15/10.

NZLR X

IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

M.13/84

BETWEEN K

1241

Appellant

A N D T

Respondent

Hearing: 13 August 1984

Counsel: T G Stapleton for appellant
N M Mackie for respondent

Judgment: 8 October 1984

JUDGMENT OF HENRY J.

This is an appeal against the refusal of the District Court in its Domestic jurisdiction to grant a re-hearing of a paternity and an associated maintenance application. The child the subject of the applications was born April 1970, being therefore now 14 years of age, and the orders in question were made as long ago as 11 October 1973 in the then Magistrate's Court at Gisborne by Mr W M Willis SM, now District Court Judge Willis. The original maintenance order referred to was varied in 1977. In May 1980, in proceedings issued in this Court under the Family Protection Act 1955, the interest of Appellant in his late father's estate

was reduced by the sum of $5,000.00, which amount was ordered to be invested for the benefit of the child the subject of the paternity order. The application for re-hearing was made on 22 June 1981 but not heard until 30 March 1984, with a reserved decision declining the application being delivered on 11 April 1984. Despite the antiquity of the matter, its importance to Appellant, to Respondent, and to the child is apparent.

The test to be applied in an appeal of this nature has recently been considered by the Court of Appeal in Campbell v Pickles [1982] 1 NZLR 477 and in Wright v Powell [1982] 1 NZLR 473. Such an appeal is a general appeal as to fact as well as to law, thus requiring a review of the evidence appropriate to an appellate Court's function, as well as a consideration of the legal principles involved. Bearing that in mind, the onus still remains on an appellant to demonstrate that the decision appealed against was wrong. In Campbell v Pickles (at p.479) the Court of Appeal noted that the overruling consideration when a re-hearing of this nature is applied for is whether there has been shown to be in all the circumstances of the particular case such a serious risk of injustice if a rehearing is refused as to outweigh the ordinary public and private interest in the finality of litigation. The Court further noted that so great a discretionary element enters into applications for re-hearings that a successful appeal is likely to be very exceptional.

Some 16 affidavits were filed in respect of the application for re-hearing, and in addition there was cross-examination before the learned District Court Judge of both appellant and respondent as well as of Mrs Wi , a sister of the Respondent. Cross-exammination of a further witness Mrs Q (formerly) was recorded in deposition form, that cross-examination having been undertaken before a Deputy Registrar of the Christchurch District Court. The Appellant does not, and did not in the original proceedings, deny having had sexual intercourse with the Respondent, the issue being whether that had occurred between them at a time when conception of the child could have taken place. At the original hearing a number of witnesses were called by both parties, and there were also produced in evidence a large number of letters written from the Appellant to the Respondent, many of which, including those written after the birth, contained unequivocal admissions of paternity. In addition, there was a further letter produced, addressed to the Postmaster at Tolaga Bay, in which the Appellant expressly consented to his name being entered on the Register of Births as the father of the child in question. It is common ground that conception must have occurred in July 1969, the child being full term and the birth normal in all respects. Blood-testing was carried out in 1983, the results being compatible with Appellant's paternity but, of course, being of an exclusionary nature they do not establish paternity, but merely that he could be the father.

The crucial issue is the date of the first meeting of the parties. According to the Appellant's evidence as given on the re-hearing application, this was 23rd August 1969, on which date sexual intercourse took place at the Commercial Flats, Ashburton being premises which the shearing gang, of which Respondent was a member, were renting. In support of this contention, Appellant relies first on the evidence of Mrs Q , who in her second affidavit and in her viva voce evidence stated she had first introduced the Appellant to the Respondent at the Somerset Hotel, Ashburton, on a Saturday shortly after her sister had given birth to a child, this date being fixed by her sister (Mrs M) as 23rd August 1969, the date of her discharge from hospital. What is noteworthy about this evidence is that it did not come forward until Mrs Q 's affidavit of 26 January 1983, which was sworn after the affidavits of Mr and Mrs M , and more significantly concerns an important and indeed critical issue which was completely absent from her original affidavit. As was pointed out by the learned District Court Judge, Mrs Q was uncertain as to how long after she first met the Appellant (which was conceded as being between 10 July and mid-July) that the introduction to the Respondent took place. Mrs Q 's first affidavit was directed to an allegation that she had heard Respondent discuss her pregnancy with the Respondent's sister, with reference to a contractor being the father of the expected child. The cross-examination made it clear that this evidence had little

