

1985 March 29

[A. LOIZOU, MALACHTOS AND STYLIANIDES, JJ.]

STELIOS CHRISTODOULOU,

Appellant,

v.

FOSTIRA HJILAVITHI,

*Respondent.**(Civil Appeal No. 6619).*

Illegitimate children—Affiliation order—Meaning—Application for—Rules applicable—Practice to be followed—Corroborative evidence under the proviso to section 9(1) of the Illegitimate Children Law, Cap. 278—What constitutes corroboration thereunder—Resemblance of child to alleged father—Failure of latter to reply to letter from mother's counsel—Filing of an action by mother against alleged father—Issue of birth certificate on the strength of an affidavit by mother and in contravention of section 13 of Law 85/73—Do not amount to corroboration under the above Law—Therefore findings of trial Judge on corroboration, which rested on above matters, amounted to misdirection in Law—Adjudication that appellant the putative father of the child without an order for payment of money—Not an affiliation order—Case not finally determined—Retrial ordered. 5 10 15

Civil Procedure—Practice—Irregularity—Non compliance with the Rules—Appellant taking steps in the proceedings after knowledge of the irregularity—Has waived the irregularity.

Evidence—Corroboration—What constitutes corroboration. 20

On 1.3.1977 the respondent a single woman, gave birth to a male child. On 13.5.1980, an application supported by affidavit was filed by her counsel, in the form of an ex-parte application, under the Civil Procedure Rules, Order 48, rule 8, praying for a declaration that the appel- 25

lant was the putative father of the aforesaid child and for an order of the Court ordering the appellant to pay £50.- per month or any other amount that the Court may deem fit for the maintenance and education of the said child. 5 The application was presented to a Judge who directed as follows: "Service of the notice of this application to be made on the putative father". The application was then served on the appellant who filed a notice of opposition supported by affidavit.

10 The trial Judge after hearing the respondent and two other witnesses adjudged the appellant as the putative father of the above child but he did not make any order for maintenance. Under the proviso to section 9 (1) of the Illegitimate Children Law, Cap. 278 "the Court shall not 15 adjudge the alleged father to be the putative father of the child unless there is evidence as to the paternity of the child implicating the alleged father and such evidence is corroborated in a material particular"; and the trial Judge having addressed his mind to the requirement of corroboration 20 found that the following facts furnished corroboration:

- (a) Omission of the appellant to reply to a letter dated 23.9.76 addressed to him by counsel for the respondent;
- 25 (b) The filing of Civil Action No. 815/76;
- (c) The certificate of birth on which the appellant's name appears; and,
- (d) The resemblance between the child and the appellant.

30 In the above action 815/76 the respondent claimed £300.- for services rendered to the appellant as agricultural labourer and was finally settled, without hearing evidence, for £50. The certificate of birth was issued in contravention of the express provisions of section 13 of the Registration of Births, and Death Law, 1973 (Law 85/73) in 35 that it was issued on the strength of an affidavit sworn by the mother and in the absence of the consent of the alleged father. Regarding the last piece of corroborative evidence in the course of her evidence the respondent

brought for a very short time the boy in Court and stated "This is the boy".

The appellant by means of the above appeal complained that:

- (1) The proceedings before the District Court were a nullity as the Law and the proper rules were not followed; 5
- (2) There was no corroboration as required by Law;
- (3) The Court wrongly relied on a finding of resemblance between the child and the appellant; and, lastly, 10
- (4) The findings of the trial Court were not warranted by the evidence before it.

The respondent by cross-appeal complained that the District Court wrongly failed to issue an affiliation order.

