29/73

SUPREME COURT OF VICTORIA

CLOSE v CURRAM

Murphy J

8 November 1973

MAINTENANCE – APPLICATION BY MOTHER OF CHILD AGAINST DEFENDANT FOR MAINTENANCE – QUESTION WHETHER DEFENDANT WAS THE FATHER OF THE CHILD – MOTHER'S EVIDENCE REQUIRED TO BE CORROBORATED IN "A MATERIAL PARTICULAR" – MAGISTRATE FOUND THAT CORROBORATION EXISTED – FINDING BY MAGISTRATE THAT THE DEFENDANT WAS THE FATHER – WHETHER MAGISTRATE IN ERROR: *MAINTENANCE ACT* 1965, S27.

HELD: Order nisi absolute.
In the light of the defendant's denial that he was the father of the child, there was no evidence in this case which was capable of providing corroboration of the mother's evidence that the defendant was the father of her child. Accordingly, the order nisi was made absolute and the order made by the Magistrate set aside.

MURPHY J: In this matter the Stipendiary Magistrate made an order on the 7 July 1972 to the effect that the defendant pay to the Magistrates' Clerk at Foster, the weekly sum of $10 for the maintenance of the child Kendal Peter Close, and also that he pay the sum of $207.50 at the rate of $5 per week to the complainant as preliminary expenses in connection with her confinement on the birth of the said child.

An order nisi to review this decision was granted by Master Jacobs on the 16 August 1972 on the following grounds:–

> '1. That the Stipendiary Magistrate war in error in holding that the evidence of Mr Close and Mrs Store was capable of amounting to corroboration of the evidence of the complainant
>
> 2. That there was no sufficient evidence to support the Stipendiary Magistrate's finding that there was corroboration of the evidence of the complainant.
>
> 3. That on the evidence the Stipendiary Magistrate should have dismissed the complaint."

The affidavits filed in this matter disclose that Lorna Joyce Close, the complainant, gave birth to a son Peter Kendale Close on 5 April 1972; that the child was a full term baby and that the complainant had her last period on 5 July 1971.

The evidence established that the defendant had intercourse with the complainant, but the point at issue in the case was whether he had intercourse with her in July 1971 (as the complainant deposed) which the defendant denies, alleging that intercourse between them first occurred on the 21 August 1971.

The matter was complicated by the admissions made by the complainant to the effect that before she first met the defendant at a party on the 17 July 1971 she had been associating with one Ray Riddell and had, at the very least, come close to intercourse with him stating that he had in January 1971 placed his penis at the opening of her vagina, but that he did not fully insert it, although he thought that he may have had intercourse with her.

The answering affidavit of the complainant sworn the 14 November 1972 states that the complainant said in her evidence that she went out with Riddell again in July 1971 and it appears that on this occasion they went to a dance. The complainant said, however, that between January 1971 and July 1971 she "did not kiss or cuddle Riddell" nor of course have intercourse with him.

In her evidence the complainant swore that she was a virgin when the defendant first had

intercourse with her in July 1971 and that he may have used a contraceptive on the first and second occasions that she had intercourse with him – "You don't watch for these things", – and that sometimes he used contraceptives and sometimes did not.

The complainant did not give any rebutting evidence to contest the fact alleged in evidence, namely, that after an argument with the defendant she told him that she had been with other men "before", or to use the words set out in the answering affidavit of her father, Mr Close, that she said to the defendant, "You are not the first bastard that has stuffed me – I've had plenty of blokes before you", and that she mentioned Ray Riddell, Alan McKenzie, Gus Arnott and Terry Baker.

The version of this incident contained in the defendant's affidavit is, "I had an argument with her and she told me that I was not the only men she had been with before. She told me their names. They were Ray Riddell, Alan McKenzie, Gus Arnott and Terry Baker."

The defendant denied on oath that he was the father of the illegitimate child, and the case appears to have proceeded on the basis that the child was conceived in July 1971.

Section 27 of the *Maintenance Act* 1965 requires that where the defendant denies paternity on oath the evidence of the complainant that the defendant is the father of her illegitimate child – "shall not be accepted without corroboration in a material particular."

