A **HARI NARAYAN**

v.

GITAWATI

[SUPREME COURT, 1965 (Mills-Owens C.J.), 19th November,
B 17th December]

Appellate Jurisdiction

Bastardy—res judicata—proceedings in magistrates court brought for second time—burden of corroborative evidence the same in both cases—Bastardy Ordinance (Cap. 33) ss.3,15,19—Bastardy Amendment Ordinance 1962—Criminal Procedure Code (Cap. 9) ss.325,326.
C *Interpretation—Ordinance—expressio unius exclusio alterius—Bastardy Ordinance (Cap. 33) s.15.*

Section 15 of the Bastardy Ordinance, which provides that a summons which is withdrawn or which is dismissed for want of corroboration shall not be a bar to the issue of a fresh summons within the
D time limited by the Ordinance, is to be construed as subject to the application of the maxim *expressio unius exclusio alterius.*

In circumstances of which the best that could be said in the respondent's favour was that the first magisterial proceedings were dismissed for want of corroboration, the respondent could not be permitted to succeed in subsequent proceedings in which the burden of the corroborative evidence was the same as in the original pro-
E ceedings.

Cases referred to: *R. v. Howard ex parte Da Costa* [1938] 2 K.B. 544; [1938] 3 All E.R. 241: *Abdul Hakim v. Jairun Bibi* (Civil Appeal No. 22 of 1963 — unreported) *Raj Kumar v. Sonmati* (Civil Appeal No. 16 of 1964 — unreported): *R. v. Sunderland* JJ. ex parte Hodgkinson [1945] K.B. 502; [1945] 2 All E.R. 175: *Robinson v. Williams*
F [1964] 3 All E.R. 12: *R. v. Glynne* (1871) L.R.7 Q.B. 16; 26 L.T. 61: *Anderson v. Collison* [1901] 2 K.B. 107; 84 L.T. 465: *R. v. Herrington* (1864) 9 L.T. 721.

Appeal against adjudication of Magistrates Court.

R. I. Kapadia for the appellant.

G *K. C. Ramrakha* for the respondent.

MILLS-OWENS C.J.: [17th December, 1965]—

In January 1964 the respondent, a single woman, gave birth to a child of which she alleges the appellant to be the father. She instituted affiliation proceedings which were heard in the Magistrate's
H Court in April/May 1964 when judgment was given dismissing the summons. The respondent appealed to the Supreme Court; her appeal was dismissed. She then instituted fresh proceedings which

came on for hearing before another Magistrate. This time she was successful, the Magistrate giving judgment in her favour in August 1965. The appellant having thus been successful in the first proceedings, and on the appeal, but having been adjudged the putative father in the second proceedings now appeals to this Court against that adjudication. A

The appeal is sought to be supported, firstly, on the principle of *res judicata*. The argument thereon falls into two parts. It is contended that whereas in England it has been held that the principle of *res judicata* does not apply to affiliation proceedings, in Fiji the position is different in that specific provision is made by section 15 of the Bastardy Ordinance (Cap. 33) with respect to the taking of fresh proceedings. Section 15 reads — B

> "15. A summons which is withdrawn or which is dimissed for want of corroboration shall not be a bar to the issue of a fresh summons within the time limited by this Ordinance."

It is contended on the part of the appellant that the first proceedings were not dismissed for want of corroboration but on the merits. Secondly, it is contended, the hearing and determination of the appeal against the dismissal of the summons in the first proceedings rendered the second proceedings incompetent (see *R. v. Howard ex pte Da Costa* [1938] 3 All E.R. 241). C

Against these contentions it is argued that section 15 is not to be taken as definitive, or exhaustive, of the circumstances in which fresh proceedings may be brought. Here the respondent relies on the decisions in *Abdul Hakim v. Jairun Bibi* (Civil Appeal No. 22 of 1963) and *Raj Kumar v. Sonmati* (Civil Appeal No. 16 of 1964). As to the construction of section 15, it is argued, the maxim *expressio unius exclusio alterius* admits of exceptions; also, section 15 is expressed in a negative form. Further, it is argued, the judgment in the first proceedings is to be read as a dismissal for want of corroboration. The main corroborative witness in both proceedings, was the respondent's mother; if the position is that the mother's evidence was not accepted in the first proceedings, so that there was a dismissal for want of corroboration, there is no reason why her evidence should not have been accepted as corroborative evidence in the second proceedings; the expression 'want of corroboration' extends to such a case. Alternatively, the learned Magistrate in the first proceedings came to no positive conclusion either way, wherefore it was open to the respondent to bring the matter forward again for determination. As to the contention that the appeal to the Supreme Court barred the second proceedings, counsel for the respondent argued, the case of *R. v. Howard* (supra) can have no application in Fiji where an appeal from a magistrate takes a different form from an appeal from the justices to Quarter Sessions; an appeal to Quarter Sessions is a true rehearing, the whole case being heard afresh, whereas in Fiji the appeal is of a limited nature, being heard on the record taken by the magistrate (see section 19 of Cap. 33 and sections 325-6 of the Criminal Procedure Code (Cap. 9)). D E F G

