IN THE FAMILY DIVISION OF THE HIGH COURT AT LAUTOKA **APPELLATE JURISDICTION**	
ACTION NUMBER:	**17/LTK/ 0280**
BETWEEN:	**ROWAN** **APPELLANT**
AND:	**LAJITA** **RESPONDENT**
Appearances:	For the Appellant: Mr A. Sen and Mr R Gordon (Gordon & Co). For the Respondent: Ms B. Muhammed (Legal Aid)
Date of Hearing	Wednesday 25 October 2023
Date of Judgment	Monday 18 March 2024
Coram:	Hon. Mr. Justice Chaitanya Lakshman
Category:	*All identifying information in this judgment have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarity to any persons is purely coincidental.*

Judgment

A. Introduction

[1] The Appellant filed an appeal on 14th July 2020 appealing the judgment of the Learned Resident Magistrate declaring the Appellant as the biological father of the child, A.S. The Births, Deaths and Marriage (BDM) Registry was ordered to register the Appellant as the father of the child in the child's birth certificate. The Appellant was ordered to pay child maintenance in the sum of $300.00 per week from the date of the decision.

B. Brief Background

[2] On 9th June 2017 the Respondent/Lady filed an application for maintenance (Form 5). In that application she had sought that Appellant/Man be declared the putative father of the child, A.S. She had sought child maintenance in the sum of $500.00 per week. A Form 12 (Application) and Form 23 (Affidavit) was also filed on 9th June 2017 seeking interim maintenance. The Appellant filed a Form 6 (Response) on 8th August 2017 where he sought that the Court order that he pay $20.00 per week as child maintenance if he is the biological father of the child. On 9th April 2019 by consent of the parties the Court ordered the Appellant/Man to pay $200.00 per week as interim child maintenance.

[3] On 28th June 2019 the Appellant/Man filed an application to set aside the interim child maintenance orders. On 12th September 2019 the Learned Magistrate delivered a Ruling and refused the application to set aside the interim child maintenance orders. A stay and an appeal of this decision was filed in High Court. Justice Nanayakara refused stay on 5th February 2020.

[4] On 8th October 2019 the Respondent/Lady had filed Forms 12 and 23 seeking orders for DNA testing. The Learned Magistrate ordered DNA testing on 20th December 2019. The Appellant/Man appealed the orders to the High Court. Justice Nanayakara dismissed the appeal on 14th February 2020. The Appellant refused DNA testing.

[5] The matter on paternity then proceeded to hearing. On 24th June 2021 the Learned Magistrate gave judgment and the orders of the Learned Magistrate is the subject of this appeal.

C. Grounds of appeal and the orders sought by the Appellant

[6] The **grounds of appeal** are – "*1. That the learned magistrate erred in fact and/or in law in holding that the family court registry was issued with specific procedural instructions and there was a misunderstanding or misinterpretation of the same and that the issue was moot (sic).*

2. That the learned magistrate erred in fact and/or in law when having accepted the written submissions of the Appellant he then failed to consider and/or adequately consider the written submissions and/or failed to engage with and/or consider the Appellant's case as set out in the written submissions.

3. That the learned magistrate erred in fact and/or in law in wrongly and/or incorrectly applying and/or interpreting and/or relying on sections 42, 89, 90, 91, 93, 131, 137, 138(2), (a), 138(2), (i), 136(1), 120 and 140 (and other relevant and applicable Sections) of the Family Law Act.

4. That the leaned magistrate erred in fact and/or in law in wrongly and/or incorrectly applying and /or interpreting and/or relying on Orders 3, 7, and 8 (and other relevant and application Orders and/or Rules of the Family Law Rules.

5. That the leaned magistrate erred in fact and/or in law in wrongly and/or incorrectly applying and/or interpreting and/or relying on Regulations 16, 17 and19 (and other relevant and applicable Regulations) of the Family Law Regulations.

6. That the learned magistrate erred in fact and/or in law in not considering the validity of the form 5 application in the totality of the matter.