In *DPP v Kilbourne* [1973] AC 727; (1973) 1 All ER 440; (1972) 57 Cr App R 381; [1973] 2 WLR 254 the House of Lords has recently delivered opinions that the word "corroboration" has no special technical meaning, and by itself means no more than evidence tending to confirm other evidence (see All ER pp448, 463). In that report his opinion, (with which Lord Morris expressed agreement), Lord Hailsham said at All ER p446:

> "In my view there is no magic or artificiality about the rule of practice concerning corroboration at all."

At the same time His Lordship said that the different, but closely similar provisions of different statutes, including the *Affiliation Proceedings Act* 1957 s4(2) UK override the common law (p447). His Lordship reiterated that the word "is not a technical term of art, but a dictionary word bearing its ordinary meaning" (p447).

Lord Reid at All ER p456 said,

> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Again His Lordship said at All ER p456,

> "We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement."

In the instant case, the Magistrate was asked by Counsel for the Defendant at the conclusion of the case to state his findings as to corroboration, and the Magistrate said

> "In my opinion the evidence of the complainant's father and sister constitute sufficient corroboration of her evidence."

It is not clear from these words whether the Magistrate ever addressed his mind to the important issue as to whether the evidence of the complainant was corroborated "in a material particular."

Mr Buchanan who appeared as Counsel to move the order absolute pointed out that the 1965 *Maintenance Act* of Victoria had substituted the indefinite article "a" for the pronoun "some" appearing in the 1958 Act, and that this was a matter of significance. He referred to *Simpson v Collinson* (1964) 2 QB 80 at p95; [1964] 1 All ER 262, and in particular to the judgment of Sellers

LJ where His Lordship stated at p95 of the QB report:–

> "It seems to me that the Divisional Court took (as my Brethren have pointed out) a somewhat narrow view of the provisions of the Act of 1957 requiring corroboration. Lord Parker CJ who delivered the only judgment of the Court said that what was required was corroboration of the date. There is no doubt that the issue in question was the period when the intercourse took place, and it might be said that on that particular issue the alleged father's admissions did not resolve precisely the date. But if this section is to be interpreted, as I think it has been interpreted in the cases, as a provision requiring corroboration of the mother 'in some material particular' and not necessarily 'in a material particular,' then I think *Cole v Manning* [1877] 2 QBD 611; (1877) 46 LJMC 175 can be applied effectively to the present case."

Mr Buchanan argued that in our *Maintenance Act* 1965 we now have the words "a material particular" which have been employed in substitution for the words "some material particular" appearing in the 1958 Act, and that as this change occurred after the decision in *Simpson v Collinson* (*supra*) it has special significance as a matter of statutory interpretation.

He argued that, on the facts of this case, the date of intercourse was the material particular as to which corroboration was required before the evidence of the woman that the defendant was the father of her illegitimate child could be accepted. That was in my opinion, the only issue in the case, (See *R v Arthur Salman* (1924) 18 Cr App R 50.) He conceded that it there was no evidence of the mother's association with men other than the defendant at the relevant time then evidence of the mother's close association with the defendant at the relevant time, together with the opportunity for intercourse at the relevant time, might constitute corroboration (see *Moore v Hewitt* [1947] KB 831; (1947) 2 All ER 270).

However, in the instant case there was the complainant's own evidence that she had partial intercourse with Riddell, (if that is a correct description) and of her going out to a dance with Riddell at the relevant time in July 1971, and no evidences was called to rebut the evidence of the defendant that she had boasted to him that she had had intercourse with other men before him and that he was not the first. Indeed, the Magistrate may have approached the matter on a false basis altogether, for he asked the defendant, "Do you know of anyone else who had sexual intercourse with Miss Close in July 1971? If it was not you, it must have been somebody else. Can you produce any of the persons you have named?" If the Magistrate meant by these questions to indicate that it was for the defendant to prove that somebody else was the father, as the questions might suggest, then this was clearly a wrong approach for him to take. It was for the applicant mother to call evidence to corroborate her own evidence of paternity "in a material particular". Otherwise the statute is mandatory and requires that her evidence "shall not be accepted".

