11/10

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1317/83

1242

BETWEEN H

APPELLANT

AND B

RESPONDENT

Hearing: 11th September, 1984

Counsel: Bayliss for Appellant
Whitlock for Respondent

Judgment:

17 SEP 1984

JUDGMENT OF SINCLAIR, J.

The respondent obtained a paternity order against the appellant in respect of the birth of a child on the November, 1980. Proceedings were commenced by the appellant in February 1981 but the hearing did not take place until 8th June, 1983, but judgment subsequently being given on 7th September, 1983. The short point advamced on behalf of the appellant, following the Family Court decision declaring the appellant to be the father of the child, is that there was no evidence tendered which corroborated in some material particular the evidence of the respondent.

The evidence discloses that the respondent went to New Guinea in January 1980 and there she met the

appellant. She claims that in the course of that holiday she spent one night with the appellant at Travelodge in New Guinea and that she next saw respondent in New Zealand on 21st February, 1980. On the evening of that day Miss B said that she met Mr. H at Princes Wharf and that she stayed with him that night in a hotel in Papatoetoe. So far as the 22nd February, 1980, is concerned, Miss B stated that she saw Mr. H again on the evening of that day and her evidence was "much the same thing happened". Miss B says that in consequence of spending those two nights with Mr. H she became pregnant, with the result that a child was born in the following November, and the medical evidence disclosed by means of a certificate that was produced that conception probably occurred in February 1980 some time after the 17th of that month. Thus whatever happened in New Guinea can be excluded so far as the birth of the child is concerned. Miss B stated that following her pregnancy she communicated with Mr. H and she says he told her not to worry as he would help out as much as he could. During the cross-examination she claimed that she knew the dates that she had been with Mr. H as she had kept a diary but she was not able to state which hotel it was in Papatoetoe where she had spent the two nights with the appellant but stated after some persistent cross-examination that she thought it was the D.B.

The only other evidence was from a friend of Miss B , one Br . She confirmed the episode

earlier related in relation to New Guinea as she was with Miss B on that journey. However, so far as the episodes in Auckland in February 1980 are concerned, Miss Br stated that she drove Miss B to Princes Wharf on the 21st February and that she did not see Miss B again until the following morning and that she was aware that Miss B had spent the night away from the flat as the two of them flatted together. The following night, that is the 22nd February, Miss Br stated that Mr. H went to the flat that evening and picked up Miss B , and once again she did not see Miss B until the following morning. She, of course, has no personal knowledge where Miss B went or what Miss B did on either of those two nights as she simply was not there. At best all she can say is that in the earlier part of each evening Miss B met Mr. H and that she did not come home until the following morning. On an occasion subsequent to Miss B becoming pregnant Miss Br apparently spoke to Mr. H once on the telephone and he inquired whether the pregnancy was correct or not and having been advised that it was he asked whether Miss B was going to keep the child and Miss Br replied that she probably would. In answer to a question "did he deny that the child was his" the answer came from Miss Br in the negative but no question was asked of her whether that fact was put by her to Mr. H or not. The last piece of evidence which has any relevance is apparently a visit by Mr. H to the flat where Miss Br was living in April 1980 and she then relates a

conversation where she says she assured Mr. H that Miss B was pregnant and in the course of that conversation that he asked for a bank account number which Miss Br was unable to locate. When asked "do you know why he asked for a bank account number" the reply came in this fashion, "he said he was going to give her $2,000 a month. He asked what bank she was with and I told him". Suffice it to say no payments were ever made by Mr. H

In the course of his judgment the District Court Judge referred to the New Guinea episode plus the meetings in New Zealand and also referred to the telephone conversations between the appellant and the respondent. When it came to the question of corroboration this is what was said in the judgment.

> " The Applicant's evidence was corroborated in certain material respects by that of her witness, Br who was also in Papua, New Guinea, with the Applicant when she went there for a holiday, and later met the Respondent on his early 1980 visits to New Zealand."

However, the Judge does not set forth what evidence it was from Miss Br which corroborated the evidence of Miss B and, more importantly, does not say what the material respects are which he referred to in the course of his judgment. In those circumstances I am of the view that I am at liberty to examine the evidence and to draw such inferences from it as ought to be drawn and then to determine whether the evidence satisfies the requirements of s.52 (2) of the Family Proceedings Act 1980 which provides as follows:

> "No paternity order shall be made upon the evidence of the mother of the child, whether the child is born or unborn, unless her evidence is corroborated in some material particular to the satisfaction of the Court."

I have searched to see whether there are any decided cases under this particular section which may assist and I have also had regard to the cases under s.49 (2) of the Domestic Proceedings Act 1968 which is identical with s.52 (2). There is one decision, Wright v. Powell (1982) 1 NZFLR 124 which gives some assistance. That was a case where a young couple had become engaged and were living together under the same roof for quite a period of time. Subsequently the engagement was broken off but the young woman had become pregnant. The matter eventually found its way to the Court of Appeal on a question of law, which has no application so far as the present appeal is concerned, but at p.128 there are some observations from the Court on the question of corroboration. The following appears:

> " Perhaps it may be of some help, however, to the District Court Judge who undertakes the re-hearing if we indicate our view on the question of corroboration, which was argued before us. Independent evidence that the young couple lived in the same house and worked together for over two years and were engaged for the latter part of that period is well capable of confirming the existence of a close and affectionate relationship between them with ample opportunities for intercourse. We think that it can be regarded as adding to the probability that her evidence of frequent intercourse during that time is true. Further we hold that the same independent evidence, coupled with independent evidence that their relationship had not been completely ended, in that she had kept the ring and they had gone out together on more than one subsequent occasion, is also capable of strengthening the probability that her evidence of intercourse on the crucial

> occasion some months later is true. In other words the history of their relationship and the fact of frequent intercourse during the earlier stage (if accepted) is material to the vital testimony. As a matter of common sense, having regard to current mores, it appears to us capable of providing some corroboration in a material particular.
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> Whether it is to be accepted as in fact corroborative in this particular case would be a matter for the tribunal of fact."

Thus it is necessary to look for evidence in the instant appeal which would corroborate the mother's allegation of intercourse with the appellant and that that intercourse resulted on a balance of probabilities in the birth of the child in question. There is no admission from the appellant and there are no blood tests. There is no evidence anywhere which corroborates the fact that these two people spent the night together on the 21st and 22nd February 1980. All that can be said is that on both occasions in the early part of the evening she was met by the appellant and that she did not arrive back at her flat until the following morning. Opportunity, even suspicious opportunity is not enough. While Miss B kept a diary, there is apparently no record of the hotel which is supposed to be involved and there is no evidence from anybody at the hotel as to the natur of the bookings which Mr. H made and whether he paid for a single or a double occupancy. So far as the telephone conversations which the respondent had with the appellant are concerned, they have resulted in merely self-serving statements being made by the respondent, and the discussions which Miss Br had with the appellant concerning the bank accounts and the money are at best equivocal. In any event with the amount of money which was being talked of according

to Miss Br it would seem that the payments envisaged would be unlikely to be referable to the maintenance of Miss B during her pregnancy because that would have been at the rate of approximately $500 per week.

When all the evidence is considered, it seems to me that it falls short of satisfying the statutory requirements contained in s.52 (2) of the statute and that in those circumstances the prohibition by the subsection ought to apply and no paternity order ought to be made against the appellant. Accordingly the appeal will be allowed and the orders made in the Family Court will be cancelled. There will be no order as to costs.

P.D. J.

Solicitors: Chignell, Miller & Co. Panmure, for Appellant
Moody & Moody, Takapuna, for Respondent