Held, (1) that section 15 of Cap. 278 empowers the Supreme Court to make Rules of Court for any matter or proceeding heard or taken before any Court under the provisions of the Law and that until such Rules are made such matters and proceedings shall be regulated by the Rules of Court for the time being; that the Rules for the time being were the Wills and Succession (Declaration of Death and Legitimation) Rules, 1953, rule 22 of which provided that subject to the provisions of these Rules and of any Law in force for the time being, the Civil Procedure Rules shall apply, with necessary modifications, to the practice and procedure in any proceeding or matter to which these Rules apply; that though no Rules of Court were made, the practice to be followed should be as follows: Application should be made to the Court by the mother for the issue and service of a summons on the alleged father and for an affiliation order; that this application should be accompanied by affidavit which should contain material to satisfy the Court that there is a prima facie case for the alleged father to answer; that the Court at that stage has to exercise a discretion having regard to the proviso to s.8(b) of Cap. 278; that if the Court is satisfied that there is a prima facie case, directions should be made for the issue of a summons and service of same 15
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on the alleged father to attend the Court at an appointed time to answer; that since in the present case the application was presented to a Judge who directed that it be served on the appellant this Court is allowed to assume that he was satisfied that there was a prima facie case for the alleged father to answer; and that though there was no strict compliance with the Rules, the appellant had taken steps in the proceedings after knowledge of the irregularity and therefore 0.64 of the Civil Procedure Rules is applicable; and that, therefore, non-compliance in this case constituted an irregularity that was waived by the appellant; accordingly the proceedings cannot be set aside and deprive a child of the fruit of the maintenance of the alleged father and any other benefit that may result.

(2) That what is required by way of corroboration "in a material particular" by the proviso to section 9(1) of Cap. 278 is independent testimony which may be direct or circumstantial, confirming in some material particular that part of the evidence of the mother which implicates the defendant; that the non-answering of the letter in the circumstances of this case could not in Law offer evidence of an admission of liability and, therefore, is not corroborative evidence; that, also, the filing of Action No. 815/76 does not amount in any way to corroboration under the Law for the case in hand; that, further, since the certificate of birth was issued on the strength of an affidavit sworn by the mother she cannot by an act of hers corroborate herself; and that, with regard to the resemblance, in the circumstances of this case this Court is unable to agree and rest the case entirely on a very short in time observation by one of our Judges in such a serious matter; and that after all, in the particular circumstances of this case, this is not only a slippery ground but very dangerous, too; accordingly the findings of the trial Judge on corroboration amounted to a misdirection in Law.

(3) That a finding or adjudication that a person is the father of a child, without an order for payment of money, is not an affiliation order as the adjudication together with the order for payment are treated as the affiliation order; that since the trial Judge did not issue an affiliation order and his findings on corroboration amounted to a

misdirection in Law the case has not been finally determined; and that in the interests of justice, the proper course to follow is to set aside his finding that the appellant is the putative father and order a retrial.

Appeal allowed.

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Retrial ordered.

Per curiam: As an affiliation order involves adjudication of a person as the father of an illegitimate child and in view of the provisions of Law No. 50/79 ratifying the European Convention on the Legal Status of the Children born out of Wedlock, we are of the view that it is desirable, though not strictly necessary, that the Attorney-General should be made a party in affiliation proceedings as well; he should be notified in time of the proceedings by the Registrar of the Court so as to take any part in the proceedings as he may deem fit.

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Cases referred to:

Re Pritchard (Deceased) [1963] 1 All E.R. 873;

Spyropoulos v. Transavia (1979) 1 C.L.R. 421;

Bell v. Clubbs, 8 T.L.R. 296 at p. 298;

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Reffell v. Morton [1906] 70 J.P. 347;

Thomas v. Jones [1921] 1 K.B. 22 at p. 44;

R. v. Baskerville, 12 Cr. App. R. 81 at p. 91;

Zacharia v. Republic, 1962 C.L.R. 52;

Meitanis v. Republic (1967) 2 C.L.R. 31;

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Vouniotis v. Republic (1975) 2 C.L.R. 34;

D.P.P. v. Hester, 57 Cr. App. R. 212 at p. 229;

Wiedmann v. Walpole [1891] 2 Q.B. 534;

Polycarpou v. Polycarpou (1982) 1 C.L.R. 182 at p. 194;

Oldfield v. National Assistance Board [1961] 1 All E.R. 524;

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Hereford City Justices, Ex parte "O" [1982] 3 All E.R. 568.

Appeal and cross - appeal.