In *Popovic v Derks* [1961] VicRp 67; [1961] VR 413, Sholl J considered the meaning of the words "corroborated in some material particular" as those words appeared in the *Maintenance Act* 1958. At p418 of the report, His Honor said:

> "Corroboration is evidence rendering the *factum probandum* more probable by strengthening the proof of or more *facta probabilia*. In an affiliation case the *factum probandum* is paternity. The most important *factum probabile* is intercourse at the material time. Corroboration may be of that *factum probabile* by evidence showing that such intercourse was very likely, and thereby rendering more probable the complainant's evidence thereof."

The magistrate has referred to the evidence of the complainant's father and of her sister as affording corroboration of her evidence, and the first question, therefore is whether anything in their evidence was capable of affording such corroboration. I cannot see anything in their evidence which could be said to make it more likely that the defendant had intercourse with the complainant at the admittedly relevant time in July 1971. The complainant's father gave evidence of an equivocal conversation which occurred in November 1971 and which contained no admission and did not relate to intercourse in July 1971, and which was incapable of making it more likely that the applicant's evidence on this issue was true. The sister gave evidence of a conversation with the defendant, which occurred when the complainant was confined to hospital in April 1972. Again I see nothing in this conversation which is capable of tending to prove more likely the happening of intercourse between the complainant and the defendant in July 1971. Nor does it contain any statement by the defendant capable of constituting an admission.

This suffices to lead me to make the order absolute, but the question arises whether there is any other evidence capable of affording corroboration in a material particular. Can the Magistrate's decision be supported on any other basis? The Magistrate, of course, did not find that there was corroboration in any other of the evidence, but he may not have turned his mind to any else, and before setting aside the order below, it appears appropriate to look to see if any of the evidence was capable of affording corroboration.

In *Simpson v Collinson* (*supra*) the mother gave evidence that she and the alleged father had been associating together between April 1961, and June 1961, and that they had had sexual intercourse on several occasions. She gave birth to a full term child on 9 January 1962. The alleged father admitted that he had associated with the mother between December 1960 and 17 February 1961, and had had sexual intercourse with her once in December 1960, and again on 3 February 1961. The mother's last menstrual period occurred in April 1961.

The Court of Appeal, relying on an earlier decision of the Divisional Court in *Cole v Manning* [1877] 2 QBD 611; (1877) 46 LJMC 175 held that the alleged father's admission of sexual intercourse with the mother, although at some date prior to the date of conception, could corroborate her evidence because it supported her story in a material respect, namely intimacy. The wording of the *Affiliation Proceedings Act* 1957 (as set out at pp87, 88 (1964) 2 QB) are, in my opinion, significantly different from our own, although Danckwerts LJ at p88 of the authorised report does not appear to have considered this to be so. However, it is clear that both *Cole v Manning* (*supra*) and *Simpson v Collinson* (*supra*) were concerned with acts of intimacy and familiarity occurring before the relevant time of conception. In the instant case the question at issue was intercourse occurring in July 1971. There is no evidence of "antecedent acts of familiarity" between the mother and the alleged father, to use the words of Davies LJ in *Simpson v Collinson* at p91 of the authorised report.

It appears to me that on the facts of this case the material particular of which corroboration was required was the date of intercourse, namely July 1971 (See *R v Arthur Salman* (*supra*)). It is not suggested that the mother had met the defendant before 17 July 1971, and the admitted fact that intercourse occurred on 21 August 1971 does not seem to me to be capable of providing corroboration of the mother's evidence of intercourse in July, leading to paternity. I think that this is particularly so in the light of the mother's evidence of her pseudo-intercourse with Riddell in January and of her further association with the same Riddell early in July.

I leave open the question whether the fact that the *Maintenance Act* 1965 (Victoria) was passed after Sellers LJ's judgment in *Simpson v Collinson* in 1964, and that the Act contained for the first time the words "a material particular", is a matter of any significance in interpreting the *Maintenance Act* 1965 (Victoria). I prefer to base my reasoning in making the order absolute on the fact that, in the light of the defendant's denial there was no evidence in this case which was capable of providing corroboration of the mother's evidence that the defendant was the father of her child. The order will be made absolute and the court order below set aside. I order that the informant pay the defendant's costs fixed at $200. On the application of the respondent, I grant a certificate under the *Appeals Costs Fund Act.*
