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AZIZ ALI

v.

MEHRUL NISHA

B [SUPREME COURT, Cullinan J, Lautoka, 27 March 1987]

Civil Jurisdiction

(Affiliation—complainant a married woman—strong and clear evidence of non-access—inference from alleged father accepting child in his home—order made).

C *G. P. Shankar* for the appellant.
A. K. Narayan for the respondent.

Appeal by Aziz Ali (defendant) against a decision of the Resident Magistrate sitting at Ba in affiliation proceedings wherein it was held that the defendant was the putative father of the child of Mehrul Nisha (complainant).

D There were put forward four grounds of appeal viz.

"1. THAT the learned trial Magistrate erred in law in making the order against the Appellant in the absence of evidence of non-access by the Respondent's husband as the Respondent was a married woman when she conceived the child in question.

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2. THAT the learned trial Magistrate erred in law in making the order against the Appellant in the absence of evidence to corroborate payment of maintenance by the Appellant to the Complainant.

3. THAT the learned trial Magistrate erred in law and in fact in not considering the appellant's explanation about the Declaration filed in Court.

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4. THAT the decision is unreasonable and cannot be supported having regard to the evidence".

The complainant was a married woman at the time of the birth on 27 September 1977 of the female child. She had left her husband (by whom she had no children) some years before the birth and lived in a de-facto relationship with the defendant.
G The defendant's husband relying on this relationship proceeded against her for Divorce citing defendant as co-respondent. A decree absolute was granted on 26 July 1979. The birth of the child was registered on 2 December 1977. there being no particulars given of the father. On 5 December 1979 the complainant and defendant jointly swore an affidavit before the Assistant Registrar of Births Deaths and Marriages' in which the defendant acknowledged paternity, and requesting his
H name to be registered as the father. He supplied the child with necessaries such as clothing for two years after the birth. The cohabitation ended about 1980 whereafter the defendant did not assist to maintain the child.

Defendant denied amongst other things having intercourse with the complainant up to 5 December. He had never lived with her he was not the father of her child. He said he had agreed to consent to paternity on the persuasion of a family friend.

As to the first ground of appeal, authority was cited including *Kanda Sami Pillay v. Elizabeth Ram Dulare* in which the learned judge observed that the presumption of legitimacy could only be rebutted by evidence strong and satisfactory. He stated

> "nothing except evidence that the husband did not have sexual intercourse with the wife at the period of conception could render illegitimate a child born in wedlock"

Such evidence was given in the instant case.

In support of the second ground of appeal. section 18 of the Maintenance and Affiliation Act (Cap 52) was considered relevant. It stated

> "18.—(1) On the hearing of the complaint. the magistrate shall hear the evidence of the complainant and such other evidence as may be produced in support. and shall also hear any evidence tendered by or on behalf of the defendant.
>
> (2) If the evidence of the complainant is corroborated in some material particular by other evidence to the satisfaction of the magistrate. he may adjudge the defendant to be putative father of the child. . . . . "

The payment of maintenance money is not mentioned s. 18 but is referred to s. 16 viz.

> "16. A single woman who is with child or who has been delivered of a child may—
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> *(c)* at any time thereafter upon proof that the man alleged to be the father of the child has before. or within twelve months after. the birth of the child paid money or has otherwise made provision for its maintenance: make an application on oath to a magistrate having jurisdiction in the place where she resides. for a summons to be served on the man alleged by her to be the father of the child."

However the learned Magistrate accepted the complainant's evidence which included that she had lived with the defendant and he had supplied various necessaries detailed in the Reasons for judgment in respect of the period. Further in *Roberts v. Roberts* (1962) 1 All E.R. 1967. Sir Jocelyn Simon P. said inter alia.

"We consider that where it is proved an illegitimate child forms part of the household of the child's father there is prima facie evidence that he has paid money for the child is maintenance."

So evidence supported that maintenance or its equivalent had been paid.

Contrary to what the third ground of appeal advanced, it was clear from the reasons for judgment that the learned Magistrate did take account of the evidence of the defendant in this area.

The fourth ground alleged the decision was "unreasonable". The magistrate accepted the complaint and rejected the denials of the defendant, so was confronted with a clear issue on credibility whereon he accepted the complainant.