7. That the learned magistrate erred in fact and/or in law in holding that the parities were involved in an intense love air (sic) when there was no evidence of the same.

8. That the learned magistrate erred in fact and/or in law in holding that the Appellant failed to deny the alleged love affair.

9. That the learned magistrate erred in fact and/or in law in holding that the Appellant attempted to down play the alleged love affair.

10. *That the learned magistrate erred in fact and/or in law in holding that the relationship evolved into something much more than just sex when there was no evidence of the same.*

11. *That the learned magistrate erred in fact and/or in law in holding that the parties were usually together every weekend when there was no evidence of the same.*

12. *That the learned magistrate erred in fact and/or in law in holding that the Appellant's evidence was that the Appellant's wife and the respondent's husband knew about the love affair and have come to accept the same when there was no such evidence of the same.*

13. *That the learned magistrate erred in fact and/or in law in holding that the Appellant was supporting the respondent financially by giving her $200.00 every week when there was no such evidence of the same.*

14. *That the learned magistrate erred in fact and/or in law in holding that the Appellant's evidence was that after attending court that day, the parties were going to spend the weekend together when there was no such evidence of the same.*

15. *That the learned magistrate erred in fact and/or in law in holding that there was a common thread of evidence of the parties when it was not.*

16. *That the learned magistrate erred in fact and/or in law in holding that the Appellant did not deny a de facto relationship by filing a formal denial.*

17. *That the learned magistrate erred in fact and/or in law in holding that the relationship had gone beyond the casual stage to the point where the couple a (sic) together every weekend (sic) when there was no such evidence of the same.*

18. *That the learned magistrate erred in fact and/or in law in holding that every week the parties spent the first 4 days with each respective family (sic) then the last 3 days of the week together when there was no such evidence of the same.*

19. *That the learned magistrate erred in fact and/or in law in holding that in those 3 days every weekend, the couple lived together on a genuine de facto basis even though they were not legally married within the meaning of section 42(1) of the Act when there was no such evidence of the same.*

20. *That the learned magistrate erred in fact and/or in law in holding that there was unchallenged evidence of the respondent when there was no such evidence of the same.*

21. *That the learned magistrate erred in fact and/or in law in holding that the unchallenged evidence of the respondent was enough to suggest that the two had developed feelings for each other when there was no such evidence of the same.*

22. *That the learned magistrate erred in fact and/or in law in holding that the relationship had become more than just sexual and it was a domestic relationship evolving into a de facto relationship when there was no such evidence of the same.*

23. *That the learned magistrate erred in fact and/or in law in misinterpreting the evidence of the doctor called by the respondent.*

24. *That the learned magistrate erred in fact and/or in law in misinterpreting the evidence of the husband of the respondent.*

25. *That the learned magistrate erred in fact and/or in law in shifting the burden of proof to the Appellant when it always rested with the respondent.*

26. *That the learned magistrate erred in fact and/or in law in using the term love affair.*

27. *That the learned magistrate erred in fact and/or in law in holding that the Appellant had a smirk and was contemptuous of the husband of the respondent.*

28. *That the learned magistrate erred in fact and/or in law in asking himself the wrong question and/or posing the wrong issue(s) to be decided.*

29. *That the learned magistrate erred in fact and/or in law in making several findings of fact when he was not entitled to do the same and/or had no evidence to do the same.*

30. *That the learned magistrate erred in fact and/or in law in holding that the parties did not end their liaison in October 2015.*

31. *That the learned magistrate erred in fact and/or in law in misinterpreting and/or misapplying* ***Jones v Dunkel*** *(1959) 101 CLR 298.*

32. *That the learned magistrate erred in fact and/or in law in misinterpreting and/or misapplying sections 138(2), (a) and 138(2), (b), (i) of the Family Law Act and the law and rules regarding and concerning DNA testing and its use of the evidence etc.*

33. *That the learned magistrate erred in fact and/or in law in drawing an adverse inference regarding DNA evidence when he was not entitled to do the same in law or in fact.*

