

NMLG

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO: 3/99

BEFORE: The Hon. Mr. Justice Bingham, J.A.
 The Hon. Mr. Justice Harrison, J.A.
 The Hon. Mr. Justice Smith, J.A. (Ag.)

BETWEEN: MACARDY BAILEY **APPELLANT**
 (Breach – Affiliation Act –
 “Maxley” born 7/8/97)

A N D KERRIAN CAMPBELL **RESPONDENT**

Hugh Hyman for Appellant instructed by Hopeton Henry

Leroy Equiano for Respondent

March 22 and October 25, 2001

HARRISON, J.A.

This is an appeal from the order of His Honour Mr. John Moodie, Resident Magistrate for the parish of St. Ann made on the 22nd July 1998 adjudging the appellant to be the putative father of a child Maxley, who was born on 7th August 1997. The appellant was ordered to pay to the complainant the sum of \$1200 per week as from 25th July 1998 for the support of the said child until the child attains the age of 18 years, and \$2500 as fees for confinement.

On 22nd March 2001, we allowed the appeal. These are our reasons for so doing.

The facts are that the respondent and appellant met in July 1996. They commenced having a sexual relationship in September 1996. She was then 16 years old and attending high school in Brown's Town St. Ann. The appellant would pick up the respondent in his motor car some mornings at her home in Barnstable, St. Ann, and take her to school. He would sometimes take her home from school in the evenings. They had sexual intercourse regularly between September and December 1996 at his brother's home in Trelawny. In December 1996 the respondent discovered that she was pregnant. The child Maxley was born on 7th August, 1997.

Joyce Lawson, the mother of the respondent gave evidence that she used to see the appellant bring the respondent in his car to her home during the period September to December 1996 and also in January to April 1997. In May 1997, Joyce Lawson having learnt of the respondent's pregnancy went to the appellant and confronted him that she heard that he was the prospective father of the respondent's child. The appellant did not deny nor admit paternity.

Demoy Campbell, the common law husband of Joyce Lawson and step-father of the respondent gave evidence that he had attended the same school with the appellant who "used to be friend of mine." He said that the appellant took home the complainant regularly. Before April he asked the appellant if he and the respondent were friends and the appellant did not reply he "just laugh." In April 1997 he heard of the pregnancy and asked the appellant how he caused it to happen. The appellant replied that the respondent had told him that she was "taking protection" and he "did not want it to happen." The appellant

subsequently told him that he was not "owning that baby," because he had heard of a threat to him made by the witness Joyce Lawson. The appellant subsequently, after the child was born, admitted "feeling shame", and asked the witness Campbell to "take the child to show his mother."

The appellant, in evidence, denied paternity, and stated that the respondent had two other children, lived with her boyfriend in the area and is associated with other men. He admitted that he had sexual intercourse with her but he "use protection." The respondent told him that the child was his "three or four months after the baby born." He never gave her money for the child's support.

The respondent had said in evidence that she had a child who was then three years old. This Court notes that she would have had that child when she was fourteen (14) years of age. She said that the father of her three (3) year old child lived in the said district of Barnstaple but that "we do not speak to each other from defendant and I started talking."

After the respondent filed her complaint the appellant requested a blood-test. The report of the tests of the blood samples of the respondent, the appellant and the child, was available to the learned Resident Magistrate, although the printed record does not show that it was tendered in evidence. The report of the technologist, and signed by the Director, Blood Transfusion Services, 21 Slipe Pen Road, Kingston concluded:

"MaCardy Bailey can be excluded as the father of Maxley on the basis of ABO(A1) group."

Counsel for the appellant argued a single ground, namely:

"That the Learned Resident Magistrate failed to apply or to take into consideration the provisions of Section 11(3) of the Status of the Children Act (1976) and accordingly fell into error by declaring the Defendant/Appellant to be the putative father of the child MAXLEY born to the body of the Complainant/Respondent on the 7th day of August, 1997 in the face of medical evidence resulting from a blood test taken by the Defendant/Appellant, Complainant/Respondent and the said child which evidence is to the effect that:

'the Defendant/Appellant can be excluded as the father of such child'."

He submitted that the report of the blood test as worded is saying that the appellant is in fact excluded because, if he was not excluded, it would have said so. The Court is not required to make a determination as to whether or not the appellant is the biological father or not. The learned Resident Magistrate was in error in not accepting that the report excluded the appellant.

