J A M A I C A

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE CIVIL APPEAL

BEFORE: Mr. Justice Cundall
Mr. Justice Lewis
Mr. Justice Henriques

ROSE V. JONES

Mr. H. D. Carberry for the appellant
Mr. R. N. A. Henriques for the respondent

May 27, 31, September 23, 1963

Cundall, P: The appellant, a single woman, laid an information against the respondent on the 1st day of June, 1962 alleging that he was the father of her bastard child Janet born on the 14th February, 1962.

The case was heard on the 12th October, 1962, when the appellant was sworn and gave evidence during the course of which she gave several different dates as the date of the birth of her child. She first said the baby was born on the 14th of May, 1962, then the 14th January, 1961 and then on the 14th January, 1962. Finally, stating that she could neither read nor write, she told the Resident Magistrate that she registered the birth of the child and produced the birth certificate. This certificate was admitted in evidence and showed that the child was born on the 14th February, 1962, the birth being registered on the 6th April, 1962.

Mr. Graham, the solicitor who appeared for the appellant in the court below, thereupon applied that the information should be amended by changing the date of birth from the 14th February, 1962, the date disclosed by the certificate, to the 14th January, 1962, and this was done.

Under cross-examination the appellant gave several contradictory replies as to the first and last days on which she and the respondent had sexual intercourse. She insisted, however, that the child was born on the 14th January 1962, that it was born in the hospital and that she went to the hospital on the 13th

January 1962, and left on January 17.

In examination-in-chief the appellant had also stated that the respondent had come to her yard, looked at the baby, and had given her £3, and that this was two days after the birth. Under cross-examination she said this took place two days after she returned home from the hospital - that is to say, on January 19, 1962.

In support of the appellant's case two witnesses were called. These were her sister, Beryl Ricketts, and Jean Thompson, a friend. At the conclusion of their evidence the case was adjourned to October 24, 1962, the Resident Magistrate having raised a point of law though the notes of evidence do not disclose this. The following is taken from the note of the learned Resident Magistrate:

> "Adjourned Part Heard to Wednesday, 24th October.
> Wednesday, 24th October 1962.
>
> Mr. Graham:
>
> If the evidence of the complaint is supported must take into account the demeanour of the witnesses. 2 difficulties quite deaf mentally slow. Evidence of complainant not wholly value-less. Mr. Henriques cannot accept complainant's evidence, must believe the evidence of the complainant. Corroboration is not sufficient by itself.
>
> Adjourned for Authorities."

Mr. Henriques was counsel for the respondent. That concludes the notes of evidence though the case appears to have been adjourned on several occasions until January 9, 1963, when the papers were endorsed:

> "Dismissed. No order on the merits:
>
> (Sgd.) H. S. Grannum
> Res. Mag. St. James
> 9.1.63

Against this dismissal, the appellant appeals on the following grounds:

"1. That the judgment or order is against the evidence and the weight of the evidence.

(a) The learned judge not having rejected the evidence of the complainant altogether (he referred to it as 'almost' valueless) and having regarded the supporting evidence tendered by the complainant as strong, should have called upon the defendant to answer the complainant.

(b) The learned judge, in evaluating the evidence of the complainant failed to take into account that she was subnormal in hearing and intelligence and most of the contradictions in her evidence were due to such subnormalities.

2. The judgment or order is contrary to law.

(a) The learned judge should have regarded the case put forward by the complainant as a whole and not piece-meal and, in view of the learned judge's remarks thereon, it is clear that the complainant had made out a case for the defendant to answer".

We had before us an affidavit by the solicitor of the appellant which reads as follows:

"I, Allan Cecil Vermont Graham, being duly sworn, make oath and say:

(1) That my true place of abode is at Macfield House in the parish of Westmoreland, my postal address is P.O. Box 526, Montego Bay 2, and I am a solicitor of the Supreme Court of Judicature of Jamaica and solicitor for the above-named complainant.