5 Appeal and cross-appeal against the judgment of the District Court of Paphos (Anastassiou, S.D.J.) dated the 29th September, 1983 (Appl. No. 33/80) whereby it was adjudged that Stelios Christodoulou is the putative father of Andreas Steliou Christodoulou the illegitimate child of Fostira Hji Lavithi but no maintenance order was made.

E. Panayides, for the appellant.

E. Korakides, for the respondent.

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Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

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STYLIANIDES J.: This appeal and cross-appeal stem from affiliation proceedings, and are directed against the order made by the District Court of Paphos.

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The respondent, Fostira Hji-Lavithi, of Peyia, a single woman, on 1.3.77 gave birth to a male child named Andreas. On 13.5.80 an application was filed by her counsel in the form of an ex-parte application under the Civil Procedure Rules, 0.48, r. 8, whereby she prayed for:-

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(a) A declaration of the Court that Stelios Christodoulou of Peyia is the putative father of the aforesaid infant child of Fostira Hji-Lavithi, namely, Andreas Steliou Christodoulou; and,

(b) Order of the Court ordering the respondent in the application—appellant before this Court—to pay £50.- per month or any other amount that the Court may deem fit for the maintenance and education of the said child.

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The application was supported by an affidavit sworn to by the applicant in which, inter alia, she alleged that Stelios Christodoulou of Peyia, the appellant, was the putative father of her child, who at all material times was married to another woman; that she at all material times had sexual relations with him to the exclusion of any other man.

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The application was presented to a Judge on 14.5.80 whose record reads:-

"Court:- Service of the notice of this application to be made on the putative father.

The Welfare Office to prepare a Social Investigation Report regarding this case". 5

The aforesaid application was served on the appellant; in due course he was represented by advocate and opposed the application. A notice of opposition was filed accompanied by an affidavit setting out the facts on which he relied. After a considerable number of adjournments the application was set down for hearing. 10

The Judge after hearing the respondent, who produced a birth certificate, exhibit No. 1, and copy of a letter addressed to the appellant on 23.9.76 that remained unanswered, and two other witnesses called by her, i.e. a clerk of the Court who produced the file of Civil Action No. 815/76 and her brother who did not support her story, he found for her in the judgment under appeal. The appellant neither gave evidence nor called any witnesses. 15 20

The appellant is a married man with three children, i.e. 2 daughters and a son, all of them of age.

In the course of her evidence the respondent brought the child before the Court and alleged that this was the offspring of her sexual intercourse with the appellant. The trial Court issued the following judgment:- 25

"Stelios Christodoulou, of Peyia, is hereby adjudged the putative father of the illegitimate infant/child named Andreas, who is the son of the Applicant, Fostira Hji-Lavithi, of Peyia. Registrar of this Court to take the appropriate steps regarding service, registration and implementation of this order accordingly." 30

He did not make any order for maintenance.

The appellant complains that:-

- (1) The proceedings before the District Court are a nullity as the law and the proper rules were not followed; 35

- (2) There was no corroboration as required by law;
- (3) The Court wrongly relied on a finding of resemblance between the child and the appellant; and, lastly,
- 5 (4) The findings of the trial Court were not warranted by the evidence before it.

The respondent by cross-appeal complains that the District Court wrongly failed to issue an affiliation order.

A P P E A L:

10 *Ground No. 1.*

It was strenuously argued that the Civil Procedure Rules were followed and not the Wills & Succession (Declaration of Death and Legitimation) Rules, 1953, made under Cap. 220 of the 1949 Edition of our Laws.

- 15 The Illegitimate Children Law, No. 15/55 (Cap. 278 of the 1959 Edition), came into operation on 22.4.55. It repealed and substituted the provisions governing legitimation in the Wills & Succession Law, then Cap. 220, and made also provision for affiliation. Section 15 empowers
- 20 the Governor with the advice of the Chief Justice—now under the Constitution and the Administration of Justice (Miscellaneous Provisions) Law, No. 33/64, the Supreme Court—to make Rules of Court for any matter or proceedings heard or taken before any Court under the provisions of the Law and for prescribing the fees to be taken
- 25 in respect of any matter or proceeding in any Court. By the proviso to this section, until such Rules are made, such matters and proceedings shall be regulated as provided by the Rules of Court in force for the time being.

