JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S MISCELLANEOUS APPEAL NO. 1/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	SANDRA WALKER	APPELLANT
A N D	JAMES TULLOCH	RESPONDENT

M. Brown for the Appellant

M. Clarke for the Respondent

June 2 and July 7, 1992

ROWE P.:

At the conclusion of the arguments, we allowed the appeal, and, as promised, we now reduce our reasons into writing.

Sandra Walker, the appellant, is a single woman who on the 19th September, 1990, gave birth to a son, Correy. In a complaint brought in the Resident Magistrate's Court for the parish of St. Elizabeth, she alleged that the respondent is the father of her son and sought an Order adjudging him the putative father. The learned Resident Magistrate refused the application. From this decision she now appeals.

The appellant testified that she met the respondent in December of 1989 when she accepted a ride on his truck and saw him regularly thereafter. She alleged that she had sexual intercourse with him for the first time at Pommel's in Santa Cruz and thereafter they developed an intimate relationship. She was supported by her sister who gave evidence that the respondent would take the appellant out every Sunday and the appellant would return the following morning.

The appellant admitted that she had a previous relationship with one Mr. Howell but that relationship had ceased before she met the respondent. She did not have intercourse with anyone else whilst she was seeing the respondent.

In February of 1990 the appellant discovered that she was pregnant and it is her testimony that the respondent admitted he was the father of the child and promised to "stand by her."

Under cross-examination the appellant expressed a willingness to have a blood test taken. It is of importance that no application was made by the respondent for an Order for the same.

The respondent on the other hand testified that he first met the appellant on the 29th of January, 1990. He admitted that on one occasion he had drinks with the appellant and they engaged in sexual intercourse.

Donald Linton, a witness for the respondent testified that on the 7th of March, 1991, while he was at the Court, he overheard the respondent tell "someone" that the child was Mr. Howell's but she was saying it was the appellant's because he is a tanker driver and had money. This suggestion had not been put to the appellant during her testimony and consequently on the application of her counsel, she was recalled, whereupon she denied the conversation. She maintained that she was not at the Court on the said date. At this stage of the proceedings counsel for the respondent applied for an Order for blood samples to be taken pursuant to Section 11(1) of the Status of Children's Act. Counsel for the appellant objected on the ground that the respondent had ample opportunity to make such an application before and the application was merely a ploy to delay the final determination of the matter. The learned Resident Magistrate made no ruling on the objection neither did he make an Order. The case was then adjourned to 31st July, 1991, for submissions on the evidence.

The learned Resident Magistrate in refusing to make an Affiliation Order on 3rd September, 1991, stated, inter alia:

> "It is this Court's view that Walker may not have been given the best advice when counsel, despite her earlier consent, elected to request blood test. For in the circumstances surrounding her later change of heart the Court could draw unfavourable inferences from her refusal."

In stating the bases on which he came to his conclusion, he said, inter alia:

> "That evidence of declaration by a woman as to the paternity of her child is good evidence of that paternity and such declaration by her may only be displaced if that evidence of declaration is discredited and if it is not it may only be displaced by scientific evidence."

and.

> "That this Court is entitled to draw such inference as it considers reasonable where, an applicant initially agrees to assist the Court by offering herself and her child to scientific examination (blood test) and subsequently withdraws that consent in circumstances when that scientific examination is a justified procedure."

The following points are worthy of note:

1. There had been no DIRECTION by the Resident Magistrate ordering that there be a blood test.

2. There was in fact no refusal by the appellant to submit to a blood test. Mr. Brown merely objected to the making of an Order pursuant to Section 11(1) of the Status of Children's Act.

   The section states:

   > "In any proceedings in which the paternity of any person ... 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."

Section 13 also states:

> "Where a Court gives a Direction under s. 11 and any person fails to take any step required of him for the purposes of giving effect to the direction, the Court may draw such inferences, if any, from that fact as appear proper in the circumstances."

Section 13(1) cannot be prayed in aid until there is a failure to comply with a direction given under Section 11(1). The learned Resident Magistrate did not give a direction under Section 11(1) hence it could not be proper to say that the appellant withdrew her consent as consent was not an issue at that stage of the proceedings.

Section 12(1) of the Status of Children's Act deals with the issue of consent. The section reads:

> "Subject to the provisions of subsections (3) and (4) and without prejudice to section 13, a blood sample which is required to be taken from any person for the purpose of giving effect to a Direction under section 11 shall not be taken from that person except with his consent."

It is clear from the various sections that consent of the party is not required to enable the Resident Magistrate to give directions under Section 11(1). Consequently the learned Resident Magistrate fell into error when he concluded that he was entitled to use the withdrawal of the appellant's consent to draw inferences which were unfavourable to the appellant.

The only evidence in the case which could possibly militate against the allegation by the appellant that the respondent was the father of her child came from one Donald Linton who testified that he overheard the appellant telling an unknown person, in the courtyard at Black River, that the respondent was not the father of her child and that she had named him because he was a tanker driver who had money. This evidence was patently contrived. It lacked particularity, came at the eleventh hour and was unsupported by anyone. Nevertheless the Resident Magistrate was impressed by Linton to the extent

that it negatived in his mind the evidence of the appellant, her sister and that of the respondent himself. It was an unreasonable finding, wholly unsupported by the evidence and cannot stand.

We are of the view that this appeal must be allowed and that the respondent be adjudged the putative father of child "Correy" born on September 9, 1990. Having regard to the proved means of the respondent he is ordered to pay the sum of One Hundred and Fifty Dollars ($150.00) per week for the child's maintenance commencing on September 4, 1991, to the Collecting Officer, at the Resident Magistrate's Court, Black River for the maintenance of the said child. The respondent is ordered to pay the costs of the appeal fixed at $500.00.