(2) That on the complainant's case being closed on October 12, 1962, the learned trial judge, his honour Mr. H. S. Grannum, addressed counsel for the defendant and myself to this effect: 'Gentlemen, I would like you to assist me by looking up the Law and addressing me on the following. The complainant's evidence is almost valueless but the corroboration is very strong. What should I do in the circumstances?'

(3) That when the case was called again, on October 24, 1962, the judge informed us he had not had the opportunity

for research on the said aspect and counsel for the defendant expressed himself to be in a similar position. I informed the court I had consulted "Stone's Justices Manual and Halsbury" on the subject, but was unable to find any help on the particular point and I had no other books to assist me on the point. I further submitted that the complainant's case should not be split as suggested but that the learned judge should view the same as a whole and, as the complainant's evidence was not wholly objectionable (it was 'almost' valueless) and the corroborative evidence was so strong, he should accept the case as a whole and call upon the defendant to answer the complaint.

(4) That the case was again adjourned to afford the learned judge and counsel time to consult authorities but counsel was engaged in circuit court when it was again called and so the case was adjourned. Eventually on January 9, 1963, the case was called and the judge expressed the opinion he could not accept the complainant's case and dismissed the complaint.

(5) That the complainant is markedly hard of hearing and apparently subnormal mentally."

This affidavit was referred to the learned Resident Magistrate who commented thereon as follows:

"I have read Mr. Graham's affidavit herein, sworn on January 28, 1963. What Mr. Graham said is substantially true, with this qualification, that when I said the complainant's evidence was 'almost valueless' I was being generous to her feelings. What I did find in effect was that the evidence of the complainant was so pitted with mistakes and inconsistencies that I could not rely upon it. On the other hand I did find that the witnesses called in support were forthright and credible, and I was generally impressed with them. At the close of the complainant's case I was in some doubt as to whether given on the one hand, worthless, unreliable evidence by the complainant, and on the other trustworthy evidence by corroborating witness, I could make and order under the Bastardy Law. I pointed out my difficulty to the advocates, and asked them to assist me with authority. No submissions were forthcoming. Advising myself as best I could with the limited facilities available, I came to the conclusion that I could not allow corroboration by itself, reliable though it was, to bolster an otherwise completely unreliable

complaint. I took the view that some acceptable evidence should exist in the first place, before the question of corroboration could come into play. I may add that I took into consideration fully, the fact that the complainant was a young woman, of simple mentality and somewhat hard of hearing."

Section 5 (1) of the Bastardy Law, Cap. 35 /‾1/, reads as follows:

"(1) After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode six days at least before the holding of the court, the Resident Magistrate shall hear the evidence of such woman and such other evidence as she may produce and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the Resident Magistrate, he may adjudge the man to be the putative father of such bastard child".

To this subsection a proviso was added by Law 5 of 1960 but that proviso is of no significance in the present case.

In the case of R. v. Armitage (1) (a case in which a mother died after the issue of the summons but before the hearing), HANNAN, J., considered the provisions of s. 3 of the Poor Law Amendment Act, 1884 (U.K.) (which are in similar terms to sub-s. (1) of s. 5 of the Bastardy Law with the omission of the proviso), and made the following comments (L.R. 7 Q.B. at p.775):

"But we are further of the opinion that it was the intention of the legislature, having regard to the peculiar nature of such inquiries, that the mother should support her accusation by her oath, and submit herself to cross- examination. The paternity of the child is a fact as to which no evidence can be satisfactory without the statement of the mother; and the peculiar language of the statute, requiring that the evidence of the mother shall be corroborated by other testimony cannot, as it seems to us, be given reasonable effect to without holding that the mother herself must be a witness on her own behalf.

With regard to the instances of alleged hardship in which the production of the evidence of the mother may be impracticable, it is sufficient to say that these, if within the contemplation of the legislature, were probably deemed to be of such rare occurrence as not to make it expedient to make an exception in their favour from the general law applicable to this peculiar class of cases."