To deal with the foregoing contentions: in my view the maxim *epressio unius exclusio alterius* applies very clearly to section 15. The section deals specifically with the circumstances in which a H

second summons may be issued and is to be viewed against the background of the law as it stood when it was passed. Section 15 has no counterpart in the English legislation but Chapter 33 is obviously framed generally on the English legislation. It is only in recent years, after many decades of uncertainty, that English law governing the circumstances in which fresh proceedings are competent has become more or less settled (see *R. v. Sunderland JJ., ex pte Hodgkinson* [1945] 2 All E.R. 175; see also *Robinson v. Williams* [1964] 3 All E.R. 12). I think it very clearly to be the case that section 15 was designed to lay down precisely, for the Colony, the circumstances in which fresh proceedings might be taken, so that the difficulties experienced in England should not arise here. Nothing in the judgments in Civil Appeals Nos. 22 of 1963 and 16 of 1964, as I read them, goes against this view.

As to the contention, based on the decision in *R. v. Howard* (supra), that the appeal to the Supreme Court against the dismissal of the first proceedings constituted a bar to the taking of the second proceedings, it is clear that even where the decision of Quarter Sessions to quash an affiliation order made by the justices is based on want of corroboration the determination on the appeal operates as a bar to fresh proceedings. The judgments in the case adopt the reasoning of Lush J. in *R. v. Glynne* (1871) L.R. 7 Q.B. 16 at p.25 where he said —

> "Neither party is concluded by the decision of the petty sessions. If they decline to make an order, the woman cannot appeal to the quarter sessions against their decision [that, of course, is no longer the case], and therefore this court has held that she is at liberty to apply again to the petty sessions, and to produce other evidence before them. If, on the other hand, the justices make an order, the putative father is, by the express terms of the statute, entitled to appeal to the quarter sessions: so that the decision of the petty sessions is not binding upon either party. Then I think both reasons and convenience require us to hold that the decision of the court of quarter sessions is binding and conclusive upon the parties. The decrees of a court of appeal, from its very nature and constitution, must be binding upon the inferior tribunal ...."

(See also *Anderson v. Collinson* [1901] 2 K.B. 107). It is evident that the decisions in *R. v. Glynne* and *R. v. Howard* are based on the principle of finality with especial reference to the binding effect of the judgment on appeal on the Court below. The principle might be said to be equally applicable in the case of an appeal to the Supreme Court in Fiji notwithstanding that on appeal to Quarter Sessions either party may bring forward new witnesses and generally introduce fresh evidence and there is a complete rehearing. Section 15 makes no reference to the case where there is an appeal, but this may given rise to argument both ways — that it does not embrace such a case, or, that it has prescribed the (only) instances in which fresh proceedings are competent. Another consideration arises from the difference in the law of Fiji in that, since the amendment of section 3 of Chapter 33 in 1962 (by Ordinance No. 24 of 1962), proceedings may be taken before *any* magistrate whereas in England a

second summons would come before the same bench, although not necessarily consisting of the same justices. The same petty sessions is bound by the appeal as being the only Court in which the fresh proceedings may be taken, but (in Fiji) is another magistrate bound? In the view I take of the case it is not necessary for me to express a concluded opinion on the question whether the appeal barred the second proceedings.

A vital point, in the view which I have taken of section 15, is whether the first summons was dismissed for want of corroboration. It is necessary to examine the evidence in the first proceedings and the judgment therein. Attention must also be paid to the view which the learned Judge took of the Magistrate's judgment on the appeal. Also, if the first summons was dismissed on the merits, as opposed to dismissal for want of corroboration, was the judgment in the respondent's favour in the second proceedings based substantially on the same evidence, so that in effect the respondent was given a second bite at the same cherry? An alternative argument for the respondent, as is mentioned above, is that the learned Magistrate in the first proceedings really came to no conclusion at all — in effect was not persuaded either way. I do not think that this argument is open to the respondent. She treated the judgment as a judgment, making it the basis of an appeal to the Supreme Court. She cannot, in my view, now be heard to say that no final determination was made in the proceedings. That would be to approbate and reprobate, very distinctly. In any event no proceedings were taken to set aside the judgment in the first proceedings.

