

Judg. Robt

JAMAICA

IN THE COURT OF APPEAL

MISCELLANEOUS CIVIL APPEAL NO: 42/82

BEFORE: The Hon. Mr. Justice Rowe, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

REGINA ATS

ELEANOR MARTIN COMPLAINANT/RESPONDENT

AND

AUDLEY MARTIN DEFENDANT/APPELLANT

Mr. Alton Morgan of Dunn Cox & Orrett for Appellant

Miss Hyacinth Walker of the Office of Director of Public Prosecutions
amicus curiae

October 5, & 20, 1982

ROWE J.A.

On October 5, we reversed the decision of the learned acting Resident Magistrate for Trelawny and remitted it for hearing generally. We promised to put our reasons in writing and this we now do.

On June 9, 1982 Eleanor Martin and her husband Audley Martin appeared before the acting Resident Magistrate for Trelawny on a complaint by Mrs. Martin that Mr. Martin had neglected to maintain her and her two children "Clifton" born on June 26, 1977 and "Audrey" born on May 5, 1971. Mrs. Martin was represented by Mr. Roy Barrett an Attorney-at-law but Mr. Martin did not have legal representation.

The learned Resident Magistrate conducted an informal enquiry and in a note which he prepared for the use of the Court of Appeal, he said that Mr. Martin indicated before him his willingness to maintain his wife and the children. He also said that Mr. Barrett requested a certain sum of money on behalf of the applicants and that he ascertained from Mr. Martin that he had the necessary means to pay the requested sums of money. When he had so satisfied himself he ordered that he pay \$150.00 per week for the maintenance of each child as of 12th June, 1982 until each child attained the age of 16 years and \$50.00 per week for the maintenance of his wife as of 12th June,

1982 and for a period of two (2) years. Finally, he said that Mr. Martin at the time agreed he could pay and expressed a willingness to pay the sums ordered.

Mr. Martin, through his attorney-at-law filed notice and grounds of appeal on June 21, 1982 complaining that the ruling of the trial judge was wrong in law and that the order made was excessive. Before us Mr. Morgan argued that as the Resident Magistrate did not conduct the enquiry upon oath, the procedure adopted was wrong in law and the purported order a mere nullity.

It is provided in section 7 of the Maintenance Act that when a Resident Magistrate embarks upon the hearing of a summons under that Act, "he shall proceed to enquire into the case and if the Resident Magistrate shall be satisfied that the party complaining, or on whose behalf complaint is made, is entitled under this Act to be maintained by the party or parties complained against, and that such party or parties had or have neglected his or their duty in that respect, the Resident Magistrate shall proceed to enquire into the means of the party or parties complained against and if satisfied that he or they or any of them are of ability to maintain or contribute to the maintenance of the party complaining or on whose behalf the complaint is made, he shall proceed to make an order".

The duty to hold an enquiry under section 7 of the Maintenance Act is similar to the duty of a Resident Magistrate to hold an enquiry under section 7 of the Affiliation Act where on an allegation that a putative father has neglected to make payments to the collecting officer under an affiliation order, the Resident Magistrate is to determine whether the putative father should be committed to prison for his neglect. This Court had occasion, as long ago as 1963, to express its strongest disapproval of the practice of informal enquiries in matters arising under section 7 supra.

In Campbell v. Sterling (1963) 8 J.L.R. 225 a Resident Magistrate acting under section 7 of the Bastardy Law (now Affiliation Act) made an order for the committal of the putative father without an enquiry and proceed to reduce the amount of the arrears. Lewis J.A. in delivering the judgment

of the Court referred to the manner in which the case was disposed of and characterized it "as extraordinary" and as one which had given the court "a great deal of concern". Then he went on:

"No notes of evidence whatever have been obtainable from the learned Resident Magistrate. That is one extraordinary aspect of this case: that she appears to have made an order in a case where the law calls for an enquiry without having made any enquiry upon oath. This is not the only case in which the court has become aware that Resident Magistrates in various parts of Jamaica are acting in this manner, a manner of which the court strongly disapproves."

This is a case in which an enquiry upon oath ought to have been conducted. There is no statutory procedure by which after an informal enquiry, (of which no record is made, in the sense that no notes of the enquiry are recorded,) a Resident Magistrate may under section 7 of the Maintenance Act, proceed to make an order for the payment of money which order is binding upon the defendant. In the instant case the defendant was ordered to pay \$350.00 per week or \$18,200 per year for the maintenance of his wife and two children. If this order were made on proper legal principles, the defendant could be numbered within that select few in the population with a disposable income after the payment of income tax of over thirty thousand dollars. Otherwise how would he be expected to maintain himself? It should have been apparent to the Resident Magistrate that the most ample evidence should have been forthcoming before him to justify an award of this magnitude.

It seems to us to be a mistake to think that an enquiry upon oath is anymore time consuming than an informal enquiry which might result in irrelevant cross-talk and will certainly produce no concrete evidence upon which to base a finding. It is always unsatisfactory for a case before a Court to be heard and disposed of without an appropriate note being taken of the evidence. There is a duty on the Resident Magistrate to either take the notes of evidence himself or in summary cases to cause them to be taken by the Clerk of the Courts. In this regard we once again call attention to the provisions of section 27 of the Judicature (Resident Magistrate) Act.

On June 14, 1982, the case of Turner v. Wiltshire M 12/81 was heard and disposed of in this Court. The appeal was allowed and a new trial ordered as in that case the learned Resident Magistrate made an order varying the amount which a putative father had been ordered to pay by substantially increasing the amount and without the benefit of sworn evidence. No notes of evidence were taken and as a consequence the matter had to be referred to the Resident Magistrate for his comments before the appeal could be finally determined.

Mention is made of Turner v. Wiltshire to illustrate that the procedure adopted by the learned Resident Magistrate in the instant appeal is not an isolated one. The informal procedure which was so strongly disapproved by this Court in Campbell v. Sterling is still extant. We express the hope that this judgment will have the desired effect of putting such a practice finally to rest and the further beneficial effect of saving litigants from the considerable expenses of an appeal, and of a new trial, and above all, to relieve them from a sense of deep grievance.