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FULORI RAQALO

v.

HARI BHAGWAN B

[SUPREME COURT, 1973 (Stuart J.), 13th August]

Appellate Jurisdiction

Bastardy—evidence—conversation between respondent and court officer—whether privileged. C

Practice and procedure—whether order dismissing bastardy application an order of acquittal—whether such an order final—whether power to set aside order and remit case for new trial—Criminal Procedure Code (Cap. 14) s. 300.

In an appeal against the dismissal of a bastardy application it was held (1) that a conversation between the respondent and a court clerk was not privileged and that the appellant should have been permitted to call the clerk to give evidence of what was said. D

(2) Bastardy applications are civil proceedings and therefore there was no question of acquittal and it was in order to remit the case to the Magistrate's Court for trial *de novo*. E

(3) The standard of proof required was not as great as that required in criminal actions.

Cases referred to:

R. v. Nottinghamshire JJ. *ex parte Bostock* [1970] 2 All E.R. 641. F

Krishna Reddy v. Flouri Radina Tavuki, Civ. App. No. 23 of 1968—unreported.

Latchmi v. Satnarayan, Civ. App. No. 26 of 1969—unreported.

Azeem Khan v. Mereani Eminoni, Civ. App. No. 3 of 1970—unreported.

Kunjbehari v. Hicks, 15 F.L.R. 90

R. v. James Berry, 169 E.R. 1161.

R. v. Sutherland JJ *ex parte Hodgkinson* [1945] 2 All E.R. 175; [1945] K.B. 502. G

R. v. Jenkin, 95 E.R. 194.

The Queen v. Glynne (1871) 7 L.R.Q.B. 16.

Pickering v. Kiss, Fiji Cr. App. No. 30 of 1953—unreported.

Appeal from the decision of the Magistrate's Court dismissing a bastardy application. H

G. P. Shankar for the appellant.

M. Sahu Khan for the respondent.

Stuart J. [13th August 1973.]—

This is an appeal by the complainant against the dismissal of a bastardy application by the Magistrate's Court sitting at Ba. The child in respect of whom the application is made was born on the 25th day of May, 1971, although the complaint shows the birth as having taken place on 25th May, 1972. This is clearly an error. It should not have been overlooked and must be corrected. The Birth Certificate lodged at the time of the complainant's application although numbered and obviously issued from a book in the Registrar-General's office has no signature or seal. This should also be corrected.

The first matter which the appellant argued was the rejection of her application to call Mrs Cagi to give evidence. Mrs Cagi is a clerk in the Magistrate's Court at Ba and I can see no reason why she or any other clerk in any Court should be entitled to hold privileged conversations with litigants. It was suggested that Mrs Cagi was in some way engaged in the reconciliation of the parties, but with a bastardy application there is no occasion for the parties to be reconciled and there was no suggestion that Mrs Cagi was the authorised agent of the complainant. The Maintenance and Affiliation Act, 1971, section 15 provides for conciliation and investigation by probation officers and subsection (2) provides that a report of an unsuccessful attempt at reconciliation made by a probation officer at the request of a Magistrate is not admissible in evidence, but that is limited to proceedings under Part I of the Act. So far as Part II of the Act—the portion relating to affiliation proceedings, is concerned, section 25 provides that a probation officer may at the direction of the Magistrate conduct an investigation into the means of the parties, but that is not what was being done here, nor is Mrs Cagi a probation officer. I think that the Magistrate was wrong and that the complainant should have been allowed to call Mrs Cagi. I am fortified in my conclusion by Reg. *v.* Nottinghamshire JJ. ex parte Bostock [1970] 2 A.E.R. 641, in which a welfare officer held conversations with a respondent to an affiliation proceeding and the Queens Bench Division overruled the refusal of the Justices to hear the evidence of the welfare officer. The Court rejected arguments that the conversations were without prejudice and that their admission was against public policy and Lord Parker L.C.J. added at p. 642 " For my part the real aspect of public policy that is involved in this case is that no man should evade his responsibility if he has one". I would allow the appeal on this ground and remit the case for rehearing. Of course when the evidence is given it will be for the Magistrate to assess its value. It has been suggested that counsel for the complainant should then have asked for an adjournment as was done in Bostock's case above mentioned, and applied for a writ of mandamus. I think that this is a case where the appellant had two possible remedies. She could either have the case adjourned and apply immediately for mandamus or she could complete the case and rely upon her right of appeal given by the Maintenance and Affiliation Act 1971. She chose the latter. I do not think it is for this Court to gainsay her.

The appellant's next complaint was that the Magistrate founded his dismissal of the application upon the fact that complainant in her evidence said that the last occasion upon which she had intercourse with the defendant was in August, 1969 and she should have been permitted to explain this. I should have thought this was a matter for her solicitor in preparing his case or presenting it before the Court, rather than for an appellant tribunal, and because I am sending this application back to the Magistrate's Court for trial do novo I prefer to say nothing further about the evidence.