Mr. Equiano for the respondent submitted that the use of the word "can" in the report was correctly construed by the learned Resident Magistrate that the appellant was not entirely excluded. The scientific evidence was not conclusive and therefore the learned Resident Magistrate could rely on other evidence.

The Affiliation Act empowers a Resident Magistrate to make a determination on the complaint of a "single woman" who alleges that a particular man is the father of her child. He is required to hear the evidence of both parties and if the evidence of the complainant is corroborated in some material particular, the said Resident Magistrate may adjudge the man to be the putative father of such child (section 4).

The Status of Children Act authorizes a court, on the application of any person in civil proceedings, to give directions that blood samples be taken of the subject and its mother and alleged father and the result of such tests be used to show whether or not such father is or is not excluded as the father of the subject.

Section 11, reads:

"In any civil proceedings in which the paternity of any person (hereinafter referred to as 'the subject') falls to be determined by the court hearing the proceedings, the court may, on an application by any party to the proceedings, give a direction for the use of blood tests to ascertain whether such tests show that a party to the proceedings is or is not thereby excluded from being the father of the subject and for the taking, within a period to be specified in the direction, of blood samples from the subject, the mother of the subject and any party alleged to be the father of the subject or from any, or any two, of those persons."

Civil proceedings include "any proceedings under the Affiliation Act" (subsection 7).

The contents of such a report are dealt with in subsection 3 of section 11 of the Status of Children Act.

"The person responsible for carrying out blood tests taken for the purpose of giving effect to a direction under this section shall make to the court by which the direction was given a report in which he shall state:

- (a) the results of the tests;
- (b) whether the person to whom the report relates is or is not excluded by the results from being the father of the subject; and
- (c) if that person is not so excluded, the value, if any, of the results in determining whether that person is the subject's father;

and the report shall be received by the court as evidence in the proceedings of the matters stated therein."

If therefore the scientific expert evidence, as contained in the report of the blood test is not contradicted by other evidence, a court is not free to reject such evidence tendered.

In the instant case, the report concluded that:

"MaCardy Bailey can be excluded as the father of Maxley on the basis of ABO (A,) group."

This Court is of the view that the phrase "can be excluded ..." is not synonymous with "... is not excluded", as counsel for the respondent sought to intimate.

The Status of Children Act by its precise wording requires "... the person responsible for carrying out (the) blood tests", to state whether the alleged putative father "... is or is not excluded ..." from being the father. The fact that the report uses the phraseology "... can be excluded ...", must be interpreted as meaning "... can safely be excluded," or "... can properly be excluded ...", as the father. If that was otherwise, the report would have been couched in the negative, namely, "MaCardy Bailey cannot be excluded ..." (Emphasis added). The report was not so worded.

The effect and meaning of the report is that the appellant "...is excluded..." as the father of the child.

Accordingly the finding of the learned Resident Magistrate that -

"I am of the view that the result does not entirely exclude the Defendant." (Emphasis added)

is not a finding that could properly be made in the circumstances. That finding is further faulted by the following further comment by the said Resident Magistrate that:

"In any event the Court is not concerned with making a determination as to whether or not the Defendant is the biological father."

The latter pronouncement reveals a misinterpretation of the provisions of Section 11 of the Status of Children Act, as to the purpose of its use of the blood test in proceedings under the Affiliation Act. It was never intended that its use should give rise to a consideration as to whether or not the alleged father was the biological father but rather whether or not he was excluded or not as the putative father, a disqualifying factor. In finding as he did on this issue the learned Resident Magistrate was in error.

It is the view of this Court that, in future, the blood technologist should confine himself to the use of the precise terminology of the statute, namely, "... is or is not excluded ...", in order to obviate arguments of the nature that were mounted in this case.

The circumstances of this case are indeed sad. Reluctant though we were, we could come to no other conclusion. We are not aware, from the record, that any attempt was made to deal with what was a criminal offence committed by the father of a three (3) year old child, to whom the respondent gave birth when she was no more than fourteen (14) years of age. A specific directive or a strong comment of a trial judge in these circumstances was required.

For the above reasons, we allowed the appeal, set aside the order of the learned Resident Magistrate and made no order as to costs.