JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT CIVIL APPEAL No. 42/73

BEFORE: The Hon. Mr. Justice Edun, J.A.(Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Robinson, J.A.

B E T W E E N NOEL WASHINGTON - Plaintiff/Respondent

A N D BERTRAM CLARKE - Defendant/Appellant

Mr. E.C.L. Parkinson, Q.C. for the appellant.

Mr. Allan Rae for the respondent.

7th June, 1974
29th November, 1974

EDUN, J.A.:

The plaintiff/respondent sued the defendant/appellant for damages for trespass. The date for the appellant to appear in answer to the summons on plaint No. 355/69 was June 3, 1969. On that date, the appellant did not appear and Resident Magistrate, Mr. J.R. Astwood, exercising jurisdiction in Hanover, entered judgment by default for the respondent in the sum of £100 (now $200) and Costs £13.5.0 (now $26.50). On the outer cover of the plaint there is an affidavit which states that the respondent, Noel Washington, served the summons on the appellant on May 12, 1969 by delivering same to him. The affidavit was sworn to by the respondent before R.G. Dinham J.P. for Hanover. Section 158 of the Judicature (Resident Magistrates) Law, Ch.179 provides that every summons, whether to a party or his agent or a witness, may be lawfully and competently served at any place in the Island by any person whatsoever. By section 159 of the same law, service of any summons, shall be proved by affidavit purporting to be sworn before a Justice, and such affidavit shall state the mode in which such service was effected.

The appellant did not pay the judgment debt or any part thereof. The respondent obtained a Commitment Summons which was duly served by the assistant bailiff Ezekias Jarrett on September 20, 1969. The appellant/debtor appeared before the Resident Magistrate, Mr. A.C.V. Whiting.

There is a note on the outer cover of the Commitment Summons thus:-

"Means proved. Debtor appearing to be examined as to his means is ordered to be committed to the nearest Lock-up for ten (10) days unless he sooner pays the Judgment Debt $226.50 and Costs $8.12. Execution of this order is suspended while the Debtor pays $10.00 monthly.

First payment on 1/1/70

Sgd. A.C.V. Whiting
Resident Magistrate
2/12/69"

But before December 2, 1969, the appellant made an application dated October 14, 1969 for the setting aside of the default judgment and for the ordering of a new trial on the ground that he had never been served with the plaint No. 355/69. On the back of those application papers are the following notes:-

" 25th November, 1969

Application postponed sine die

Sgd. A.C.V. Whiting,
R.M. Hanover

A.C.V. Graham.

The 4th November 1969

By Consent Application for New Trial granted on payment of costs $34.62 - if paid trial 25/11/69.

Sgd. A.C.V. Whiting
Resident Magistrate
Hanover."

The appellant, appealed against the committal order dated December 2, 1969 and in the body of text of the Notice he states: "The appellant attended court on the 4th day of November 1969, and made application through his Solicitor for trial or re-trial or Hearing or re-Hearing of the said suit but that the said application was not upheld by the said Resident Magistrate, who instead of appointing or setting down a date for hearing of the said Suit ordered that the Appellant pays ($10. ten Jamaican Dollars) per month as from 2nd January 1970, aforesaid."

On the same day he lodged into Court $50 "as security against Costs in the abovenamed suit or Action Plaint No. 355/69, Judgment Summons No. 322/69 ..." Section 256 of the Judicature (Resident Magistrates) Law Ch.179 provides that an appellant shall at the time of lodging the appeal, deposit in the Court ten shillings (one dollar) as security for the due prosecution of the appeal and shall further within fourteen days after the lodging of the appeal give security to the extent of £12 (twenty-four dollars) for payment of any costs that may be awarded against the appellant, and for due and faithful performance of the judgment and orders of the Court of Appeal.

It would appear that the appellant at the time he filed those documents and lodged $50 instead of only $25.00, had no legal assistance. In the case of Eric Christian v Eric Brown R.M.C.A. No. 46 of 1972, the payment of the sum of one dollar was not in fact made at the time the law demanded it should have been made. In the case of Vincent Patterson and Charles Nicely v Samuel Lynch R.M.C.A. No. 18 of 1973 the sum of one dollar only was paid instead of the sum of two dollars which was required to be deposited because of two appellants being involved. In the instant case, however, the sum of more than one dollar apart from the sum of twenty-four dollars for the payment of costs, has been paid. But be that as it may, nowhere in the record is there any note of the Resident Magistrate's reasons for entering the committal order on December 2, 1969 of $10 per month. The last note of his is that the application, that is, for a re-trial: "application postponed, sine die." It may well be that the appellant had not paid the costs of $34.62. But in the light of what the appellant has stated in the notice of appeal and the application for re-hearing being postponed sine die; it is reasonable to enquire what happened in Court on December 2, 1969.

In my view, it would appear that the appellant has complied with s.256, then the Resident Magistrate should draw up for the information of the Court of Appeal, a statement of his reasons for the judgment, decree, or order appealed against. Upon the receipt of such a statement, the appellant shall within twenty-one days draw up and serve his grounds of appeal. There is a "Formal Certificate" by the Clerk of

Court dated July 6, 1973 that a thorough search in the court's office was made for notes of evidence which might have been taken on June 17, 1969 but it appeared that no notes were taken. But the date of June 17, 1969 refers to the date when the default judgment was entered. When this appeal came up for consideration on February 12, 1974, the Court remitted the matter to the Resident Magistrate for notes of proceedings before him on December 2, 1969, re Plaint 355/69 and Committal summons No. 322/69. It is the committal order on December 2, 1969 which has been appealed against. This appeal again came up before this Court on June 7, 1974 and among the papers is now another "Clerk's Certificate" that a thorough search was made of the note-books of Mr. A.C.V. Whiting for notes of evidence taken on December 2, 1969 and no notes of evidence were found.