34. *That the learned magistrate erred in fact and/or in law in misinterpreting and/or misapplying sections 140 of the Family Law Act and the other relevant and applicable sections thereto.*

35. *That the learned magistrate erred in fact and/or in law in making the findings he did in/at paragraphs 26 and 27 of his judgment when he was not entitled to do so on the evidence before him.*

36. *That the learned magistrate erred in fact and/or in law in misinterpreting and /or misapplying sections 46, 86 and 88 and 89 and 90 of the Family Law Act and the other relevant and applicable sections thereto.*

37. *That the learned magistrate erred in fact and/or in law in holding that it was undisputed that the child will have ongoing health issues when there was no such evidence of the same before him.*

38. *That the learned magistrate erred in fact and/or in holding that the appellant had not been entirely truthful with his financial statement when there was no such evidence of the same before him.*

39. *That the learned magistrate erred in fact and/or in law in awarding a sum of $300.00 a week when there was no evidence at all before him of the expenses of the child, the needs of the child or the income and expenses of the respondent, all of which was needed in order to make a lawful order and/or award under the Family Law Act.*

40. *That the learned magistrate erred in fact and/or in law when he made orders that were was ultra vires.*

41. *That the learned magistrate erred in fact and/or in law when he made orders that were beyond his jurisdiction and/or which he was not empowered to make.*

42. *That the learned magistrate erred in fact and/or in law when he relied upon irrelevant and/or inadmissible evidence and /or failed to rely on relevant and/or admissible evidence.*

43. *That the learned magistrate erred in fact and/or in law when he relied on evidence not properly before him and/or not on evidence recorded by him.*

44. *That the learned magistrate erred in fact and/or in law in declaring the Appellant the biological father of the child Adrian Shaw born on 13 July 2016.*

45. *That the learned magistrate erred in fact and/or in law in ordering that the Department of Births, Deaths and Marriages (BDM) within the Ministry of Justice be ordered to record the name of the Appellant in the birth certificate of the child.*

46. *Such further or other grounds that may manifest upon receipt of the Record of Appeal."*

The orders sought by the Appellant are *"1. An order that the orders of the learned magistrate dated 24 June 2020 be quashed and/or set aside wholly and/or unconditionally.*

2. that there be an immediate and forthwith stay of the orders made on 24 June, 2020 until the final determination of this appeal.
3. an order that the substantive proceedings be transferred to the family division of the high court to be heard and determined by the family division of the high court.
4. that costs of this appeal be paid by the respondent lady."

D. <u>Determination</u>

[7] With the grounds of appeal the appellants have taken a scatter gun approach. At the commencement of the hearing of the appeal, the Appellants lawyer informed me that the grounds of appeal "*overlap, intertwine and synergise with each other*" and for that reason they grouped numerous grounds of appeal at the hearing. Such a thought when the grounds of appeal were being formulated would have been generous. The grounds of appeal need to be precise. The Court does not want a scatter-gun approach. We want to know your precise argument on appeal. The grounds of appeal at the hearing were grouped into 4 lots. The <u>first group</u> was grounds 1 and 2, the <u>second group</u> was grounds 3, 4 and 6, the <u>third group</u> was grounds 5, 32, 33, 34, 40 and 41 and the final (<u>fourth group)</u> was grounds 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25,

26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 42, 43, 44, 45 and 46. I would deal with them as they are grouped for ease of reference.

[8] The first group was grounds 1 and 2. According to the appellants for the **1st** and **2nd** ground of appeal the Learned Magistrate "failed to engage with the appellant's case". In these grounds of appeal, they challenge the form and structure of the judgment and they contend that the Learned Magistrate failed to engage with the appellant's case. The Learned Magistrate in his judgment states that following the conclusion of the hearing of the matter, both the parties were ordered to file written submissions. The Respondent/Lady's submissions were filed on time, while the submissions for the man were out of time. The Learned Magistrate then stated what needed to be done by the Man's lawyer to file the submissions out of time. He set out the correct procedure. He found the issue moot as the Man's submissions were accepted and considered by him. I do not find anything wrong with the form and the structure of the judgment of the Learned Magistrate. Both the grounds of appeal are dismissed.

