he would have been able to stop within less than 5 ft. I can see no justification for this view. According to the table of overall stopping distances shown in the English Highway Code, at a speed of 10 miles per hour the thinking distance is given as 10 ft. and the braking distance as 5 ft. making an overall stopping distance of 15 ft. I realise that the English Highway Code does not apply here but this table would apply anywhere so far as its figures are concerned.

I am fully conscious of the duty of an appellate court when it comes to considering a decision on facts. One should not lightly differ bearing in mind that the trial magistrate has had the advantage of hearing the witnesses and observing their demeanour. However, in this case I think the appellant has made out his second and third grounds of appeal and I shall allow the appeal.

With regard to the disqualification: In my view this was illegal. Section 23(1) of the Act of 1964 permits this "in addition to any other penalty imposed." There should therefore at least have been a nominal fine imposed before the order for disqualification could be made.

The appeal is therefore allowed. The conviction is quashed and the order for disqualification from holding or obtaining a driving licence is set aside.

Appeal allowed.

IN RE EDWINA JANET CLARKE (AN INFANT)

SUPREME COURT (Bankole Jones, C.J.): November 3rd, 1965
(Misc. App. No. 26/65)

[1] Evidence—burden of proof—standard of proof—illegitimate child of married woman—proof of illegitimacy required beyond reasonable doubt to rebut presumption of legitimacy: The child of a married woman is presumed to be the legitimate child of her and her husband until the contrary is proved beyond all reasonable doubt by the person alleging illegitimacy (page 273, lines 17–26).

[2] Evidence — presumptions—presumption of law—legitimacy—child of married woman presumed legitimate until contrary proved beyond reasonable doubt: See [1] above.

[3] Family Law—custody of children—illegitimate child—welfare of child paramount: No person has any absolute right to the custody of an illegitimate child since its interests and welfare are the first consideration of the court (page 276, lines 5–8).

[4] **Family Law—custody of children—right of blood relations to custody —illegitimate child—blood relationship gives priority if in child's interests:** The natural relationship of the mother, the putative father, and the relations on the mother's side will always be looked to first in determining questions of the custody of an illegitimate child as against strangers but the interests of the child will always remain paramount (page 276, lines 11–25).

[5] **Family Law—custody of children—right of father to custody—illegitimate child—putative father has qualified right after death of mother:** As a rule, after the death of the mother of an illegitimate child, the putative father is entitled to custody, but this is not an absolute right and may be displaced by circumstances showing that the child's welfare requires otherwise (page 276, lines 5–8, 26–29).

[6] **Family Law—illegitimacy—child of married woman—presumed legitimate until contrary proved beyond reasonable doubt:** See [1] above.

[7] **Family Law—illegitimacy—custody of illegitimate child—blood relationship gives priority if in child's interests:** See [4] above.

[8] **Family Law — illegitimacy — custody of illegitimate child—putative father has qualified right after death of mother:** See [5] above.

[9] **Family Law—illegitimacy—custody of illegitimate child—welfare of child paramount:** See [3] above.

The applicant moved the court in habeas corpus proceedings to grant an order for the custody of his illegitimate daughter who was detained by the respondent, the child's maternal grandmother.

The child was born to a married woman 19 months after her marriage. Three months after the marriage the woman left her husband in Makeni and went to live with her mother in Freetown 100 miles away. The husband never visited her from the time she left him until his death four years later. One year before the birth of the child the applicant went to live with the woman in her mother's house and they lived together as man and wife for six years. They subsequently had a further child of which the applicant was admittedly the father. The applicant registered the first child's birth (the mother's name being recorded as her maiden name) and made all the arrangements for her christening ceremony, which the mother's husband did not attend. The applicant made himself responsible for her maintenance for the next few years and when she was five years old, took her to Ghana and put her in the custody of his mother who lived there. The child's mother did not object to this or make any attempt to have the child returned to her.