- 30 Section 11 of the Interpretation Law, Cap. 1, provides that “whenever any Law shall be repealed and other provisions are substituted by the repealing Law all public instruments— a term that includes Rules of Court—made or issued under the repealed Law, and in force at the time of
- 35 such repeal, shall, until revoked or replaced, continue good and valid in so far as they are not inconsistent with the substituted provisions”.

Rule 22 of the Declaration of Death and Legitimation Rules, 1953, provided that subject to the provisions of these Rules and of any Law in force for the time being, the Civil Procedure Rules shall apply, with necessary modifications, to the practice and procedure in any proceeding or matter to which these Rules apply. The prescribed forms in the appendix are for legitimation and not for affiliation. The respondent to such a petition is the Attorney-General and all other persons whose interests may be affected by the order of legitimation; the Court may at any time direct any persons not joined as respondents to be made parties and to be served with the petition, affidavit, and consents, if any. 5 10

Our statutory provisions about affiliation and legitimation in Cap. 278 are modelled on the English Bastardy & Legitimation Laws. (See Bastardy & Legitimation Act, 1872; the Affiliation Proceedings Act, 1957; and the Legitimacy Act, 1926). 15

The joinder of the Attorney-General as respondent is required in the case of legitimation under English legislation but not in affiliation proceedings. Obviously the reason is that a legitimation order affects the status of a person and the State has an interest in it. However, as an affiliation order involves adjudication of a person as the father of an illegitimate child and in view of the provisions of Law No. 50/79 ratifying the European Convention on the Legal Status of the Children born out of Wedlock, we are of the view that it is desirable, though not strictly necessary, that the Attorney-General should be made a party in affiliation proceedings as well; he should be notified in time of the proceedings by the Registrar of the Court so as to take any part in the proceedings as he may deem fit. 20 25 30

Under s. 8 the mother of an illegitimate child, at any time before the birth of the child or at any time within five years from such birth, may apply for affiliation order. If the Court is satisfied that there is a prima facie case for the alleged father to answer, the Court shall issue a summons to him to appear before the Court on a date fixed in the summons and shall cause such summons to be served on him: Provided that the Court shall refuse to issue a summons if satisfied that there is reasonable cause to be- 35 40

lieve that the person alleged to be the father of the child is not in truth and in fact the father of such child or that such application is not made bona fide but made for the purpose of intimidation or extortion.

5 Though no Rules of Court were made, the practice to be followed should be as follows: Application should be made to the Court by the mother for the issue and service of a summons on the alleged father and for an affiliation order. This application should be accompanied by affidavit
10 which should contain material to satisfy the Court that there is a prima facie case for the alleged father to answer. The Court at that stage has to exercise a discretion having regard to the proviso to s. 8(b). If the Court is satisfied that there is a prima facie case, directions should be made
15 for the issue of a summons and service of same on the alleged father to attend the Court at an appointment time to answer.

In the present case the application was presented to a Judge who directed that it be served on the appellant. We
20 are allowed to assume that he was satisfied that there was a prima facie case for the alleged father to answer. Though there was no strict compliance with Rules, the appellant had taken steps in the proceedings after knowledge of the irregularity. 0.64 of the Civil Procedure Rules is applicable.

25 Order 64 derived its origin from and corresponds to 0.70 of the Old English Rules. The classic case on the distinction between nullity and irregularity is *Re Pritchard (Deceased)*, [1963] 1 All E.R. 873, that was cited and adopted by this Court in *Spyropoulos v. Transavia*, (1979)
30 1 C.L.R. 421.

With regard to forms in *Bell v. Clubbs*, 8 T.L.R. [1891-1892] 296, an affiliation case, Mr. Justice Hawkins at p. 298 had this to say:-

35 “It was very convenient to have forms, which, if followed, should be sufficient. But it did not require a service adherence to the forms provided, for this might do infinite mischief and make the forms traps instead of aids”.

Non-compliance in this case constituted an irregularity

that was waived by the appellant. The proceedings cannot be set aside and deprive a child of the fruit of the maintenance of the alleged father and any other benefit that may result.

Ground No. 2.