In the present case the mother did support her accusation by her oath and did submit herself to cross-examination and her evidence was corroborated by other testimony. At this stage, the learned Resident Magistrate instead of hearing such evidence (if any) as might be tendered by or on behalf of the person alleged to be the father invited the solicitor and counsel who appeared for the somplainant and defendant respectively to assist him by the citation of authorities as to what he should do where "the complainant's evidence is almost valueless but the corroboration is very strong".

We understand from the Resident Magistrate that although he used the expression "almost valueless" to characterise the complainant's evidence he was being generous to her feelings but his view in fact was that her evidence "was so pitted with mistakes and inconsistencies that he could not rely on it". I can only comment that if the Resident Magistrate was taking the unusual course, at this stage, of telling the complainant's solicitor and the defendant's counsel what was in his mind and seeking their assistance, it was unfortunate that he did not state his assessment of the complainant's evidence with accuracy and precision.

Be that as it may, the case was adjourned for the citation of authorities and at the adjourned hearing the solicitor for the complainant submiited that as the complainant's evidence was not wholly objectionable (it was "almost valueless") and the corroborating evidence was so strong, the Resident Magistrate should accept the case as a whole and call upon the defendant to answer the complaint.

It now transpires that what really was exercising the mind of the Resident Magistrate was whether or not he could "allow corrobotation by itself, reliable though it was to bolster an otherwise completely unreliable complaint" and whether in such circumstances he could lawfully make an order under the

Bastardy Law. In this context, I take it that for "completely unreliable complaint" one should read "completely unreliable complainant".

It is clear that in the event of the learned Resident Magistrate, in deciding that he could not accept the complainant's evidence, has put out of his mind the evidence of the corroborating witnesses including that of the complainant's sister who, coming home unexpectedly one night towards the end of May, 1961, found the defendant in bed with her - he in his underclothes and she in her nightdress. As was pointed out by SAVARY, Ag. C.J., in the bastardy appeal of Elliott v. Elliott (2) (4J.L.R. at p. 246), corroborating evidence is some additional evidence rendering it probable that the story of the mother is true and that it is reasonably safe to act on it. It is difficult to see what stronger corroborating evidence there could be than that of the complainant's sister, evidence which the Resident Magistrate has found to be trustworthy.

In my view the Resident Magistrate should not have rejected the complainant's story without taking into consideration the very strong corroborative evidence of her sister and without hearing such evidence as might be tendered by or on behalf of the defendant in his defence. He should have considered the cumulative effect of all the evidence before him rather than taking the evidence of the complainant in isolation. I am of the opinion that under the circumstances there has been no proper judicial adjudication of the evidence.

It remains to be considered what this court should do under the circumstances. In Nelson v. Aljoe the former Court of Appeal considered the question as to what were the powers of that court when dealing with appeals under the Bastardy Law. They were of the opinion (6 J.L.R. at p. 381) that they were as set out in s. 9 (2) of Cap. 452 (now s. 9 (2) of Cap. 35) to:

(1) confirm the decision
(2) reverse the decision
(3) modify the decision
(4) remit the matter with the opinion of the Court of Appeal thereon, or
(5) make such order as the Court of Appeal may think just, and by such order exercise any power which the Resident Magistrate's Court might have exercised.

The court was also of the view (ibid., at p.382) that it had no power to order a new trial and in this view I concur.

By s. 32 of the Judicature (Appellate Jurisdiction) Law, Law 15 of 1962, "any reference in any enactment in force prior to the appointed day (August 5, 1962) to the former Court of Appeal ... shall from and after the appointed day be construed as a reference to the Court of Appeal". Having regard to this provision I am of the opinion that in this respect the powers of this court are co-extensive with those of the former Court of Appeal, and are as set out in Nelson v. Aljoe (3).

In my view the most satisfactory way of dealing with the situation which has arisen would be to order a new trial but we have no power to make any such order. Clearly we cannot, even if we were minded to do so, make an order adjuding the defendant to be the putative father of the child Janet and ordering him to pay a sum of money weekly for her maintenance and education as the defendant has not been given any opportunity to make his defence and the complainant-appellant has quite rightly not asked us to make any such order.