real value, related to comments by the sister, and could not really be put forward as an admission by the Respondent of paternity being with some other person. The evidence from Mr and Mrs M was directed to establishing August 23 as being the date on which Mrs Q had visited the Somerset Hotel, but this does not necessarily establish that as being the occasion upon which the introduction took place, that depending on the acceptance or otherwise of Mrs Q 's evidence to which I have already referred. Further evidence was adduced to show that as at 26 July the Appellant was still friendly with one B and that she, not the Respondent, had attended a 21st birthday party with him on that date. That evidence, however, did not relate directly to the date upon which the Appellant and the Respondent first met, and is not necessarily inconsistent with there already being an association by 26 July.

For the Appellant, considerable weight was placed on the fact that at the initial hearing and in her originating application the Respondent had referred to the first act of intercourse having taken place in July in a motor car outside the home of people named M , and then again in August at the Commercial Flats. Evidence at the re-hearing was called to show that the M incident was on 31 August and could not have been in July. It so happens that 31 August was the date upon which the Appellant initially said they had first met and

had intercourse - not in the car outside M 's, but at the Commercial Flats. At the re-hearing he contended that the first meeting and the first act of intercourse was not on 31 August but 23 August. I note also that in early correspondence the Appellant's solicitors had alleged that the first meeting of the parties was 4 September, but that was not pursued at either hearing.

In my view these differences in Respondent's evidence, although relevant, are not decisive and having regard to the lapse of time are understandable. They may demonstrate the fallibility of memory, but the primary question is the effect which they have on the acceptability or otherwise of the Respondent's evidence as to the first act of intercourse between the parties being in July and not August, which must be judged on the whole of the evidence and the credibility of witnesses.

In his decision the learned District Court Judge traversed some of the evidence, particularly that of the parties and of Mrs Q and stated:

> "Reviewing the evidence as a whole, I do not consider that it may be construed that the Respondent's (appellant in this Court) is more probably right."

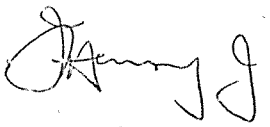
The Judge had the benefit of seeing and hearing the two parties. I have considered carefully the affidavits, as well as the transcripts of evidence both

before him and before the Deputy Registrar. I am not persuaded that the conclusion reached was wrong, and indeed it is one with which I agree. There are disrepancies in the evidence of the Respondent, as one would expect. But so there are in the evidence of the Appellant, and in my opinion the overall effect of the whole of the evidence does not point to the first meeting of the parties as being 23 August rather than some time in July, consistent with the date of conception.

It is also relevant to consider two other factors, both of which should be taken into account and which tend to operate against the grant of a rehearing. The first is the availability of the fresh evidence at the time of the original hearing. With the exception of the evidence of Mrs Qu as to the conversation concerning the Respondent's pregnancy and the person responsible for it, and to which I have already referred, there is nothing to show that it was not available in 1973. The second is the extraordinary delay which has occurred. In July-August 1969 when the events in question occurred, the Respondent was only 16 years of age. She is now aged 31 years. The cause for the delay must very largely rest with the Appellant. Mrs Qu 's evidence as contained in her first affidavit was of very limited value. The appellant was at all times fully aware of the importance of the dates

and the relevance of his being able to establish that he did not meet the Respondent until August 1969, but no positive steps were taken until he swore his first affidavit on 12 November 1979, and the present application was not filed until 22 June 1981. Further delays occurred thereafter, which brought about an application by the Respondent to dismiss for want of prosecution, before pleadings were completed and a fixture sought and allocated. In my view the time lapse here has been so great as to constitute a serious risk of injustice if a rehearing is granted, rather than the contrary. For witnesses now to recall events of more than 15 years ago, when they or most of them were in their early youth, and when the accuracy of dates is crucial, is making for them and for the Court an unacceptably difficult task. The overall strength of the evidence which was adduced on the re-hearing application does not in my opinion require that task to be undertaken, nor does it outweigh the importance of bringing this litigation to finality.

The appeal is therefore dismissed. The Respondent is entitled to costs which I fix at $300.00.



Solicitors:

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