[9] The second group of the grounds of appeal are grounds 3, 4 and 6. In the **3rd** ground of appeal the appellants have not submitted to me how the Learned Magistrate erred and wrongly and incorrectly applied and interpreted Sections 42, 89, 90, 91, 93 131,137, 138 (2(a), 138 (2), 120 and 140 of the Family Law Act 2003. I do not find that the Learned Magistrate erred or wrongly and incorrectly applied and interpreted the laws. To his credit he correctly applied the laws, as he was required to do so. In their submission the appellants included the **4th** and **6th** grounds of appeal with the **3rd** ground and submitted that the "*Form 5 application is defective and/or null and/or void*". The basis for the appellants submission on these grounds are that the Respondent/Lady filed "a second Form 5 Application… on 20 December 2019" and it superseded and replaced the Form 5 filed on 9th June 2017. The Form 5 filed on 9th June 2017 was for child maintenance and paternity, while the Form 5 filed on 20th December 2019 was for spousal maintenance. The two applications were separate and could be made separately by the Applicant/Lady. Prior to the hearing of the paternity and child maintenance the lawyer for the lady informed the Court (page 49 of the records) that the lady will withdraw the spousal maintenance matter. Whether it was withdrawn or not has no bearing on the paternity and child maintenance matter. The 3rd, 4th and 6th grounds of appeal are dismissed.

[10] On the **4th** ground of appeal the Appellants submitted that "*an application by way of Form 5 proceeds on the basis that paternity is not in dispute. That is who is the father of the child is not an issue between the parties. A Form 5 Application cannot be made if paternity is in dispute*". It is clear from the Family Law Act 2003 that maintenance application can be made for the children of the marriage or for ex-nuptial child (a child whose parents never married each other: Rule 1.03). The practice in relation to child maintenance for ex-nuptial children is that once the Form 5 is served on the Respondent and if the Respondent disputes the application he must file and serve a Form 6 (Rule 7.05). Paragraph 4 of the Form 6 specifically gives the Respondent an opportunity to refute anything contained in the Form 5, not just the orders sought by the Applicant. If

the Respondent elects not to file a Form 6 and not attend Court (and the Court is satisfied that service of the Form 5 has been effected) the Court may proceed on the basis that the Respondent does not challenge the application and the facts alleged within the Form 5, including the fact of paternity. It is deemed that the Respondent by failing to file a response (Form 6) and by not attending court admits paternity. No corroborative evidence is required.

[11] On the other hand, where paternity is challenged (and the parties cannot afford parentage testing procedures) it is appropriate to allow the Applicant (Mother) time to file and serve an affidavit setting out the facts relied upon to establish paternity together with any witness affidavits. The Respondent can then file his answering affidavit and any witness's affidavits. If any of the presumptions set out in sections 132 to 135 of the Family Law Act 2003 applies, the onus of proof falls upon the Respondent (to rebut the presumption) and it is appropriate that the Respondent files his affidavit first and then the Applicant (Mother) responds to that affidavit/evidence. A hearing then takes place to establish the facts on the balance of probabilities.

[12] The Appellants also raised the issue that the birth certificate of the child was not filed in compliance with Order 3 Rule 3.04 and Order 7 Rule 7.02 (d) of the Family Law Rules 2005 when the Form 5 was filed. I note from the records (page 47) that Mr Gordon did not object to the birth certificate and the register of birth of the child. Order 3 Rule 3.04 (2) which deals with filing of documents provides that "*during the hearing of proceedings by a court, a document relating to the proceedings may, by leave of the court, be filed by delivering it to an officer of the court*". Leave of court was not required as Mr Gordon consented to the Birth Certificate and register of birth of the child being tendered and being filed when the court was dealing with the Form 5 application.