It was pressed upon me by Mr Sahu Khan that I had no power to remit this case to the Magistrate's Court for a new trial on two grounds, first that the matter had been decided in *Krishna Reddy v. Flouri Radina Tavuki* (Civil Appeal No. 23 of 1968) and secondly that this was an order of acquittal under section 300 of the Criminal

Procedure Code as amended by section 39 of Ordinance 13 of 1969. The case cited to me above was, of course, prior to the amendment of section 300 of the Criminal Procedure Code and in at least two cases subsequent to that amendment, Knox-Mawer J., who decided Krishna Reddy's case remitted bastardy applications to the Magistrate's Court for re-trail. I refer to *Latchmi v. Satnarayan* (Civil Appeal No. 26 of 1969) and *Azeem v. Mereani Eminoni* (Civil Appeal No. 3 of 1970). The second point is perhaps somewhat more difficult. Section 300(1) of the Criminal Procedure Code as amended reads—

" 300.—(1) At the hearing of an appeal, the Supreme Court shall hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears and the Attorney-General or his representative, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:

Provided that—

(*a*) The Supreme Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred;

(*b*) the Supreme Court shall not order a new trial in any appeal against an order of acquittal."

The question is whether an order of acquittal can be said to have been made in favour of the defendant in this matter. I think counsel for the respondent has assumed that because bastardy proceedings are taken in accordance with the procedure laid down in the Criminal Procedure Code, a man against whom a bastardy application is made is an accused person and therefore a dismissal of the application involves an acquittal. But this is not so. A bastardy application is a civil proceeding, and one has to look no further for evidence of that fact than that the proceeding is instituted as a civil appeal. See also *Kunjbehari v. Hicks* (Civil Appeal No. 8 of 1969 reported in the 1969 Cyclostyled Judgments at P.226), which follows *R. v. Berry Bell* 46: 169 E.R.1161 where the Chief Justice of England, Lord Campbell is reported as saying at p.1166—

" The proceeding against the putative father of a bastard child to obtain an order of affiliation and maintenance is not a proceeding in poenam to punish for a crime, but merely to impose a percuniary obligation, and is a civil suit within the meaning of 14 & 15 Vict. c. 99, ss. 2 and 3;"

which is the Evidence Act 1851 otherwise known as Lord Brougham's Act and is in force in Fiji. If a bastardy application be a civil proceeding, then there is no question of acquittal. Again in *R. v. Sutherland JJ.* [1945] 2 A.E.R. 175 at pp. 177–166 Humphreys J. discusses the nature of a bastardy proceedings, and goes on to cite a passage referring to the powers of justices from the judgment of Lord Denman C.J. in *R. v. Machen* as follows:

" We cannot, therefore, see that the legislature intended them to have any power to adjudicate finally against the mother. Their dismissal of the application is rather in the nature of a nonsuit in an action; in which case the plaintiff may come again better prepared. We are far from saying that the dismissal is to have no weight: but we think that the justices cannot refuse to hear the

second application. If it should appear to them that the matter was fully inquired into on the first occasion, they will reasonably view any new evidence with such suspicion, and sift it accordingly: but we do not think that the dismissal can operate as a bar to further inquiry."

R. v. Sunderland JJ. dealt with an application to quash an order made in favour of a complainant in a second application in bastardy proceedings but the passage cited above is also apposite to the point raised here. It is, perhaps, unfortunate in the light of what I have said above, that the headnote to that case refers at one part to a ' conviction ' but I read that merely ' as what may be termed ' a reporter's gloss ' on the judgment of *Humphreys J.* Finally I turn to *R. v. Jenkin*, a case decided in the time of Lord Hardwicke as Chief Justice of England of which the only report available in Fiji is Vol. 95 E.R. 194. This refers to the action of Lord Hardwicke in 1736 in quashing an order by justices declaring that the alleged putative father was not the reputed father of an illegitimate child and acquitting him of the case, on the ground that the order was *ultra vires*, since the justices had no power to make a final order of discharge in a bastardy case. Lord Hardwicke said—

"..... the objection to this order is, that the justices have no such authority to give a judgment of discharge; and we are of opinion, that they have no such authority; their whole authority out of sessions, in cases of this nature, arises by statute and the power given thereby is not a power of judicature, or to proceed by way of conviction, or to give judgment to convict or acquit, but merely to proceed by way of order, as in many other cases;....."

The *Queen v. Glynne* (1871) 7 L.R.Q.B. 16 follows *R. v. Jenkin* in recognising that an order by justices in bastardy proceedings is not final. I am therefore of opinion that an order dismissing a bastardy application is not an order of acquittal and that I have power to set aside the Magistrate's order and to send the case back for retrial.

One further matter perhaps arises from the fact that this is a civil proceeding. I see from the record that counsel for the defendant urged upon the Magistrate that the case did not rest upon a balance of probabilities, and I infer that it was suggested that proof beyond reasonable doubt is required in bastardy proceedings. Of course this is not so, as was held many years ago by Ragnar Myne C.J. in *Pickering v. Kiss* (Criminal Appeal No. 30 of 1953) where the learned Chief Justice said—

" These surroundings being civil proceedings, the standard of proof is not as great as that required is criminal actions....."

The Magistrate's order dismissing the application is set aside and the case is remitted to the Magistrate's Court at Ba for trial *de novo*.

There will be no order for costs

Remitted to Magistrate's Court for trial de novo.