Held: Having regard to the finding on credibility, such matters as the registering of the defendant's name as father and that he had given a house to the complainant which the Magistrate said was about the time of the complainant giving birth to the child, was compelling evidence.

Appeal dismissed.

Cases referred to:

(1) *Marshall v. Malcolm* (1917) All E.R. Rep. 365.
(2) *Jones v. Evans* (1945) 1 All E.R. 19.
(3) *Kanda Sami Pillay v. Elizabeth Ram Dulare* (1961) 7 F.L.R. 177.
(4) *W. v. W.* (1953) 2 All E.R. 1013.
(5) *Hodges v. Bennett* (1860) 5 H & N 625; 157 E.R. 1329.
(6) *R. v. Berry* (1859) 8 Cox C.C. 190.
(7) *R. v. Simmonds* (1859) 8 Cox C.C. 190.
(8) *Regina v. Lightfoot* (1856) 6 El. & Bl.822; 119 E.R. 1070.
(9) *Rajend Singh v. Tara Wati* Civ. App. No. 3 of 1984
(10) *Roberts v. Roberts* (1962) 2 All E.R. 967.

CULLINAN, J.

Judgment

This is an appeal from the judgment of the Court of the Resident Magistrate sitting at Ba in an affiliation proceedings wherein the learned Resident Magistrate adjudged the appellant (whom I shall refer to as "the defendant") to be the putative father of the respondent's child.

The respondent (whom I shall refer to as "the complainant") was a married woman at the time of the birth of the female child. She testified that she had left her husband, by whom she bore no children, some years before the birth and had lived in a de facto relationship with the defendant. The female child was born to the complainant on the 27th September, 1977. The complainant's husband commenced divorce proceedings against her, citing the defendant as co-respondent. The complainant testified that the child was three months old when she attended court in the divorce proceedings. They were commenced in Tavua Magistrate's Court on 2nd

November, 1978 and no doubt the complainant's recollection as to the age of the infant at the time is not correct. In any event, a decree absolute was not granted until 26th day of July, 1979.

The birth of the child was registered on 2nd December, 1977. No particulars were registered in respect of the father of the child. On 5th December, 1979 the complainant and defendant jointly swore an affidavit before the Assistant District Registrar of Births, Deaths & Marriages, in which the defendant acknowledged paternity and requested his name to be registered as the father's name. On 15th January, 1980 the complainant obtained a birth certificate, that is, a certified copy of the particular entry in the register of births, in which the defendant's name appears as father of the child.

Meanwhile, the complainant testified, the defendant had supplied the child with clothing, baby powder and milk for about two years after the birth. Co-habitation ended sometime in 1980 it seems, when the defendant did not assist thereafter in the maintenance of the child.

The defendant testified that he was a married man (since 1952) with five children, who at the material time was paying maintenance to another woman, in respect of her two children. His wife left him in 1968 and he lived alone at Lautoka. He had not had sexual intercourse with the complainant "up to the time of the declaration (of paternity in the affidavit of 5th December, 1979)". He had never lived with the complainant and he was not the natural father of the child. He had met her but twice, once when he gave her a lift in his taxi about December 1977 and again when they met at the office of the Assistant District Registrar at Lautoka, where they swore the affidavit. He had agreed to consent to paternity on the persuasion of a family friend, who was the complainant's employer.

The learned Counsel for the appellant Mr Shankar has filed four grounds of appeal. They read:

"1. THAT the learned trial Magistrate erred in law in making the order against the Appellant in the absence of evidence of non-access by the Respondent's husband as the Respondent was a married woman when she conceived the child in question.

2. THAT the learned trial Magistrate erred in law in making the order against the Appellant in the absence of evidence to corroborate payment of maintenance by the Appellant to the Complainant.

3. THAT the learned trial Magistrate erred in law and in fact in not considering the Appellant's explanation about the Declaration filed in Court.