In the course of the arguments before us, the question arose as to whether or not the matter should again be remitted to the Resident Magistrate, this time for him to give this court a statement of his reasons for making the committal order appealed against. It is now quite clear that there are no notes of evidence taken by the Resident Magistrate as to what happened on December 2, 1969. In those circumstances, it would be unreasonable to ask him to remember, after a lapse of over 4 years, what happened in this matter on that day.

In the case of Lester Campbell v Eva Francis (1965) R.M.C.A. No.27/1965, there was a delay of about nine months in the Resident Magistrate's giving his reasons for judgment. Duffus P, had this to say about the importance of a Resident Magistrate's reasons for judgment:

> "This Court, more recently, has had to consider cases in which there has been delay by the learned Resident Magistrate in giving his reasons for judgment but each case stands on its own particular facts. If the Court is satisfied that as a result of the delay in giving reasons for the judgment the learned Resident Magistrate has not dealt adequately or properly with the facts of the case, or it is otherwise made to appear that some injustice may result following on the delay, the Court will, of course, order a new trial."

In this case, however, there has been no reasons for judgment, let alone delay, and there is every likelihood of an injustice occurring. However, it may well be that Resident Magistrates do not take notes of committal summons proceedings because the prepared note on the outer cover of the committal summons papers avoids such a requirement if the particulars of the order made are filled in and signed by the Resident Magistrates. But the fact remains that in this case, there could not be a committal summons order unless the appellant failed to pay the costs of $34.62, which he on November 4, 1969, by his consent undertook to pay.

As it is, the record of appeal is incomplete unless the Resident Magistrate does draw up and file with the Clerk of Court a statement of his reasons for the order he made on December 2, 1969. However, the fact remains, that in the papers which the appellant filed and are on record as grounds of appeal, the appellant asserts positively that instead of the Resident Magistrate "appointing or setting down a date for re-hearing .... ordered that the appellant pays $10 ... per month ...." In the meantime, while this appeal is still pending, another Resident Magistrate of the same Parish, has since made another committal order for the same judgment debt, on March 6, 1973, committing the appellant/debtor "to the nearest lock-up for 10 days unless he sooner pays $234.62 and costs $8.15." It does appear that the committal order appealed against, has since lapsed and if the appeal from the order dated December 2, 1969 is successful, the appellant would have gained a pyrrhic victory. We see in our papers that the appellant has applied to the Resident Magistrate for a stay of execution of the later committal order pending the appeal against the present order. We do not know the result of that application.

In my view, the interests of justice cannot be by-passed and the least I say about the affidavit of service of the original plaint No.355/69, sworn to by Noel Washington as having delivered same to the appellant, the better. Section 158 is a provision which more often than not, has worked extreme hardships, because it allows an interested party in a suit to serve the summons to appear, upon the opposite party. In this case, there may well have been no service upon the appellant at all. Further there is no sufficiency of evidence upon the record for us to assume that the costs of $34.62 were not paid. It is only because the

Resident Magistrate proceeded to make the committal order on December 2, 1969 that we can suspect that those costs were not paid. It would have been so easy for the Resident Magistrate to make a note on the outer covering of the committal summons papers, something to the effect:-

"... Re-hearing refused. Means proved. Debtor appearing ...."

So far as we can assume, there is still the note:

"25th November, 1969

Application /i.e for a new trial/ postponed: sine die. (words in brackets mine).

Sgd. A.C. Whiting
R.M. Hanover."

In these strange circumstances, the facts are -

1, there is no statement of the Resident Magistrate's reasons for making the order appealed against;
2, such statement was never lodged with the Clerk of Court;
3, the appellant has not been given notice thereof;
4, twenty-one days from the receipt thereof have not yet commenced to run to cause the appellant to file grounds of appeal; and
5, until the appellant files with the Clerk of Court the grounds of appeal, there is no legal obligation on the Clerk of Court to transmit to the Registrar of the Court of Appeal, the statement of the reasons for the order, certified copies of the notes of the Judge and all other proceedings in the cause: s.258 of the Judicature (Resident Magistrates) Law Ch.179.

For those reasons given, I would remit all the papers to the Clerk of Court to await the statement of the Resident Magistrate's reasons. No reasons may be forthcoming. No injustice will be done because the appeal will still be pending. If I were the Resident Magistrate hearing the application for a stay of execution of the committal order dated March 3, 1973, I would grant the stay of execution pending the hearing of the appeal against committal order dated December 2, 1969, because the same issues as to the setting aside of the original default judgment, the granting of a new trial and a setting aside of subsequent committal orders would be involved. In the long run, it may well be in the interest of justice for all parties concerned

to have a new trial of the original action if the appellant pays the Costs of $34.62, as to which he had previously consented, if the same were not paid.

I would, as stated, remit the papers back to the Clerk of Court, to await the statement of reasons of the Resident Magistrate with directions not to transmit the papers to the Registrar of the Court of Appeal unless sections 256, 257 and 258 have been complied with. I would make no order as to Costs in this "appeal", or proceedings before us.

Bdun J.A.

Appeal is dismissed with cost to the Defendant Respondent @ $40.00.