[13] The Appellants have raised the issue that the Respondent/Lady is married and that the child is born during her marriage with her husband. They rely on the presumption of parentage under Section 131 (1) of the Family Law Act 2005 that "*if a child is born to a woman while she is married, the child is presumed to be a child of the woman and her husband.*" The position of the Appellants is that the husband of the Respondent/Lady is the father of the child. They further state that it is the husband of the Respondent/Lady against whom the presumption applies and it is he who can challenge it.

[14] It is essential that the role of the parentage presumptions contained in the Family Law Act 2003 are clearly understood. It is to assist the Court in determining questions of parentage. This is relevant in the context of seeking to rebut a presumption arising under the Act (for example; that a husband is the father of his wife's children), or in circumstances where no presumption arises (example; where a child is conceived following a casual relationship), parentage evidence may be adduced to establish, as a matter of fact, who the parent are or, as is most frequently the case, who the father of the child is. Prior to the development of DNA testing, these presumptions were of

utmost importance in determining parentage. Currently, the purpose of these presumptions is little more than to place the onus of proof on the person who seeks to rebut these presumptions. It is clear from the application made by the Respondent/Lady that she is claiming that the Appellant is the father of the child. The appellant is not her husband. Section 131 (1) of the Family Law Act 2003 is not applicable to the Appellant. The evidence before the Court of the husband and the Respondent/ Lady was that they were not having sex during the period in question. The husband of the Respondent/Lady was having an affair and he was not sleeping with the Respondent/Lady.

[15] The third group covers grounds 5, 32, 33, 34, 40 and 41 of the appeal. The **5th** ground of appeal deals with Regulations 16, 17 and 19 of the Family Law Regulations 2005. On this ground the Appellant has submitted that Lautoka Hospital is not an accredited laboratory. Letter from Lautoka Hospital dated 3rd August 2017 is not a proper report and does not comply with Part III – Parentage Testing and Reports of the Family Law Regulations 2005. They also contended that the procedure carried out was not a parentage testing procedure but a blood test. The orders of 9th April 2019 for Gentech to carry out the DNA testing is also challenged by the Appellants. They allege both breach Regulations 16, 17, 18, 19 and 28 of the Family Law Regulations 2005. No DNA report was before the Magistrate Court. No report was relied upon by the Learned Magistrate in determining the matter relating to paternity.

[16] 1The Family Law Act 2003 and the Family Law Regulations 2005 set out the parentage testing orders, procedures and reporting. The Family Law Act 2003 gives a Court power to order a 'parentage testing procedure' where a child's parentage is in issue in proceedings under the Family Law Act 2003. The Court may make the order in relation to the child, the mother, or any other person who might assist in determining the child's parentage. If an adult contravenes an order, or withholds consent on behalf of the child, the court may draw such inferences as appear just in the circumstances. A convenient starting point for the consideration of the relevant authorities on this topic is the judgment of Barry J. in **R. v. Jenkins (Ex parte Morrison) (1949) V.L.R. 277** at p. 280 where his Honour said: ``*Where a party has exclusive knowledge of a fact, and fails to make that knowledge available to the Court, the Court will usually be astute to draw an inference adverse to him*." In similar vein, Lord Denning M.R., in the course of delivering his judgment in **Re L. (An infant) (1969) P. 119**, said at p. 159: ``*If an adult unreasonably refuses to have a blood test, or to allow a child to have one, I think that it is open to the court in any civil proceedings (no matter whether it be a paternity issue or an affiliation summons, or a custody proceeding) to treat his refusal as evidence against him, and may draw an inference therefrom adverse to him. This is simply common sense*."

[17] The Family Law Regulations 2005 address two main aspects of scientific reliability in parentage testing: the protection of the integrity of bodily samples and the technical accuracy of the testing process. The Family Law Regulations 2005 cover the collection of bodily samples; the storage of samples and their transport to the

laboratory (that is, chain of custody); the timeframe for testing samples; and the format of the parentage testing report.

