

## IN THE SUPREME COURT OF FIJI

## Appellate Jurisdiction

Civil Appeal No. 41 of 1961

Between:

KANDA SAMI PILLAY

Appellant

v.

ELIZABETH RAM DULARE

Respondent

Bastardy Ordinance (Cap. 33)—presumption of legitimacy where child born during wedlock.

The appellant appealed against a Magistrate's order adjudging him the putative father of a child conceived during the respondent-mother's marriage to a third person. The Magistrate did not advert to the point as to whether there was evidence that this third person, the husband, had not had sexual intercourse with the respondent during the period of conception.

*Held.*—The presumption of legitimacy could only be rebutted by evidence which is strong and satisfactory.

Appeal allowed: proceedings directed to be re-opened in the court below.

Case cited:

*In W. v. W.* 1953 2 All E.R. 1013.

*F. M. K. Sherani* for the Appellant.

*D. N. Sahay* for the Respondent.

KNOX-MAWER, Ag. J. (15th December, 1961).

This is an appeal against a decision of the Magistrate's Court of the First Class, Suva, under the Bastardy Ordinance (Cap. 33), whereby the appellant was adjudged the putative father of the child born to the respondent on 16th October, 1959, and ordered to pay £1 per week maintenance.

The parties have been involved in protracted litigation for some years. I have read the now very lengthy record with care. I would not be disposed to interfere with the learned trial Magistrate's order but for the following reason. It is common ground that this child was conceived and born during the subsistence of the respondent's marriage to one Andrew Krishna. The presumption of legitimacy which therefore arises can only be rebutted by evidence which is strong and satisfactory (see *Halsbury's Laws of England 3rd Edition, Volume 3, p. 87, paragraph 139*). *In W. v. W.*, 1953 2 All E.R. 1013 it was held that nothing except evidence that the husband did not have sexual intercourse with the wife at the period of conception could render illegitimate a child born in wedlock. In his judgment the learned Magistrate has here not adverted to this particular point. If the lower court has in fact concluded that there is evidence upon which it can safely rely to the effect that the husband did not have sexual intercourse with the respondent during the relevant period, then this conclusion should, I think, be specifically stated in the judgment.

There is insufficient substance in the other grounds of appeal to warrant any interference by this Court. However for the reason I have stated above, I must set aside the order and direct that the proceedings be reopened in the court below by the learned Acting Senior Magistrate. Both parties will be at liberty to call further evidence upon this issue. The trial Magistrate will then consider his finding, and in particular he will direct his mind to the question as to whether the presumption of legitimacy is rebutted.

The appellant appealed against a Magistrate's order regarding the putative father of a child conceived during the respondent's marriage to a third person. The Magistrate's order was to the effect that there was evidence that the third person, the husband, had had sexual intercourse with the respondent during the period of conception, and that the presumption of legitimacy could only be rebutted by evidence which is strong and satisfactory.

Appeal allowed: proceedings directed to be re-opened in the court below.

Case cited:  
*In W. v. W.* 1953 2 All E.R. 1013.  
 F. M. K. Szwant for the Appellant.  
 D. V. Saway for the Respondent.  
 K. M. MAWER, A.G. J. (15th December, 1961).

This is an appeal against a decision of the Magistrate's Court of the First Class, under the Bastardy Ordinance (Cap. 33), whereby the appellant was adjudged the putative father of the child born to the respondent on 18th October, 1959, and ordered to pay £1 per week maintenance.

The parties have been involved in protracted litigation for some years. I have read the now very lengthy record with care. I would not like to interfere with the learned trial Magistrate's order but for the following reason. It is common ground that this child was conceived and born during the subsistence of the respondent's marriage to one Andrew Krishna. The presumption of legitimacy which therefore arises can only be rebutted by evidence which is strong and satisfactory (see *Wainman's Law of England*, 3rd Edition, Volume 3, p. 87, paragraph 139). *In W. v. W.* 1953 2 All E.R. 1013 it was held that nothing except evidence that the husband did not have sexual intercourse with the wife at the period of conception could render illegitimate a child born in wedlock. In his judgment the learned Magistrate has here not adverted to this particular point. In the present case it is a fact concluded that there is evidence upon which it can be said that the effect that the husband did not have sexual intercourse with the respondent during the relevant period, then this conclusion should, I think, be specifically stated in the judgment.

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