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Section 9 of the Law reads as follows:-

“9. (1) Subject to any Rules of Court, on the date fixed in the summons, the Court shall proceed to hear the case and, if satisfied upon the evidence that the alleged father is in truth and in fact the father of the child, the Court shall adjudge him to be the putative father of the child and make an affiliation order subject to such terms and conditions as the Court may deem fit to impose:

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Provided that the Court shall not adjudge the alleged father to be the putative father of the child unless there is evidence as to the paternity of the child implicating the alleged father and such evidence is corroborated in a material particular.

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(2) The alleged father shall be deemed to be the father of the child if he has co-habited with the mother, to the exclusion of all other male persons, at any time during the period of possible conception specified in subsection (3), unless it is made to appear that it is impossible that the mother has conceived the child in consequence of such cohabitation.

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(3) The period of possible conception mentioned in subsection (2) is the period between the one hundred and eighty-first day and the three hundred and second day, both inclusive, before the birth of the child”.

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Corroboration in thus required by Law.

The question as to what constitutes corroboration “in some material particular” was discussed by the Divisional Court in *Reffell v. Morton*, (1906) 70 J.P. 347, where Alverstone, L.C.J., expressed the opinion that the corroborative evidence must have some relation to the conduct

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of the putative father or some relation to the probability of the person summoned being the father.

With regard to corroboration in proceedings under the English Bastardy Law, in *Thomas v. Jones*, [1921] 1 K.B. 22, Atkin, L.J., at p. 44 had this to say:-

10 “The evidence of the mother of the child to be sufficient has to be ‘corroborated in some material particular by other evidence to the satisfaction of the said justices’. That appears to me to be a very important safeguard, and it is of the greatest importance that it should not be whittled down, but should be maintained in full, as in my experience it is essential for the purpose of doing justice between the parties in this class of case, where charges are so easily brought and with such difficulty refuted, and where there is a strong temptation either to conceal the identity of the real father or to impose liability upon the person who is best able to bear it. What is meant by corroborative evidence is established now by the decision in *Rex v. Baskerville*, 12 Cr. App. R. 81, which I think must be treated as an authority generally upon the meaning of corroborative evidence”.

In *Halsbury's Laws of England*, 4th Edition, Volume 1, paragraph 633, we read:-

25 “*Evidence of mother.* On the hearing of a complaint by the mother, the court may adjudge the defendant to be the putative father of the child, but it must not do so, in a case where evidence is given by the mother, unless her evidence is corroborated in some material particular by other evidence to the court's satisfaction. What is required by way of corroboration is independent testimony, which may be direct or circumstantial, confirming in some material particular that part of the evidence of the mother which implicates the defendant. It is not sufficient that such evidence should show no more than possibility”.

The often repeated passage from *R. v. Baskerville*, (*supra*), at p. 91, reads as follows:-

“We hold that evidence in corroboration must be

independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offence for which corroboration is required by statute. The language of the statute, "implicating the accused", compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shews or tends to shew that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused.

The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime".

(*Charalambos Zacharia v. The Republic*, 1962 C.L.R. 52; *Meitanis v. The Republic*, (1967) 2 C.L.R. 31; *Vouniotis v. The Republic*, (1975) 2 C.L.R. 34).

The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible, but only to confirm and support that which as evidence is sufficient and satisfactory and credible: And corroborative evidence will only fill its role if it itself is completely credible evidence—(*D.P.P. v. Hester*, 57 Cr. App. R. 212, per Lord Morris of Borth-y-Gest, at p. 229).

The Judge addressed his mind to the requirement of corroboration in relation to the facts of the case. The following facts were found to furnish corroboration:-

- (a) Omission of the appellant to reply to a letter dated 23.9.76 addressed to him by counsel for the respondent;
- (b) The filing of Civil Action No. 815/76;
- 5 (c) The certificate of birth on which the appellant's name appears; and,
- (d) The resemblance between the child and the appellant.

10 With regard to the first item of corroboration found by the Judge, it is sufficient in answer to say, following *Wiedemann v. Walpole*, [1891] 2 Q.B. 534, that the non-answering of a letter in the circumstances of this case could not in law offer evidence of an admission of liability and, therefore, is not corroborative evidence.