4. THAT the decision is unreasonable and cannot be supported having regard to the evidence."

As to the first ground Mr Shankar refers to the cases of *Marshall v. Malcolm* (1) and *Jones v. Evans* (2). Those cases, which concerned the separation of a wife from her husband serving as a soldier or sailor overseas, did not really turn on the point of non-access, but on the point as to whether or not, for the purposes of filing an affiliation complaint under the Bastardy Laws Amendment Act of 1872, a married woman could file such a complaint against the putative father of her illegitimate child, that is, "as a single woman". The complainant in this case was not a married woman when the complaint was filed, so that those cases are not really in point therefore. Mr Shankar however referred to the case of *Kanda Sami Pillay v. Elizabeth Ram Dulare* (3) decided by Knox-Mawer, A. J. In that case the learned Judge observed:

A "It is common ground that this child was conceived and born during the subsistence of the respondent's marriage to one Andrew Krishna. The presumption of legitimacy which therefore arises can only be rebutted by evidence which is strong and satisfactory (see Halsbury's Laws of England 3rd Edition. Volume 3. p.87. paragraph 139). In *W v. W.* (4) it was held that nothing except evidence that the husband did not have sexual intercourse with the wife at the period of conception could render illegitimate a child born in wedlock."

B The complainant in this case testified however that "I left my husband because of the respondent", and that she had left him a number of years before the birth of the child. Again. she testified that her husband had filed divorce proceedings "on the grounds that I was living with another man": indeed neither she nor the defendant had contested the petition. She testified further that after she left her husband "she has not been associating with anyone else", that is other than the defendant.
C until the child was born. On the issue of credibility the learned trial magistrate as will be seen. accepted the complainant's evidence. Under the circumstances the above evidence must be regarded therefore as "strong and satisfactory" evidence of non-access by the husband during the relevant period.

As to the second ground of appeal. the provisions of section 18(1) and (2) of the
D Maintenance And Affiliation Act Cap. 52 (hereinafter referred to as "the Act") are relevant:

> 18.—(1) On the hearing of the complaint. the magistrate shall hear the evidence of the complainant and such other evidence as may be produced in support. and shall also hear any evidence tendered by or on behalf of the defendant.
>
> E (2) If the evidence of the complainant is corroborated in some material particular by other evidence to the satisfaction of the magistrate. he may adjudge the defendant to be the putative father of the child . . ."

It will be seen that the legislation requires that the evidence of the complainant be corroborated merely as to "some material particular". There is no specific statutory requirement that any evidence as to the payment of maintenance must be
F corroborated. I consider that the legislation permits of only one interpretation and that this ground of appeal must fail. The learned Counsel for the complainant. Mr Narayan. however refers to the case of *Hodges v. Bennett* (5). which serves but to confirm my view in the matter: in that case no evidence was tendered at the hearing to corroborate the allegation in the complaint that money was paid within twelve months of the birth for maintenance. Martin B.. who was considering identical 1844 legislation. had this to say at p.1330:

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> "The decision of the justices was right. By the 2nd section of the 7 & 8 Vict.c.101. if the man alleged to be the putative father has paid money for maintenance of the child within the first twelve months after its birth. the mother may apply for the summons. By section 3. on the hearing. if the evidence of the mother is corroborated in some material particular. the justice may make an order. Here the justices state that the mother was corroborated in a material particular. It is said
> H that she was not corroborated in the particular necessary to give jurisdiction. But it is enough that she was corroborated in some material particular: and this is in analogy to the practice as to the confirmation of the testimony of accomplices in criminal cases."

I respectfully agree with those dicta. In the course of the argument however, Mr Shankar submitted that there was no evidence that the defendant had paid money for maintenance within twelve months after the birth of the child, as required by section 16*(c)* of the Act, which submission seems to me to conflict with the terms of the second ground of appeal. Nonetheless section 16*(c)* reads as follows:

> "16. A single woman who is with child or who has been delivered of a child may—
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> *(c)* at any time thereafter upon proof that the man alleged to be the father of the child has before, or within twelve months after, the birth of the child paid money or has otherwise made provision for its maintenance: make an application on oath to a magistrate having jurisdiction in the place where she resides, for a summons to be served on the man alleged by her to be the father of the child:"

It will be seen that the complainant is required to state on oath that the defendant has "before, or within twelve months after, the birth of the child paid money or has otherwise made provision for its maintenance". Mr Narayan refers to the cases of *R. v. Berry* (6) and *R. v. Simmonds* (7). The summons in those cases was based on 1845 legislation, on which ultimately our legislation and the forms used thereunder are also based. In the first case, in *Berry* (6), it was required to state on the summons that the complainant had given proof that the defendant had paid money for the maintenance of the child within twelve months after its birth. The summons however merely stated that she had so alleged. Lord Campbell C. J. observed at p.1166:

> "The proceedings against the putative father of the 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 pecuniary obligation and is a civil suit....: see *Regina v. Lightfoot* (8)."

