01/77

SUPREME COURT OF VICTORIA – FULL COURT

ANDERSON v CALLAHAN

Young CJ, Newton and Kaye JJ

22 September 1976

FAMILY LAW – APPLICATION BY MOTHER FOR MAINTENANCE FOR TWO CHILDREN – FINDING BY MAGISTRATE IN FAVOUR OF THE APPLICANT – PRESUMPTION OF LEGITIMACY (REBUTTAL EVIDENCE) – CORROBORATION – PATERNITY FINDING (ADEQUACY OF EVIDENCE) – SUBMISSION OF NO CASE – WHETHER ELECTION TO BE MADE: *MAINTENANCE ACT* 1965 (VIC), S27.

C. sought maintenance from A. claiming that he was the father of her twins. A. denied he was the father. The Magistrate upheld C.'s claim. Upon Order nisi to review—

HELD: Order nisi discharged.
1. The presumption of legitimacy can be rebutted by proof on the balance of probabilities.

2. In relation to the claim that there was no evidence of corroboration of C.'s claim, there was sufficient evidence for the Magistrate to find that there was corroboration in a material particular.

3. In relation to the claim that there was no evidence to support the Magistrate's finding of paternity, this was a matter for the Magistrate. If A. did not accept the Magistrate's finding, his only prospect of redress would have been to seek a rehearing in the County Court.

4. The claim that the Magistrate was in error in putting A.'s counsel to his election when a 'no case' submission was made was not made out. The proceedings were civil not criminal and in such proceedings it is undesirable for the Court to hear a submission on a 'no case' to answer without first putting the defendant to his election.

NEWTON J: *[with whom Young CJ and Kaye J agreed]* ... An order under Section 10 of the *Maintenance Act* 1965 was made against the applicant Mr Anderson, in favour of the respondent, Mrs Callahan, in respect of twin children. The respondent gave evidence she was separated from her husband and that over the relevant period she had intercourse only with the applicant. A Miss Britton gave evidence that subsequent to the births, Mr Anderson had asked how his son was – referring to the male twin. The applicant however denied paternity as he never had "full sexual intercourse" because he was unable to achieve penetration being impotent and unable to ejaculate nor get an erection. He did although admit some form of intimacy.

Mrs Callahan had written to the applicant saying she was pregnant and he was the father. The applicant did nothing about this letter and explained his gift of babies' clothing and a pram because the respondent told him if he gave these articles she would give him back his property he had left in her flat. In addition, Mr Anderson denied he had made any admission of paternity to Miss Britton.

It was submitted:—

1. The presumption of legitimacy of the twins arising from the fact that Mrs Callahan was a married woman had not been rebutted as the presumption could be rebutted only by proof beyond reasonable doubt.
2. There was no evidence of corroboration as required by s27 of *Maintenance Act* 1965.
3. There was no evidence to support the Magistrate's finding of paternity.
4. That the Magistrate was in error in putting the defendant's Counsel to his election as to whether or not to call evidence:—
   (a) before ruling on defendant's Counsel's submission of insufficient corroboration, and before ruling on defendant's Counsel's submission of insufficient corroboration, and
   (b) before ruling on defendant's Counsel's submission that the presumption of legitimacy had not been rebutted.

[As to the first submission Newton J said:] ... "In my opinion this ground has no substance. Counsel for Mr Anderson submitted in this Court that the presumption of legitimacy could only be rebutted by proof beyond reasonable doubt. As at present advised, I am not prepared to accept this submission, notwithstanding that authorities exist to support it. My present view is that since the decision of the High Court in *Rejfek v McElroy* [1965] HCA 46; (1965) 112 CLR 517; [1966] ALR 270; (1965-1966) 39 ALJR 177 it must be accepted by this Court that the relevant standard of proof is the civil standard of proof, that is proof to reasonable satisfaction on the balance of probabilities. I respectfully agree with the views expressed on this matter by Judge Moynihan in *Elliott v Stutz* (1972) 66 QJPR 81, to which counsel for Mr Anderson very properly referred us.