15 In Action No. 815/76 the respondent claimed £300.- wages for services rendered to the appellant as agricultural labourer for a period of 7 months from November, 1975—June, 1976. The appellant desisted the claim and contended that the respondent worked for him for sometime in April, 20 1975, November, 1975 and March, 1976. The action was finally settled, without hearing evidence, for £50.- plus an amount for costs. Certainly, this does not amount in any way to corroboration under the Law for the case in hand.

25 The child was born on 1.3.77. Affiliation proceedings commenced on 13.5.80. A certificate of birth, exhibit No. 1, was issued on 12.6.82 in contravention to the express provision of s.13 of the Registration of Births and Deaths Law, No. 85/73, that reads:-

30 «Εν περιπτώσει γεννήσεως νόθου τέκνου ουδείς υποχρεούται να παράσχη πληροφορία περί την γέννησιν ως πατήρ αυτού, ο δε Ληξιαρχος δεν καταχωρεί εν τω Μητρώω Γεννήσεων το όνομα οιοσδήποτε προσώπου ως πατρός του τέκνου ειμή τη κοινή αιτήσει της μητρός και του αναγνωρίζοντος εαυτόν ως πατέρα του τέκνου» εν τη περιπτώσει ταύτη ο αναγνωρίζων υπογράφει το Μητρώων Γεννήσεων μετά της μητρός του τέκνου».

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(“In the case of the birth of an illegitimate child no

person shall be required as its father to give information concerning its birth and the Registrar does not enter in the Register of Births the name of any person as the father of the child unless at the joint request of the mother and of the person acknowledging himself to be the father of the child; and in that case such person shall sign the Register of Births together with the mother of the child").

This certificate was issued on the strength of an affidavit sworn by the mother. It is cardinal principle that she cannot by an act of hers corroborate herself. Had the registration of the name of the father been effected according to s. 13, the matter would have been completely different but this is not the case and we cannot imagine a man contesting the case in Court so vigorously to apply with his opponent for the registration of his name as the father of the child and to sign the register. It is significant that on this certificate we read: "Is correct so far as I am able to ascertain from «'Ενορκον Δήλωσιν» (affidavit)", and nothing more.

With regard to the last piece of evidence which was treated by the trial Court as corroboration, the resemblance between the child and the appellant, we may say that this is a very weak corroborative evidence. From the record it is evident that in the course of her evidence the respondent brought for a very short time the boy in Court and stated: "This is the boy". In the circumstances of this case we are unable to agree and rest the case entirely on a very short in time observation by one of our Judges in such a serious matter. After all in the particular circumstances of this case, this is not only a slippery ground but very dangerous, too.

The rest of the evidence does not carry any further the story of the respondent. In view of the course that we have decided to take in this appeal, we need not say anything about the veracity of the respondent. After all we did not have the opportunity to watch her— (*Polycarpou v. Polycarpou*, (1982) 1 C.L.R. 182, at p. 194).

CROSS—APPEAL

Affiliation was introduced in our legislation by the Ille-

gitimate Children Law, No. 15/55. "Affiliation order" means an order made by the Court under the provisions of this Law whereby the putative father of an illegitimate child is required to pay sums of money towards the main-
5 tenance and education of the child and to make such other payments in connection with the child as may be directed by the order.

A finding or adjudication that a person is the father of a child, without an order for payment of money, is not an
10 affiliation order as the adjudication together with the order for payment are treated as the affiliation order—(*Oldfield v. National Assistance Board* [1961] 1 All E.R. 524; *R. v. Hereford City Justices, Ex-parte "O"*, [1982] 3 All E.R. 568).

15 The trial Judge did not issue an affiliation order. His findings on corroboration amounted to a misdirection in Law.

As the case has not been finally determined, we consider that, in the interests of justice, the proper course to follow is to set aside his finding that the appellant is the putative
20 father and order a retrial. The Attorney-General to be notified by the respondent-appellant, by posting or serving at his office the application and the opposition.

In all the circumstances of the case, however, we make no order as to costs.

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*Appeal allowed.**Retrial ordered.*