respondent had discharged the burden that lay upon her of showing that the child was not the legitimate son of her husband ;

(3) BECAUSE the Magistrate wrongly admitted the statement made by the witness Sonnamma to the headman in purported pursuance of section 157 of the Evidence Ordinance ; had this statement been omitted the credibility of this witness would have been seriously in doubt ;

(4) BECAUSE the Magistrate wrongly admitted the statement made by the Respondent to the headman ;

(5) BECAUSE the order of the Magistrate and the decree of the Supreme Court were wrong and ought to be set aside.

STEPHEN CHAPMAN.

JOHN STEPHENSON.

No. 45 of 1955.

In the Privy Council.

ON APPEAL

from the Supreme Court of the Island of Ceylon.

BETWEEN

KALIKUTTY KANAPATHIPILLAI
(Defendant) - - - *Appellant.*

AND

VELUPILLAI PARPATHY
(Applicant) - - - *Respondent.*

Case for the Appellant.

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