Four of the bench of five Judges of the Court for the Consideration of Crown Cases held that the summons in the matter merely went to process, and that the defendant had waived any objection to such by submitting himself to the jurisdiction of the Court. The complainant had in fact given evidence at the hearing of such payment of money. The defendant in his evidence denied such, and was subsequently indicted for perjury. Upon conviction, Hill J. reserved the case for the Court for the Consideration of Crown Cases. It was submitted by Counsel, as a second ground, "that the assignment of perjury upon what the defendant swore respecting the payment of the money was upon a matter immaterial upon the hearing of the summons". Lord Campbell C. J. observed:

> "As to the second objection we never entertain the smallest doubt—clearly thinking that it was necessary to prove at the hearing the payment of the money by the defendant as alleged: and further, that his payment of money for the maintenance of the child was corroborative evidence of the paternity."

In the case of *Simmonds* (7) the summons was valid on the face of it, but in fact no proof that the defendant had paid money for the maintenance of the child within twelve months of the birth was in fact given to the summoning Justice. Cockburn C.J. delivering the judgment of the Court of Criminal Appeal observed at p. 193 that:

> "No defect on this ground was then brought under their (the magistrate's) cognizance."

I presume therefore that the complainant gave evidence of such payment at the hearing of the complaint. The defendant in his evidence denied having made any such payment. The Justices in petty sessions made an order of affiliation against him, when he was indicted for perjury. At the trial for perjury, the jury found that the defendant had not, within twelve months next after the birth of the child, paid any money for its maintenance. Yet they found that the charge of perjury was proved against the defendant, in view of the statement at the affiliation proceedings that "I have never given her a farthing". Presumably therefore the jury found that the defendant had made such payment at some other time, other than within the stated period. Counsel for the defendant contended before the Court of Criminal Appeal that the fact that proof had not been given before the summoning Justice was fatal to the jurisdiction of the Justices at petty sessions and that they had no power to make any such order, and that therefore no indictment lay for perjury in the matter. Cockburn C. J. observed:

> "The case of *Reg. v. James Berry* (6), however, shows that that is not so, and that this is not a matter of substance essential to found the jurisdiction of the justices, but a matter of process only, which may be waived by the defendant if he chooses to waive it. It follows, therefore, that it is not of the essence of jurisdiction. If that is so, this case is still stronger than the one of *Reg. v. James Berry* (6), where the defect was on the face of the summons. Now here there is no defect apparent on the face of the summons, and therefore it was the duty of justices at the petty sessions to proceed (and they did so proceed) to hear and decide on the complaint. No defect on this ground was then brought under their cognisance; and, in the course of the hearing of the complaint, the evidence of the defendant was given on oath, and it is in respect of that evidence that perjury has been assigned in this indictment. This case, therefore, is stronger than *Reg. v. James Berry* (6), and must be governed by it.

In the present case however the summons is valid on the face of it. Regrettably however the summons in form is defective, in that it does not follow the wording of section 16(c). The reason for that, is that no subsidiary legislation has been enacted under the Act. By virtue of the provisions of section 19 of the Interpretation Act Cap. 7, the forms contained in the previous subsidiary legislation under the Bastardy Act Cap. 46 (1967 Ed.) are still being used: see the case of *Rajend Singh v. Tara Wati* (9) decided at Lautoka. Section 3*(c)* of the Bastardy Act Cap. 46 provided that:

> "Any single woman who may with child or may be delivered of an illegitimate child may—
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> *(c)* at any time thereafter upon proof that the man alleged to be the father of such child has within twelve months next after the birth of such child paid money for its maintenance....."
>
> make application on oath to any magistrate for a summons..."

It will be seen that on re-enactment of those provisions in the present Act (No. 16 of 1971), the words "or has otherwise made provision for" have been inserted. Unfortunately both the summons and the complaint in the present case, in printed form, although expressed to be drawn up under the Maintenance and Affiliation Act No. 16 of 1971, nonetheless adhere to the form utilised in the repealed Bastardy Act Cap. 46. In other words, the phrase "or has otherwise made provision", has not been included in the printed form. That is a matter which I hope will soon be remedied.

