[FULL BENCH.] 1921.

Present : Bertram C.J. and Ennis and De Sampayo J.J.

PONNAMMAH *v.* SEENITAMBY

356—P. C. Batticaloa, 8,497.

Maintenance Ordinance, s. 7—Corroboration of the evidence of the mother —Statements made by mother to third persons some months after conception—Evidence Ordinance, s. 157—Complaints made before public authority competent to investigate.

The requirement of section 7 of the Maintenance Ordinance of 1889 that, in order to justify an order for maintenance, the evidence of the mother should be corroborated in some material particular by other evidence is satisfied by any kind of corroboration which is recognized by law at the time that her evidence is given ; and consequently section 157 of the Evidence Ordinance of 1895 applies to section 7 of the Maintenance Ordinance of 1889.

Statements made by the mother to third persons some months after conception, and some months after intimacy had ceased, was held not to be corroboration, as the statements were not made at or about the time of the intimacy.

THE facts appear from the judgment.

This case was referred to a Full Court by Shaw J. by the following order :—

April 20, 1921. SHAW J.—

This case raises a very important point under the Maintenance Ordinance, viz., whether previous statements made by the mother of the illegitimate child to third persons as to the paternity of the child are sufficient corroboration for the purpose of satisfying the requirements of the last part of section 7 of the Maintenance Ordinance. In the case of *Angohamy v. Kiriselis Appu*,[1] Wood Renton J. expressed the opinion that such proved statements would be sufficient corroboration. The opinion expressed by the Judge in that case is, however, a mere *obiter dictum*, because there was independent corroboration of another kind sufficient to comply with the requirements of section 7 of the Ordinance. That case has been followed in a case reported at *3 Weekly Reporter 87*. It was also in somewhat hesitating manner accepted by myself in a case reported in *1 Ceylon Weekly Reports 280*. I have, however, serious doubts as to whether the opinion expressed is correct.

[1] *(1911) 15 N. L. R. 232*

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The question as to what is sufficient corroborative evidence in cases of this sort has been recently dealt with at considerable length in the Court of Appeal in England in the case of *Thomas v. Jones*,[1] and the opinion expressed in the case of *Angohamy v. Kirinelis Appu*[2] seems to me to conflict with the requirements which the Court of Appeal have considered necessary in a similar matter in England. It is true that there is no provision in England similar to the provision in section 157 of the Evidence Ordinance. But it appears to me at least doubtful whether that section can have been intended to vary the safeguards provided by a previous Ordinance.

At any rate, it is a matter of considerable importance, and it is desirable to have a definite opinion expressed on it. I. therefore, refer it to a more fully constituted tribunal.

H. V. Perera, for defendant, appellant.—The evidence of the mother must be corroborated by "other evidence," section 7. It is submitted that a previous statement made by the mother to the effect that the defendant is the father of the child is not such "other evidence." What the Ordinance requires is some ground of belief other than the statement of the mother. Proof of the fact that the same statement was made by the mother on some previous occasion does not furnish the Court with an additional ground of belief. No doubt a previous statement made by the mother may be an element in a set of circumstances pointing to the defendant as the father of the child, and such a set of circumstances would be "other evidence" of the allegation made by the mother (*1 C. W. R. 208*). Thus, where a statement as to the paternity of the child is made by the mother in the presence of the putative father, in such circumstances that one would expect the defendant to deny the allegation if it is false, and if he does not deny it, there would be corroboration of the mother's evidence by "other evidence" (*3 C. W. R. 87 and 366*). In such cases it is the conduct of the defendant when the statement is made, and not the mere making of the statements, that constitutes the "other evidence." In order to ascertain the meaning of the words "other evidence," we must consider the law of evidence in force at the time when the Maintenance Ordinance was enacted. That law was the English law, and under that law a previous statement made by a witness is not corroboration of evidence to the same effect subsequently given by the witness.

Even if section 157 of the Evidence Ordinance be read with section 7 of the Maintenance Ordinance, the question is at what time should the previous statement have been made in order to satisfy the requirements of section 157, and to make such statement corroboration of the subsequent evidence of the mother. The section requires that the previous statement should have been

[1] *36 Times Law Reports 872.*

[2] *(1911) 15 N. L. R. 232.*

made " at or about the time when the fact took place." Now, the fact to be proved is that the defendant is the father of the child. Neither the conception nor the birth of the child has any bearing on this question. The fact that indicates the defendant, as the father of the child, is the existence of sexual intimacy between the parties at such a time that conception can be attributed to it. Consequently, the previous statement must have been made by the mother at the time of such sexual intimacy, in order to satisfy the requirements of section 157. A statement made at the time of conception or birth is not sufficient. The *obiter dictum* of Wood Renton J. in *Angohamy v. Kirinelis Appu* [1] in a contrary sense is not correct. In the present case, when the inadmissible evidence is left out, there only remains a statement as to paternity made by the mother several months after conception.

J. Joseph, for respondent.—" Other evidence " means any evidence which is admissible under the law of evidence in force at the time when the question arises. The Legislature intended nothing more than this ; it had not in mind any particular species of evidence. Section 157 of the Evidence Ordinance must, therefore, be read with section 7 of the Maintenance Ordinance. The fact in question is the fact of paternity, and this consists of the series of events commencing with the sexual intimacy between the parties and continuing till the birth of the child. The fact of the paternity comes into question only when the birth takes place. Hence, a statement made by the mother at any time between the commencement of sexual intimacy and the birth of the child or shortly after satisfies the requirements of section 157.