[18] As for ground **32** the appellants submitted that "*the learned magistrate erred in fact and/or in law in misinterpreting and/or misapplying sections 138(2), (a) and 138(2), (b), (i) of the Family Law Act and the law and rules regarding and concerning DNA testing and its use of the evidence etc."* I do not find that the Learned Magistrate erred in misinterpreting or misapplying Section 138 (2), 138 (2) (b) (i) of the Family Law Act 2003. It is clear from the records that the Appellant/Man was receptive to DNA testing. On 9th April 2019 he consented to DNA testing and volunteered to pay the costs. He later reneged on this. As I have mentioned earlier no report was before the Learned Magistrate. The Learned Magistrate did not rely on any DNA tests in his judgement.

[19] Section 140 of the Family Law Act 2003 states that "*if a person who is aged 18 or over f1ails to comply with a parentage testing order under section 139, the person is not liable to any penalty in relation to the contravention, but the court may draw such inferences from the failure as appear just in the circumstances*". The Learned Magistrate found that the Man was unreasonable and considered his conduct as evidence to his detriment. The Learned Magistrate found that the Appellant failed to provide reasonable explanation for his non-compliance. Ground **33** for this reason fails. I also do not find that the Learned Magistrate erred in applying Section 140 of the Family law Act 2003. Ground **34** fails.

[20] For grounds **40** and **41** of the appeal there is no submission before me on these grounds. The Appellant's lawyer has not elaborated what these grounds stand for and what orders were ultra vires. It is not enough to file the grounds of appeal without stating what you actually imply. The Court should not be expected to make inferences from the grounds of appeal as to what the Appellant is challenging. A Lawyer must be clear as to what aspect of the judgment they are challenging. From the written submission I infer that the Appellants are challenging the orders for blood grouping and the orders made on 9th April 2019 and the orders of 20th December 2019. The orders made by the Learned Magistrate had no bearing on his decision. The Learned Magistrate did not have the benefit of the DNA tests or relied upon the blood results. Both the grounds of appeal are dismissed.

[21] The fourth group of the grounds of appeal are 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 42, 43, 44, 45 and 46. The Learned Magistrate had evidence before him of the Respondent, the Appellant, their spouses, a Doctor and the Financial Controller of the Appellant's Company. I find that the Learned Magistrate carefully analysed the evidence of all the witnesses. In analysing the evidence, the Learned Magistrate put things into perspective. He found there was "intense love affair" which the Appellant failed to deny. The Learned Magistrate from the evidence before him found that the appellant/man down played the love affair. The Learned Magistrate found that the relationship between the Respondent/Lady and the Appellant/Man "*evolved into something much more than just*

sex". The Learned Magistrate had evidence before him which he believed that the "*parties were usually together every weekend*". He also had evidence before him that the Appellants wife and the Respondents husband knew about their "*love affair and had come to accept the same*". This evidence was led by the Respondent/Lady. The Learned Magistrate found the evidence of the Respondent/Lady "*open, clear and precise…it was explicit*". The findings of the Learned Magistrate were based on his review of the evidence that was given before him. I do not find anything wrong in the assessment and the findings of the Learned Magistrate on these issues.

[22] The reference by the Learned Magistrate to the Appellant/Man supporting the Respondent/Lady by giving her $200.00 every week is based on the consent orders for interim maintenance entered by the Learned Magistrate on 9th April 2019. This is confirmed by the court records. The Learned Magistrate took comprehensive note of the evidence of the witnesses. He assessed the evidence of the witnesses. He carefully weighed the evidence of the Appellant, the Respondent and the other witnesses in reaching a decision. He assessed the demeanour of the witnesses. It was well within the Learned Magistrate's role to do so. The usage of the term "love affair" by the Learned Magistrate was not wrong. Both the parties informed the court of love and their affairs, while being married.