Under the circumstances I would set aside the decision of the Resident Magistrate and remit the matter with an opinion that he should now proceed to hear such evidence (if any) as may be "tendered by or on behalf of the person alleged to be the father" and thereafter consider the totality of the evidence that has been adduced and on weighing the whole of such evidence that of the complainant and her witnesses and that (if any) tendered by or on behalf of the defendant determine whether or not he adjudges the defendant to be the putative father of the bastard child Janet. If he does not so adjudge him he should dismiss the case; if, however, he does so adjudge him, he should go on to decide in terms of s. 5 (2) of the Bastardy Law, Cap. 35, whether or not "having regard to all the circumstances of the case" he does or does not see fit to order the defendant to pay a weekly sum for the maintenance and education of the child.

LEWIS, J.A. : I concur

Henriques, J.A.: At the conclusion of the evidence for the complainant and the witnesses called on her behalf, the learned Resident Magistrate expressed the fact that he had come to the conclusion that the complainant's evidence was almost valueless but that the corroboration called in support of that evidence was very strong. He proceeded to invoke the assistance of the legal representatives for the complainant and the defendant in deciding whether in those circumstances he should call on the defendant to answer. The matter was then adjourned to a future date for the hearing of legal argument. On that day certain submissions were made on behalf of both parties and it was impressed upon the court by the solicitor for the complainant that the evidence in the case should be looked at as a whole and not in isolation, and in the circumstances the defendant ought to be called on for an answer. The matter was then further adjourned for the citation of authorities in support of the submissions. No authorities were forthcoming at the adjourned hearing, and the learned Magistrate then stated that he was unable to accept the case for the complainant and proceeded to make an order dismissing the complaint. It is in respect of this dismissal that the appeal arises.

In my humble view, the learned Magistrate erred in law in weighing the evidence of the complainant in a separate compartment from that of the supporting witnesses instead of looking at the evidence presented on behalf of the complainant in its totality.

It is only in the performance of a task of this nature that the court could apprise itself as to the correct value to attach to the evidence in the case presented before it. In the circumstances the order which the learned Magistrate has made cannot stand and I would set it aside, The matter in my view should be further remitted to the Magistrate with the direction of the Court that he should consider the evidence in the manner above stated and continue the hearing of the case.

It might be of assistance to those entrusted with the task of adjudicating in matters of this kind to call to their attention a recent decision of the Divisional Court of the Probate Divorce and Admiralty Division in the case of a matrimonial order. It is reported in Vol. 107, No. 26 of the Solicitor's Journal at page 515 under the title of Clifford v. Clifford. In that case a wife appealed from the dismissal by justices of her complaint for a matrimonial order on the ground of her husband's desertion, the justices having upheld a submission on behalf of the husband at the end of the wife's case that there was no case to answer. Sir Joscelyn Simon, P., in the course of his judgment, said -

> "That a significant proportion of the work of the Divisional Court arose from rulings by justices that there was no case for the defendant to answer. This was such a case. As had been said on a number of occasions, in the overwhelming majority of matrimonial cases heard in magistrates' courts a just decision could not be reached without hearing both parties. There were certain cases where the evidence in support of the complaint was so utterly ridiculous that it could be thrown out at the conclusion of the complainant's case. Similarly, there might be submissions on clear points of jurisdiction or other points of extraneous law, such as whether a foreign marriage had been proved. But in the

field of fact and of mixed fact and law with which the majority of justices' decisions were concerned, there was very rarely any advantage, and were very many disadvantages, in deciding the case at the conclusion of the complainant's case without hearing the defendant. The case would be remitted for rehearing."

I think that the principles referred to in this case would be equally applicable to proceedings under the Bastardy Law, and I would commend it as a guide to these responsible for adjudication in these matters.

Appeal allowed.

Solicitor: A.C.V. Graham (for the appellant).