Nonetheless, as far as process goes, the summons was perfectly valid on the face of it, in that it alleged the payment of money. It was not therefore "of the essence of jurisdiction". It seems to me that had the learned Resident Magistrate in this case not been satisfied that money had been paid for maintenance by the defendant during the relevant period, he nonetheless could have proceeded to make an order in the matter, all things being equal, if he found that alternatively the defendant had "otherwise made provision" for the maintenance of the child during the relevant period. The evidence before the the learned Resident Magistrate was in fact that:

> "After the birth of the child the respondent provided the child with maintenance—clothing, baby powder and milk. These were supplied to the child for about two years after the birth."

On the issue of credibility the learned Resident Magistrate accepted that evidence. Further, it was the complainant's evidence that she and the child lived with the defendant for at least one year after the birth. The case of *Roberts v. Roberts* (10) decided by Sir Jocelyn Simon P., and Karminski J., on appeal from Justices, concerned a matrimonial proceedings where the husband was required to maintain his wife. The question arose as to the contribution to such maintenance to be made by the putative father (a Mr Wright) of her illegitimate child (named Sandra). Sir Jocelyn in delivering the judgment of the Court had occasion to consider provisions similar to Section 3*(c)* of the Bastardy Act Cap. 46. He observed as follows at pp. 969/970:

> "It is argued for the wife that there was no evidence here that Mr Wright paid money for Sandra's maintenance. It is true that the wife and Sandra were living in his house and it is reasonable to suppose that what they lived on came from Mr Wright; but, it is contended, that was paid by Mr Wright to the wife in her capacity as housekeeper, and it was out of her earnings that the child was maintained. This seems to us to be an unrealistice approach. The wife may originally have been engaged as Mr Wright's housekeeper; but after a short time she became Mr Wright's kept mistress, and it was their common child, not a stranger, for whom food and clothes and shelter were provided. This was not provided gratuitously like manna it had to be paid for; and the source of payment, whoever did the actual shopping, was Mr Wright. We consider that where it is proved that an illegitimate child forms part of the household of the child's father, that is prima facie evidence that he has paid money for the child's maintenance."

Those dicta are exactly in point in the present case and the second ground of appeal and accompanying submission must fail. As to the third ground of appeal, as earlier stated, the defendant explained that he had admitted paternity solely at the request of a family friend. He conceded in cross-examination indeed that he had first gone to see the Assistant District Registrar at Lautoka, Mr Naidu, and obtained his advice in the matter; the latter informed him that he could register himself as the father of the child, but then he would be liable for maintenance in the matter. He admitted that he readily swore the affidavit in question. He then said that, contrary to the jurat thereon, the contents of the document had not been read, that is, explained to him, but nonetheless "I knew I was signing a declaration acknowledging that I was the father of the complainant's child", he said.

In this respect Mr Naidu, who was called as a witness by the complainant, testified that he explained the contents of the affidavit to both parties. Section 16 of the Births, Deaths and Marriages Registration Act Cap. 49 in part reads as follows:

> 16.—(1) In the case of the birth of an illegitimate child, no person shall, as the father of such child, be required to give information concerning such birth, and a registrar shall not enter in the register the name of any person as father of such child except on the written request of both the mother and of the person acknowledging himself to be the father, and such person shall, together with the mother, sign the register or the registration form furnished.
>
> (2) If, at any time after registration of the birth of an illegitimate child, the Registrar is satisfied by statutory declaration or such other evidence as he may deem sufficient that both the mother and the person acknowledging himself to be the father require the name of or any other particulars relating to the father to be entered in the register, the Registrar may enter in the register the particulars required to be entered as aforesaid:"