After the mother's death in 1965, the applicant brought the child,

now eight years old, back to Sierra Leone accompanied by his own mother. The three of them made a number of visits to the respondent, the child's maternal grandmother, with whom the applicant's other daughter lived. After a few visits the respondent refused to allow the child to return to the applicant, claiming that he was not her father.

The applicant then commenced the present proceedings to compel the respondent to deliver up the child into his custody. There was evidence that if the proceedings succeeded he would ultimately send the child back to live with his mother and be educated in Ghana. The evidence as to the child's educational level, however, suggested that she was not developing satisfactorily. Her paternal grandmother did not appear and no assessment could be made of her suitability for looking after the child.

Cases referred to:

(1) *Bosvile* v. *Att.-Gen.* (1887), 12 P.D. 177; 57 L.T. 88.

(2) *Morris* v. *Davies* (1837), 5 Cl. & Fin. 163; 7 E.R. 365.

(3) *R.* v. *Nash, In re Carey* (1883), 10 Q.B.D. 454; [1881–5] All E.R. Rep. 174, *dicta* of Jessel, M.R. applied.

Gelaga-King for the applicant;
Marcus-Jones for the respondent.

BANKOLE JONES, C.J.:

In these habeas corpus proceedings, the applicant Christian Clarke has moved the court for an order for the custody of one Edwina, a girl of not quite eight years of age, born to a Mrs. Lucy Savage, a married woman now deceased, on the ground that he was the father of the child.

The undisputed facts are that Lucy Savage (*neé* Barnett) was married to Charles Savage on April 16th, 1956 at Makeni, in the then Protectorate. On November 19th, 1957 Lucy Savage gave birth to Edwina at Goderich Village in what is now known as the Western Area. Some time in 1960, Charles Savage died and both his wife and the respondent, who is the maternal grandmother of Edwina, attended the funeral at Makeni. It would appear that after his death Lucy Savage was paid a gratuity by the government in her own behalf and on Edwina's behalf as well, the latter having been represented as the child of the marriage. Lucy Savage gave birth

to another daughter Christiana, whose father it is not disputed was the applicant and who is now about five years of age and has practically always lived with the respondent. In January 1962, the applicant took Edwina to Ghana and placed her under the guardianship of his mother who is a Ghanaian; it is said she was attending school there. In the latter part of 1962, the applicant left Goderich Village, where he had been living with Lucy Savage as man and wife, and took up residence alone at Wellington Village. In June of 1965 Lucy Savage died. The applicant sent for Edwina and his mother from Ghana and they both arrived in Sierra Leone in August 1965. The applicant, his mother and Edwina paid three visits to the respondent at Goderich and on the third visit it was agreed that Edwina should spend five days with the respondent. At the end of this period when the applicant went for the child, the respondent refused to hand her over, and as a result these proceedings were commenced.

Now, it is conceded that at the time when Edwina was born, the marriage between Lucy Savage and her husband was legally subsisting and in full force. In such a case, I apprehend the law to be that if a child is born to a married woman, her husband is deemed to be its father until the contrary is proved. This means that if it is alleged that the child is not legitimate, the burden of rebutting the presumption is immediately cast upon the party alleging the illegitimacy (that is, in this case upon the applicant) and the standard of proof required must be one beyond all reasonable doubt that the husband is not the father of the child. It has been said in *Eversley on Domestic Relations*, 6th ed., at 319 (1951), that "the rebutting evidence must not be circumstances which only create doubt and suspicion, but must be strong, distinct, satisfactory, and conclusive." See *Morris* v. *Davies* (2) (5 Cl. & Fin. at 215; 7 E.R. at 385).