The case for the respondent was such that quite apart from the statutory requirement corroboration was virtually essential. The learned Judge on the appeal from the first proceedings expressed himself as follows —

> "In the Court below the appellant, who is a spinster, gave evidence that she worked as a domestic servant in the house and as a labourer in the fields of the respondent's father. She said that the respondent frequently had sexual intercourse with her both in his parents home in the presence of his brother and also at her own home which led to her becoming pregnant and giving birth to a female child on 10th January, 1964. The appellant's mother gave evidence that the respondent, in the presence of his mother, had admitted being the father of the appellant's child. This was, if believed, ample corroboration of the appellant's testimony.
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> The respondent gave evidence denying that he had ever had sexual intercourse with the appellant. This the learned trial Magistrate said he did not believe but he qualified this by saying that he only considered it probable that sexual intercourse took place. The respondent and his mother also both denied on oath that the respondent had ever admitted paternity to the appellant's mother. The judgment contained no findings of fact on this issue.
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> It is the contention of counsel for the appellant that there was no reason why the evidence of the appellant and the corroborative evidence of his mother should not have been believed, and

that since the learned trial Magistrate did not say he disbelieved them, but he did say that he disbelieved the respondent's evidence on the question of sexual intercourse generally, he must have believed them and should, therefore, have made an affiliation order against the respondent.

It must be conceded that the judgment in the Court below was not adequate in these respect. When the judgment is read as a whole, however, it appears that the learned trial Magistrate did not know who to believe by the time he had heard all the evidence called by both parties. At the end of his brief judgment he said: 'I hold that the complainant has not proved her case'.

In the absence of any specific findings of fact by the learned trial Magistrate in favour of the appellant, and in the absence of any specific finding by him that in his opinion the appellant and her mother were witnesses of truth or that he did in fact believe them and accept their evidence as the truth of the matter, it can only be concluded that the learned trial Magistrate considered that the appellant had not discharged the onus of proof that rested on her."

Accordingly the appeal was dismissed.

I respectfully agree with the foregoing observations. The brother, it may be mentioned, is a youth some two years younger than the appellant. Virtually the only evidence of substance in both proceedings, that is before each of the learned Magistrates, was that of the respondent and her mother. If corroboration was to be found it was in the evidence of the mother that the appellant admitted paternity and promised to marry the respondent. It must, I think, be accepted that the learned Magistrate in the first proceedings was not convinced by the mother's evidence. In the second proceedings the mother's evidence was found to be 'substantially true' although it is evident that there were material inconsistencies, to the detriment of the respondent's case, between the evidence the mother gave in the first proceedings and that she gave in the second proceedings. Looking at the substance of the matter the respondent succeeded in the second proceedings virtually on the evidence which had failed to convince the first Magistrate. The first Magistrate considered it 'probable, despite his (the appellant's) denials, that he had had intercourse with the (respondent)'. He then referred to the need for corroboration and concluded by holding that the respondent had not proved her case. Unless as counsel suggests this was a complete failure to reach a conclusion, the best that can be said in the respondent's favour is that this was a dismissal for want of corroboration, entitling her under section 15 to bring fresh proceedings. I have dealt with the suggestion that there was no real determination arrived at in the first proceedings and it remains to deal with the question whether the respondent should have been allowed to succeed, on virtually the same evidence, in the second proceedings. Here the recent case of *Robinson v. Williams*, which was not before the Court below, has a bearing. A portion of the headnote reads —

"(ii) (a) (per Lord Parker C.J., and John Stephenson J.), fresh evidence entitling the justices to make an order on the second complaint did not have to be evidence that was not available to

be called on the first complaint, but only evidence that was not in fact given on the first occasion, and in the present case the new evidence was sufficiently substantial ... and (b) (per Widgery and John Stephenson JJ.) the additional evidence before the court on the second complaint raised different considerations and justified a re-assessment."

The following extracts from judgments in cases cited in *Robinson v. Williams* are particularly pertinent — (from *R. v. Herrington* (1864) 9 L.T. 721 per Cockburn C.J.) —

"If there has been a hearing upon the merits, and a dismissal upon the merits, and if that be brought to the notice of the justices upon a second application, and there is no other evidence produced, I think that ought to be a sufficient answer ....."

(from *R. v. Sunderland JJ.* (supra) per Oliver J.) —

"It is unthinkable that, on the same facts and on the same evidence, the same tribunal, though perhaps differently constituted, should be invited to reverse a previous decision.'

It is to be noted that Humphreys J., in the latter case, expressed himself to the same effect. In my view these authorities establish conclusively that the second summons in the present case ought to have been dismissed. The burden of the mother's evidence purported to be the same in both proceedings, namely of an admission of paternity and a promises to marry. The respondent was not entitled to have that evidence weighed a second time, at first instance. Accordingly the appeal is allowed, with costs to the appellant.

Appeal allowed.