[23] The day (9th June 2017) the Lady filed her Maintenance Application seeking that the Appellant be declared the putative father of the child, she had filed an affidavit (Form 231) where she had stated "*that I was involved with the Respondent for 2 years and that within 2 years I had a child from him…*" A Form 12 was also filed seeking Interim Maintenance. The Response (Form 6) to the Form 5 (Maintenance), by the appellant was filed on 8th August 2017. Part B states "*we seek $20 a week for child maintenance if I am the biological father of the said child*". Part B (4) of the Form which states if the Appellant disagrees with any of the original application is not responded to by the Appellant. The Appellant was not certain if he was the father of the child. He was ready to pay maintenance if he was the father of the child. The Appellant did not deny the relationship or that he was involved with the Lady. This all formed the basis of the Learned Magistrate's assessment that the Appellant did not deny the de-facto relationship by filing a formal denial in ground 16 of the appeal.

[24] The records also shows that before interim maintenance was ordered by consent of the parties the Learned Magistrate was given a background. The Learned Magistrate noted that both the parties were married, their relationship was a de-facto relationship. It started in 2015, child would be 3 years by 13th July 2019. The Appellant was giving $200 every fortnight willingly. Once or twice a week the parties go out. This information was provided to the Learned Magistrate. The Appellant consented to paying interim maintenance for the Child. He was represented by a lawyer when this consent order was entered into. He had legal advice and representation. For grounds 18, 19, 20 and 21 the Court had ample evidence to determine matter as it did on those issues. Ground 22 of the appeal is an extension of ground 10, which I have dealt with above.

[25] I also note that Section 132 of the Family Law Act which deals with the presumption arising out of cohabitation is relevant. It provides that if a man and a woman cohabit out of marriage at any time between 20 weeks and 44 weeks before the woman gives birth to a child, the man is presumed to be the father of the child. The child was born on 13th July 2016. The evidence of the Appellant/Man and the Respondent/Lady was that they started cohabitating in September 2015. Even if we take it to have been in October 2015 then the cohabitation was within the 20 weeks and 40 weeks before the Respondent/Lady gave birth to the child. The child was conceived following the cohabitation of the Appellant and the Respondent. The Appellant in his evidence had reason to avoid agreeing to having sex with the Respondent in December 2015 and giving evidence that he always used a condom. It was self-serving evidence. It is evident from the records and the response given by the Appellant in cross-examination that he was evasive when he was cross-examined by the lawyer for the Lady. He defl1ected the questions on DNA testing and blamed his previous lawyers on the contents filed on his behalf.

[26] For the Appellant it was argued that the Learned Magistrate misinterpreted and misapplied **Jones v. Dunkel (1959) 101 CLR 298.** The submission for the Appellant was that the Respondent/Lady in her evidence at various times stated that her friend Manisha corroborated most if not all of what she testified. However, Manisha was not called to give evidence. Therefore, the Learned Magistrate should have drawn an inference that the evidence of Manisha would not have corroborated what the lady said in her evidence. For the Appellant it was also argued that the lady did not call any other independent corroborative witnesses to testify as to her relationship with the Appellant or that the Appellant was the father of the child. The rule developed from **Jones v. Dunkel** is that when there is an unexplained failure by a party to call evidence, to call a witness or to tender documents or other evidence, the court may draw an inference that the uncalled evidence would not have assisted the party. However, the court may only draw such an inference if appropriate circumstances exist. An inference can be drawn where an uncalled witness is a person who could reasonably be expected to shed light on facts relied on by a party as the basis for an inference favourable to that party. An unfavourable inference cannot be drawn solely on the basis that a witness was not called; the evidence must support the inference.

[27] The Respondent/Lady gave evidence. She called her husband (B.K) and a Doctor. The Respondent/Lady and B.K (husband) gave evidence of her relationship with the Appellant. The Appellant, called his wife. They gave evidence of the relationship between the Appellant and Lady. All these witnesses knew of the relationship between the Appellant and the Lady. They gave their version. I do not think it was necessary for the Learned Magistrate to draw any inference from the failure to call Manisha. In

Murdock & Madden [2011] FamCAFC 219; (23rd November 2011) the Full Court said the following:

"*[68]... it is, we think, necessary to point out that, even in circumstances where the pre-conditions to the application of the rule [in Jones v Dunkel] are made out, a court is not compelled to draw an adverse inference. Nor can it be presumed "that the uncalled evidence would have been damaging" (LexisNexis Butterworths, Cross on Evidence, vol 1 (at Service 129) [1215], citing HML v R [2008] HCA 16; (2008) 235 CLR 334; Brandi v Mingot (1976) 12 ALR 551 at 559-560).*

[69] But, there are pre-conditions to the application of the rule. No inference should be drawn unless and until "enough has been proved to warrant a reasonable and just conclusion" against the person not giving evidence. Moreover, it is only where "the nature of the case is such as to admit of explanation or contradiction" that the inference can sought to be drawn. (Jones v Dunkel per Windeyer J at 321 citing R v Burdett [1814-23] All ER 80)."

[28] What was happening between the Appellant and the Lady behind closed doors could not have been testified by anyone else. Only the parties were present. The Appellant's evidence on the relationship with the Lady was carefully analysed by the Learned Magistrate. The Learned Magistrate believed the Lady. I do not find any fault in the analysis or reasoning of the Learned Magistrate on the relationship and sexual relationship between the parties.

[29] Paragraphs 26 and 27 of the Judgement of the Learned Magistrate is based on the evidence that was before him. The Learned Magistrate correctly relied upon **Ashish v Shila [2015] FJHCFD 4,** where the court had cited Lord Denning MR in **Re L [1968] 1 All ER 20** on the refusal to do tests and the powers of the court to treat the refusal as evidence against him, and to draw an inference adverse to him. The Learned Magistrate also correctly identified and applied the law relating to each parents' role in parental responsibility (Section 46), parents' duty to maintain child (Section 86), who can apply for maintenance (Section 88), power of court (section 89), and the relevant financial support matters that are to be taken into account for maintenance of child (Section 90).

[30] The parties focused mainly on paternity at the trial of Form 5. The evidence on maintenance for the child is basically on what the parties filed in Form 5 and 6. The Learned Magistrate had been provided very little evidence by the parties on child maintenance. He cannot be faulted for the manner in which he dealt with child maintenance. The Respondent/Lady had sought $500.00 per week as Maintenance for the child. The Court noted that the Appellant had proposed to pay $20 per week. The Learned Magistrate had noted that the Appellant "*has not been entirely truthful with his financial statement*." This could have been an assessment based on the disclosures made by the Appellant. The Appellant had informed the Court that he was the Director of a Company with about 20 branches all over Fiji, employing around 500 workers. Form 6 filed on behalf of the Appellant disclosed that his pay was $900.00 per week.

The income of the other members living with him (wife, 3 sons and two daughters in law) was $1100.00 per week. The total expenses per week was $1538.00. He also disclosed that the company had a debt of $19 million. The Appellant's expenses was $515.00 per week.

[31] In determining the maintenance for the child I note that the Learned Magistrate took into consideration the needs of the child as required under Section 90 (2) of the Family Law Act 2003. In assessing the child maintenance and with the limited evidence at the trial on maintenance the Learned Magistrate found $300.00 per week as sufficient for the needs of the child in the existing circumstances. I do not find anything wrong with his assessment of the child's maintenance.

[32] It is important that the parties note that they "*must produce to the Court at the hearing copies of [their] latest income tax returns, [their] latest income tax assessment [their] 3 most recent pay advice slips, their] bank records for the last 12 months and any other documents in their] possession or control that may help the court to decide [their] income needs and financial resources*." This is an important note/compliance that has been missed out. Filing out a Form 6 and stating your income, assets and liabilities is not enough without salary slip, income tax returns, bank records and other documents that may assist the Court in determining their income needs and financial resources.

[33] The Learned Magistrate's decision and orders made on 24th June 2021 are affirmed. For the reasons given herein I would dismiss the appeal. No orders as to costs.

Court Orders:

(i) The Appeal is dismissed.
(ii) No orders as to costs.

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Chaitanya Lakshman

Acting Puisne Judge