The applicant's case is that he first got to know Lucy Savage in the year 1955, that is, before she was married. She was married in April 1956 at Makeni where the husband resided. About three months after the marriage, Lucy Savage left her husband and came to live with her mother, the respondent, at Goderich Village. Later in 1956 the applicant went to live with her as man and wife in Lucy Savage's house at 6 Collier Street, where her mother was then living, and they continued to live as such until Edwina was born in November 1957. Thereafter, another child Christiana was born to both of them, the paternity of which is not in issue. When he

went to live with Lucy Savage, the applicant did not then know that she was a married woman. He got to know this afterwards when she told him that she was separated from her husband because they could not get on together. When Edwina was born, it was the applicant who gave the information to the Registrar of Births at Goderich. This fact was recorded in the birth certificate but it does not state the name of the father, and the name of the mother was recorded as Lucy Barnett, the mother's maiden name. The applicant was accompanied to the Registry of Births by Lucy Savage's sister Naomi, then a schoolgirl. When Edwina was christened on February 22nd, 1958, it was the applicant who made all the arrangements and his cousin, Mr. U. J. Clarke, was one of the child's sponsors. Mr. Charles Savage, the husband of Lucy Savage, did not attend the christening ceremony. For the next three years the applicant was responsible for the child's maintenance. Mr. Charles Savage never visited his wife from the time she went to live with her mother up to the time she gave birth to Edwina or until his death in 1960. It was conceded by counsel that Makeni is a town over 100 miles from Goderich.

In 1962, when Edwina was five years of age, the applicant took her to live with his mother in Ghana and she lived there for three years, during which time he maintained her, until the death of Lucy Savage, without, it would appear, any step having been taken by Lucy Savage to recover the child. In fact, on his return from Ghana where he had left Edwina, the applicant went back to live with Lucy Savage. After the death of Lucy Savage in June 1965 the child was brought to Sierra Leone by the applicant's mother, and the respondent appeared to have raised no objections to visits paid to her by the applicant, his mother and the child. On one visit, it was agreed that the child should stay with her for only five days. At the end of this period, she refused to give up the child to the applicant and then declared that the applicant was not the father of the child.

As opposed to all this, the respondent swore that her daughter left her husband and came to live with her in mid-1957 when she was visibly pregnant. She swore at first that she did not know the applicant until these proceedings started in this court but in the same breath said she got to know him when Edwina was only a year old. She said that at no time did the applicant live with her daughter at 6 Collier Street, Goderich, as husband and wife, and that she had not known him when Edwina was christened. She admitted,

however, that after Charles Savage died the applicant used to sleep with her daughter at Collier Street and also that her daughter later had a child by him, who is now living with her. She admitted that she knew that the applicant took Edwina to Ghana but said that she did not question him as to this because she was annoyed. She admitted that at no time did Mr. Charles Savage visit her house since her daughter returned to her and also that Mr. Savage was not present at the christening ceremony of Edwina. She admitted the visits made to her by the applicant, his mother and Edwina, as well as her refusal to deliver up the child to the applicant.

It is unfortunate that both Lucy Savage and her husband are dead and therefore cannot be parties to or witnesses in these proceedings. This court is, however, bound to decide the issue of legitimacy on the evidence available before it. The court is bound in doing so to take into consideration not only the conduct of all the parties concerned, but also the circumstances existing at the time of the conception and birth as well as relevant facts both preceding and following these. See *Morris* v. *Davies* (2) and *Bosvile* v. *Att.-Gen.* (1). In the instant case, the conduct of Lucy Savage, her husband, the respondent and the applicant himself and all other surrounding circumstances, without attempting to lay one's finger on specific instances, clearly oust the presumption of legitimacy.

On the facts before the court, I have therefore no difficulty whatsoever in accepting the evidence of the applicant, fully corroborated by his witness Albert Savage in material particulars and reject that of the respondent and her witness Freeman in matters where they conflict with the evidence of the applicant and his witness Albert Savage. I find as proved the following, namely: (a) that Lucy Savage left her husband's home at Makeni three months after they got married, that is, some time in mid-1956 or thereabouts, and came to live with the respondent at Goderich; (b) that the applicant lived with her in Goderich as man and wife from late in 1956 and continued to live with her until the birth of Edwina on November 19th, 1957, to the knowledge and with the approval of the respondent who lived in the same house with them; (c) that Lucy Savage's husband had no access to her during the whole of this period; and (d) that the child Edwina born to Lucy Savage is therefore illegitimate, the father being the applicant.