Moreover, in the present case, the mother also made a statement to the Vanniah, who made an investigation into a petition alleging that there had been an attempt to procure an abortion. The Vanniah being an authority competent to investigate the fact, the mother's statement to him would be corroboration of her testimony under the second part of section 157.

Counsel cited *15 N. L. R. 232* and *1 C. W. R. 169.*

June 17, 1921. BERTRAM C.J.—

This is a case which comes before the Court on a reference from Shaw J., and the point referred to us arises under the Maintenance Ordinance, No. 19 of 1889, section 7. That section requires that, in order to justify an order of maintenance, the evidence of the mother of the child should be corroborated in some material particular by other evidence. In this case the learned Magistrate accepts as corroboration statements made by the mother of the child to her mother, and, subsequently, to a Police Vidane and a Rural Constable some months after the child was conceived. The

[1] *(1911) 15 N. L. R. 232.*

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learned Magistrate has followed a previous decision of this Court, namely, a judgment of Wood Renton J. in *Angohamy v. Kirinelis Appu.*[1] In that case Wood Renton J. first considered the bearing of section 157 of the Evidence Ordinance upon the section of the Maintenance Ordinance just referred to. He expressed the opinion that, when the section speaks of the corroboration of the evidence of the mother, it must be taken to include any kind of corroboration which is recognized by law at the time that her evidence is given. In other words, the learned Judge held that section 157 of the Evidence Ordinance applied to section 7 of the Maintenance Ordinance, and that, I take it, must be accepted as the law.

We have to ask ourselves, therefore, looking at section 157 of the Evidence Ordinance, whether the statements accepted as corroboration were made at or about the time when the fact spoken to by the principal witness took place. That fact seems to me to be the sexual intimacy between the appellant and the respondent. I would not narrow it to the actual act of connection which produced the conception. But if a statement is made at or about the time when sexual intimacy is continuing between the parties, then it seems to me that under section 157 of the Evidence Ordinance a statement by the woman to another person alleging that intimacy is corroboration within the meaning of the section. There is, indeed, a case precisely in point, namely, the case referred to in the judgment of my brother De Sampayo in *Avalo Umma v. Adamlevvaipodi.*[2] There, a complaint was made at the time when intimacy was actually going on. But that case did not go the same length as the previous case, *Angohamy v. Kirinelis Appu,*[1] to which I have referred. In that case the evidence showed that, within a few months of the conception and when her condition was discovered, the woman made a statement to her parents. Wood Renton J. observes that the words "at or about" were relative terms. Of course, in any case, it must be a question of fact whether one event is at or about the time of another. Personally, I feel a difficulty in following this pronouncement that a statement made by a woman within a few months after conception is made "at or about the time" of the material fact under consideration, namely, the alleged sexual intimacy between the parties, unless, of course, if it were shown that the sexual intimacy continued after conception and down to about the time of the complaint.

In the present case I am not able to agree with the Magistrate that the statement made by the girl to her mother, and afterwards to the local headman, can be considered as being made at or about the time of the intimacy.

There is, of course, another branch of section 157 in addition to that which I have already considered. If it were shown that complaints were made before any public authority competent

[1] *(1911) 15 N. L. R. 232.* [2] *(1915) 1 C. W. R. 169.*

to investigate the fact, that is to say, the intimacy, it would be immaterial that the complaint was not made at or about the time of the intimacy. Something of this sort was suggested in this case. It was said that there was an inquiry held by the Vanniah into an anonymous petition presented by a mischief-maker, alleging that there had been an attempt to procure an abortion, and that the respondent was implicated in that attempt by having sent medicine, calculated to procure an abortion, to the girl's mother. If there had been any definite evidence of such an inquiry, and if the inquiry was held by the Vanniah as a police officer, and if it became material in the course of the inquiry to consider whether the respondent had sent medicine, then the question whether the respondent was the parent would be a material question in that inquiry, and it would have been a question into which the Vanniah would have been legally competent to inquire. No evidence of any such formal inquiry has been given in this case, and I do not think it would be just to the person implicated to send the case down now for such an investigation.

I may observe incidentally with regard to the Magistrate's judgment, that he was not justified in saying that he fully believed the statement of the mother of the applicant that the respondent sent her some medicine to bring about an abortion. If that actually had been done, it would have been a new material point in the case, giving the very strongest corroboration of the girl's statement. But there was no evidence before the Magistrate, except pure hearsay evidence, namely, the statement of the mother that the medicine was sent. The passage, in the learned Magistrate's judgment, therefore, was not justified by the evidence.

The immediate question we have to consider is simply whether the statements made by the girl to her mother and the rural police officers some months after conception, and, so far as it appears, some months after intimacy had ceased, can be considered as being made at or about the time of the intimacy. The answer to the question I would give in the negative, and I would, therefore, allow the appeal, but without costs, as costs are not pressed for.

ENNIS J.—I agree.

DE SAMPAYO J.—I agree.

Appeal allowed.