19/2 Butterworths

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M.No.442/79

No Special Consideration

BETWEEN [redacted] FEELY
Appellant

A N D [redacted] HURITU
Respondent

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Hearing: 13th February, 1980

Counsel: C.J. Thompson for Appellant
Mrs M.A. Frater for Respondent

Judgment: 13th February, 1980

ORAL JUDGMENT OF ONGLEY J.

The respondent in this appeal gave birth to a female child on the 30th of April, 1975. In the previous year she had been intimate with the appellant and she alleges that he is the father of that child. He admits that he had intercourse with her but suggests that she was already pregnant when intercourse between them occurred. His reason for saying that was that according to him she informed him that she was pregnant so soon after they first had intercourse that she could not by that time have known that she was pregnant to him. Further he believes that at the time that their relationship started he was already practising cricket which would have put the time of the first possibility of conception to him in mid to late September.

The respondent said in evidence that she became pregnant early in September and that appears to have been the information which she gave to her doctor and which, if true, would have meant that the child was an eight month baby. It was not possible to tell from the birth weight or apparently from other indicia whether the child was a full-term child or an eight month child. If the appellant is correct about the time of the commencement of his relationship with the respondent then the child is unlikely to be his. It would be a seven month child and no doubt that would have been readily apparent at birth.

He is supported to some extent, although I think somewhat tenuously, in his assertion as to the time of the commencement of the relationship by a Mrs Heteraka who was

present on the occasion of the first meeting and places it in time, as the appellant does, into the cricket season. At the same time, however, she says that the respondent was then still working at the Labour Department, a factor which the learned Magistrate regarded as crucial and to which I shall return in a moment.

It is common ground that the first act of intercourse took place after a party of people which included the appellant and the respondent who had been drinking returned to the appellant's flat to dance and do some more drinking, resulting in the respondent staying the night and sleeping with the appellant. Her recollection of that event is that it was a celebration of some sort because of the appellant having achieved his Factory Inspector's Certificate, which may or may not be correct but is not particularly material; but if she was still at the Labour Department at that time then records of the Inland Revenue Department show that she left her employment there on the 16th of August. If that record is correct then it appears to be established that intercourse first took place before that date. According to her the relationship continued from that first occasion on a more or less regular pattern of intercourse taking place between them twice weekly up until about the end of September when she informed him that she was pregnant and their relationship cooled.

Apart from that first admitted act of intercourse there was another act of intercourse spoken of by a Mrs Mallett who attended a party at the respondent's flat on a date which she puts about the middle of August. She was also employed by the Labour Department and was a confidante of the respondent. She remembers the occasion because she herself was in the early stages of pregnancy. Her full-term child was born on the 17th of April, 1975, conception having taken place in July in all probability. It appears to me that her evidence is entirely consistent with the events which she described having taken place in mid-August which would mean that the first act of intercourse was some time earlier. She continued working at the Labour Department until the end of September and she does not remember whether the respondent had left the Department by then. From that Mr Thompson says it may be inferred that the respondent had not left by that time but I do not take that inference from the evidence. As I read her evidence Mrs Mallett just did not

remember whether the respondent had left or not. If she had not left then, of course, it could be consistent with the appellant's evidence that intercourse did not first take place until mid or late September. That would also be consistent with Mrs Heteraka's evidence that the first occasion that the parties slept together was into the cricket season. But it would not be consistent with her evidence that the respondent was then still at the Labour Department if the date of her leaving there was in fact the 16th of August. That is why that date becomes crucial.

Evidence that she left at that date was given by the respondent and as I have said is supported by the Inland Revenue Department document. Mr Thompson says that the document was itself hearsay and that the respondent gave her evidence in reliance upon it and that such evidence is therefore suspect. I note that she was cross-examined upon that aspect of the case and it was open to the learned Magistrate to make up his mind whether or not she recollected the date of her departure. He did not reject her evidence in that regard and he found support in the document which is admissible evidence in a case such as this.

Mr Thompson submits that there was such conflict between that evidence and other evidence to make it unsafe for the learned Magistrate to rely upon the date of her leaving the Department as being the 16th of August. But in my view there was evidence upon which he could have come to that conclusion and it is clear from his decision that he did so. If he did find that to be established then clearly conception could have taken place during the continuing relationship between the parties. I do not think that the medical evidence by way of certificate is of much significance in determining the date of conception. The date, the 2nd of September, must, one would think, have been the date given to the doctor by the respondent. Why she gave him that particular date is not clear but it is clear that that date is within the period of the continuing relationship if one accepts the evidence as to the time at which she continued to work at the Department as the learned Magistrate did. There is nothing to say whether the child was an eight month child or a full-term child.

In my view there was evidence upon which the learned Magistrate could decide as he did and I am not prepared to say that he was wrong. If he found that the relationship

extended from early August to early September there was ample corroboration available for that period.

As to the possibility of there having been another person who fathered the child, there is no specific finding upon that in the learned Magistrate's decision. The respondent was cross-examined fairly closely as to her acts and as to admissions which it is suggested were made by her to Mrs Hekerata. It was entirely a matter for the learned Magistrate to decide, largely on a question of credibility, whether on the balance of probabilities she had discharged the burden that lay upon her.

The possibility of Robbie being the father was eliminated by him and by her and remained no more than a hopeful suggestion put forward by the appellant. The allegations made by Mrs Hekerata were vague as indeed she herself appeared to concede. A specific allegation related to a Danish man but the weakness of that particular allegation appeared to show the paucity of material which was available to the appellant on this aspect of his case. I am sure in my own mind that it is implicit in the learned Magistrate's decision that he found against the appellant on this issue but just in case he did not I am prepared to supply my own view of the matter on this appeal. That view is that she discharged the onus of showing that she had not had intercourse with any other person during the relevant period. I do not find her assertions so untenable as to enable me to say that they should have been disregarded. I do not see in fact any reason why she should not have been believed and I take it that the learned Magistrate did believe her.

That being so, the appeal in my view must fail. It is dismissed and the respondent is allowed the sum of $75.00 costs.

Solicitors:

Messrs Beyer, Christie, O'Regan & Partners, WELLINGTON, for Appellant

Messrs Buddle, Anderson, Kent & Co., WELLINGTON, for Respondent