Mr. Gelaga-King argued that this court has no jurisdiction in these proceedings to entertain the application of the respondent for the guardianship of the child. I myself am inclined to this view.

On the question of custody, he submitted that the whole purpose of habeas corpus proceedings is for the respondent to show that the detention was lawful and that once this is not established the putative father's right to the custody, especially where he had *de facto* adopted the child, is absolute. I do not think that anyone has vested in him an absolute right to custody, because I opine that, just as in the case of a legitimate child, the interests and welfare of an illegitimate child are the first consideration of the court. In *Eversley on Domestic Relations*, 6th ed., at 425 (1951) is to be found the following passage:

> "As between strangers and the parents of a bastard child the parents have a very considerable claim to its custody, control, and education; but under all circumstances the benefit and welfare of the child are kept prominently before the mind of the Court which has to decide the question of custody."

I think the correct statement of the law is to be found in the case of *R.* v. *Nash, In re Carey* (3) where Sir George Jessel, M.R. said *inter alia* (10 Q.B.D. at 456; [1881–5] All E.R. Rep. at 176):

> "The Court is now governed by equitable rules, and in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. There is in such a case a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child."

As a rule after the mother's death, the putative father is entitled to custody but this is not an absolute right or the same as that of a father of a legitimate child. It can be displaced in certain circumstances.

The applicant is unmarried and lives alone. He intends, if he is granted custody, ultimately to send the child to his mother in Ghana where she would continue her schooling and be maintained. There is something to be said about such an arrangement, in that the child has been living for the last three years with the applicant's mother, her paternal grandmother. As against this, however, the child's education seemed to have suffered. There is evidence that a child of her age should be qualified for Class Three; her performance shows that she is only fit for Class One; and what is surprising, if not distressing, is the fact that at the age of nearly eight, she is not yet grounded in the alphabet. But above all this, the court is being wooed, so to speak, to shut its eyes to the fact that a child of such

tender years is to be sent out of the jurisdiction to live with, if I may say so with respect, a stranger in law and equity, whose fitness for custody or guardianship has not been tested out of her own lips in the witness box. If, however, her custody was given to her maternal grandmother, the respondent, in my view several advantages would flow from such arrangement. She would not only be living in the country of her birth, but in a village where she would enjoy the company of her younger sister and several other of her maternal relations. Her education in my view ought to improve, and if an order is made for reasonable access by her father, their natural relationship would be far more strengthened than if she were permanently estranged from him.

These are the considerations which have compelled this court to come to the conclusion that the best interests and welfare of the child will be served if I were to refuse the application for the delivery of the child to the applicant, and order that the child remain in the custody of the respondent. I now so order. And I also further order that the applicant be afforded access to his child at all reasonable times. In the circumstances of this case I make no order as to costs.

Order accordingly.

KAMAL and BOMBALI SEBORA CHIEFDOM COUNCIL *v.* STEVENS and KOROMA

COURT OF APPEAL (Cole, Ag. C.J., Dove-Edwin, J.A. and Marke, J.): December 2nd, 1965
(Civil App. No. 14/65)

[1] **Civil Procedure — appeals — appeals against interlocutory orders — leave to appeal—where judge making order refuses leave, application lies to Court of Appeal:** Where the judge making an interlocutory order in the Supreme Court refuses an application for leave to appeal against the order, the applicant may make a fresh application to the Court of Appeal for leave to appeal (page 286, lines 21–32).

[2] **Civil Procedure—appeals—procedure—enlargement of time—Court of Appeal may enlarge times appointed by Court of Appeal Rules:** The Court of Appeal has jurisdiction to enlarge the time appointed by the Court of Appeal Rules (*cap.* 7) for doing any act or taking any proceeding (page 287, line 40—page 288, line 12; lines 30–34).