But even if the true view were that the presumption that Mr Callahan was the father of the twins could be rebutted only by proof beyond reasonable doubt, the fact is that the Stipendiary Magistrate stated in effect that he was satisfied beyond reasonable doubt that Mr Callahan was not their father. And in my opinion it was undoubtedly open to the Stipendiary Magistrate on the evidence of Mrs Callahan, Miss Britton and Mrs Ricketts to be so satisfied, that is to be satisfied that Mrs Callahan had not seen Mr Callahan since about September 1972. His conclusion of course involved being satisfied beyond reasonable doubt that Mr Anderson's evidence about Mr Callahan's continuing association with Mrs Callahan was untrue. But the Stipendiary Magistrate saw and heard the witnesses, and it was for him to decide whom he believed, and whom he disbelieved. I may refer to *Foenander v Dabscheck* [1954] VicLawRp 6; [1954] VLR 38 at p42; [1954] ALR 168; and to *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346 at pp351-2; (1961) 19 LGRA 232.

Ground 2 of the Order nisi is as follows: "That there was no evidence or sufficient evidence of corroboration within the meaning of s27 of the *Maintenance Act* 1965." In my opinion this ground also has no substance. Since Mr Anderson gave evidence on oath denying that he was the father of the twins, it followed from s27 that Mrs Callahan's evidence that Mr Anderson was their father could not be accepted by the Stipendiary Magistrate 'without corroboration in a material particular'.

But in my opinion the evidence of Miss Britton and Mrs Ricketts as to the presence of Mr Anderson, together with his belongings, including his bed, in Mrs Callahan's flat, coupled with Mr Anderson's own admission of an association with Mrs Callahan, involving some form of sexual intimacy, between November 1973 and June 1974, was evidence which could corroborate Mrs Callahan's evidence. It was evidence which, if accepted, could be regarded as making it probable that Mrs Callahan's evidence that Mr Anderson had intercourse with her at the time when the twins were conceived, was true. I may refer to *Popovic v Derks* [1961] VicRp 67; [1961] VR 413, and *Simpson v Collinson* (1964) 2 QB 80; [1964] 1 All ER 262, and also to the detailed discussion of the authorities by Mr Frank Bates *Lovers' perjuries – some reflections on corroboration of evidence in affiliation proceedings* in (1974) 48 ALJ 83.

As at present advised, I consider that there was also other evidence which could corroborate Mrs Callahan's evidence for the purposes of s27. This evidence included Miss Britton's evidence that after the twins were born she saw Mr Anderson at Mrs Callahan's flat, and he asked how his son was, particularly when this evidence is coupled with Mr Anderson's denial of this incident, which it was open to the Stipendiary Magistrate to regard as a false denial made by Mr Anderson for the purpose of defeating Mrs Callahan's claim that he was the father of the twins. The evidence also included Mr Anderson's admission that he gave nappies and other items to Mrs Callahan; see *Sprott v Waterman* [1931] VicLawRp 39; [1931] VLR 234; 37 ALR 153.

[As to the third submission his Honour continued:] ... "In my opinion this ground is quite untenable. The Stipendiary Magistrate's finding was amply supported by the evidence of Mrs Callahan, Miss Britton and Mrs Ricketts, and also, in my view, by some parts of the evidence of Mr Anderson himself. As earlier emphasised, it was for the Stipendiary Magistrate to decide whom he believed and whom he disbelieved, and this Court, which has not seen or heard the witnesses, cannot interfere with his decision in that matter. Insofar as Mr Anderson's real complaint is that the Stipendiary Magistrate ought to have believed his evidence instead of the evidence of Mrs Callahan, then his only prospect of redress would have been to have had the whole matter reheard by a County Court Judge, pursuant to an appeal under s107 of the *Maintenance Act* 1965. *[As to the fourth submission His Honour said:]* "This ground is based on a circumstance to which I have

not previously referred, namely that at the conclusion of Mrs Callahan's case, and before Mr Anderson gave evidence, counsel for Mr Anderson sought to submit to the Stipendiary Magistrate that there was no case to answer. This submission was based on two contentions, namely that there was no sufficient evidence of corroboration, and that the presumption of legitimacy had not been rebutted. The Stipendiary Magistrate however put counsel to his election as to whether or not to call evidence.

In my opinion the Stipendiary Magistrate was plainly entitled to put counsel for Mr Anderson to his election in this way. The proceedings were civil proceedings, not criminal proceedings. Furthermore, it has been held that in proceedings of this character it is ordinarily very undesirable for the Court to hear a submission at the close of the complainant's case that there is no case to answer, without first putting the defendant to his election: see *Cumming v Cumming* 48 QJPR 76; (1954) QWN 23; and *Carlson v Carlson* (1958) Qd R 149; 52 QJPR 117. ..."
