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IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T  L A U T O K A

Appellate Jurisdiction

Civil Appeal No. 11 of 1980

Between

SAKATAR SINGH s/o Bakshi Singh — Appellant

- and -

A R I E T A  T O G A — Respondent

Messrs. Sahu Khan & Sahu Khan — Counsel for the Appellant
Messrs. M. K. Sahu Khan & Co. — Counsel for the Respondent

J U D G M E N T

In the Magistrate's Court the appellant was adjuged to be the putative father of a child born to the respondnnt on 14th February, 1978.

It was not disputed that in May 1977 when the child was conceived the respondent lived in the same house with the appellant and his family. Her brother Deedar Singh also lived in the same house. She was living there apparently in the role of housegirl.

Not necessarily surprisingly, apart from the evidence of the respondent, there was no evidence of any intimate relationship between the appellant and the respondent, although her brother Deedar Singh said he had seen them often going out in the appellant's car, sometimes at night. However mere proof of opportunity is not enough.

There was only the evidence of the respondent, together with certain pieces of evidence which may constitute corroboration, because of course the law requires that the respondent's evidence should be corroborated. But before the court even begins to consider this evidence the respondent has to meet a statutory requirement. The claim was lodged more than 12 months after the birth of the child and so it would be statute barred unless there were proof that the appellant had paid maintenance for the child within the 12-month period.

The respondent in evidence said that two months after the child was born the appellant gave her $20 and then one month later gave her $10. On the first occasion she said that Deedar Singh was present, and in fact Deedar Singh gave evidence to this effect though there was a discrepancy in that both gave different places where the money was handed over. The respondent also said that when the appellant handed over the money he said "It is for the child", whereas Deedar Singh did not report any conversation accompanying the gift.

The appellant denied making any such payments, so this was a vital piece of evidence which needed to be evaluated very carefully. In this regard very significant evidence was given by Mahendra Kumar the assistant court officer. He said that when the respondent came to commence proceedings against the appellant, he asked her if the appellant had paid her maintenance and she said "He did not pay maintenance".

He told her that in that case she could not institute proceedings. She went away but came back one or two days later and said she had not understood what he had asked her before, that she had thought that he had asked her if there was a court Order against the appellant for maintenance.

Again the Court Clerk asked if the appellant had paid money for the child and she said he had. He asked how many times and she replied that he had paid money for the child. In cross-examination the court clerk said he did not explain to her what maintenance meant, and then he said "I did not mention maintenance of child. She did not tell me how many times he paid". There seems to be a conflict there (did he or did he not mention "maintenance" to the respondent), and there seems also to be a conflict between his evidence and that of the respondent. Did he or did he not explain to her what maintenance meant?

There could be an innocent explanation of this incident, or it could mean that when the respondent realised that some payment of money by the appellant for the child within 12 months of the birth was an absolute pre-requisite for proceedings under the Affiliation Act she made up the story about the two payments by the appellant, and got her brother Deedar Singh to support her. It was one of the important issues that had to be resolved by the magistrate who saw and heard the witnesses and was in a position to ask them questions to clear up any ambiguities in their evidence. An appeal court is not in the same position and must rely on what the record tells it.

The magistrate set out the evidence given for both sides in some detail, but his evaluation of the evidence took up only ten lines where he said:

> "Having regard to the evidence herein, opportunity being present, the conduct of the defendant when he is taxed, as I do find as a fact that he was with being responsible for the complainant's condition and remaining silent and not making any reply. His interest in having the complainant examined not in Ba where facilities available but having on his own initiative, as I do find her, examined in Lautoka are all matters for which a court would, and I do so, hold that there is corroborative evidence sufficient to reasonably satisfy this court that the defendant is the putative father of the child and I do so adjudge." (sic).

Having then apparently decided that the appellant was the putative father of the child he then proceeded to consider the question of whether the appellant had paid monies for the maintenance of the child within the first 12-month period since the birth, on which point the magistrate said, ". . . . . this is one of fact and I do accept the evidence of the complainant that the defendant did make these payments as alleged." In the first place this question should have been the first point he decided. In fact it is not always easy to separate the two issues because payment of maintenance is an important element in deciding paternity because it may well indicate recognition that the child is the child of the person paying maintenance. And in the second place in deciding this point the magistrate should very carefully have evaluated the evidence of the respondent, especially in the light of the evidence of the court clerk, and together with the discrepancies between her evidence and that of Deedar Singh. There was no such evaluation - at least none is shown in the record.

This is not a very satisfactory state of affairs. There is evidence, on which properly evaluated the magistrate could have properly found the appellant to have been the putative father, although on the other hand proper evaluation might have persuaded him otherwise.

The appellant has asked the court to set aside the magistrate's findings and declare him not to be the putative father, but I do not think that this is appropriate or in the true interests of the child which are paramount.

The proper course is to set aside the magistrate's findings and order a re-hearing.

(sgd.)
G. O. L. Dyke
JUDGE

LAUTOKA,
12th September, 1980