Section 16(2) is applicable to the present case. The word "Registrar" includes any District Registrar (see section 2 of Cap. 49). Section 4(6) of Cap. 49 provides however that an Assistant District Registrar appointed by the Registrar may exercise "such of the powers, duties and functions of the district registrar as may be authorised by the Registrar by writing under his hand". The presumption of regularity operated here and there is nothing to show that the Registrar did not so authorize Mr Naidu. In any event, there is nothing to show that the Registrar was not subsequently satisfied as to the contents of the affidavit sworn by the parties in this case, which takes matters further than a statutory declaration. Mr Shankar makes reference to an incorrect heading to the affidavit, which refers mistakenly to the Legitimacy Act. That cannot possibly affect the contents contained in the body of the affidavit. Although the affidavit is a joint affidavit, the jurat refers only to the defendant and not to the complainant also. But then there is the evidence of Mr Naidu in the matter that the contents of the affidavit sworn by both deponents was explained by him to them. Further there is the thumb print of the complainant, as she is illiterate, on the affidavit. I do not see therefore that it can be said:

> "That the learned trial magistrate erred in law and in fact in not considering the appellant's explanation about the Declaration filed in Court."

In this respect the learned Resident Magistrate had this to say:

> "The respondent's explanation that he gave his name and consented to be the father purely to oblige a friend Baksi Singh I find extremely hard to believe having seen and heard and observed the respondent's demeanour and behaviour in court. I might further add that it strains my credibility to the maximum limit to accept that a married man with 5 children, ordered to pay maintenance to another woman for a further 2 children at $32 per month, would purely to oblige a friend consent to be registered as a father of a strange child whose mother he has met only twice. Having seen and heard this respondent I formed the definite view that he was not the type of person to acknowledge a liability for which he was not responsible, and indeed would even deny a responsibility, if he had half a chance of doing so."

On the issue of credibility, in view of the evidence before the court, I do not see how those observations can be impugned. The third ground must fail also.

I turn then to the fourth ground of appeal, that is, that the decision is unreasonable and cannot be supported, having regard to the evidence. Mr Shankar submits that the learned Resident Magistrate accepted the evidence of the complainant as the truth, before proceeding to consider the evidence of the defendant. It will be seen that the learned Resident Magistrate dealt with the straightforward issue of credibility in the very first page of his judgment. Dealing briefly with the complainant's evidence first, and thereafter the defendant's evidence. It is correct to say that he did firstly accept her evidence and then in turn rejected that of the defendant. But that I think was the learned Resident Magistrate's method of succinctly stating his conclusion in the matter, and cannot in any way, as I see it, be taken to indicate his mental process in coming to such conclusion. Indeed, it will be seen that his judgment thereafter gives ample reasons for coming to the conclusion that he did. He described the complainant "as an ignorant uneducated and illiterate woman", and that clearly she was. But that did not mean that she was an untruthful witness. There are many contradictions in her evidence, as to how long the parties had lived in and the location of a particular house etc. The learned trial Magistrate observed,

> "However I formed the definite impression, quite clearly and beyond all doubt that she spoke the absolute truth when she said that the respondent was the father of her child."

It will be seen that the learned Resident Magistrate there referred to an "impression" and not necessarily to a conclusion, much less satisfaction in the matter. There is the phraseology "beyond all doubt", but taking the passage as a whole it conveys nothing more than that the complainant was a very convincing witness.

The learned Resident Magistrate adverted to the evidence of the respondent admitting taking some groceries to the complainant's brother's house, maintaining however that he did not realise that these groceries were intended for the child's birthday. That, the learned Resident Magistrate observed, was

> "strange conduct for a man who, if his evidence is correct, had met the complainant twice in his life."

There is then the affidavit which the learned Resident Magistrate accepted as corroboration of the complainant's allegation, and also as an admission of paternity by the defendant. Futher, there was the evidence that the defendant admitted that he had given a house to the complainant for the lump sum of $200. "She promised to pay me $200 lump sum. She did not pay it," he said. He did not ask for the $200. He had first said that he gave the complainant the house about six months after he had signed the affidavit, that is, in May 1980. He subsequently said that he gave her the house in 1977 or 1978. The learned Resident Magistrate observed that this was about time when the complainant gave birth to the child. He observed:

> "Why a man who has met a woman just twice should give her a house to live in, is beyond comprehension and more so when the man who does so makes his living as a Taxi—driver"

I would respectfully agree with that observation. Suffice it to say that I consider that the evidence before the learned Resident Magistrate was compelling. The fourth ground must also fail and the appeal is accordingly dismissed.

Appeal dismissed.