JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CRIMINAL APPEAL NO. 133/73

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding).
The Hon. Mr. Justice Hercules, J.A.
The Hon. Mr. Justice Swaby, J.A.

METUE CAMPBELL v. BERTELL COX

G.R. Andrade (Amicus Curiae) for Respondent.

Horace Edwards, Q.C. for the Appellant.

22nd February, and 5th April, 1974

HERCULES, J.A.:

This is an appeal against an order by Her Honour Miss P.E. Gibson, Resident Magistrate for the parish of St. Mary, adjudging the Appellant to be the putative father of a child named Mark born of the Respondent, Metue Campbell, on 6th June, 1973.

In the record, the evidence of the Respondent reads in part:-

> "Have known Defendant for about 2 years. We became friends about 2 months before I expected child. In September last year I expected baby. Had sexual intercourse with Defendant at sister's home on 23rd September, 1972. Defendant, his sister Claudia Cox, and myself went with Defendant to Defendant's friend's house to a party on 23rd September, 1972. After returning from party I stayed with Defendant until early the following morning. We had sex that night. Once I had sexual intercourse with Defendant in his car while we were returning from Defendant's

sister's home."

It would seem that the Respondent was claiming that she had sexual intercourse with Appellant on 23rd September, 1972 at the home of Appellant's sister. The only other sex act she gave evidence of was in Appellant's car while returning from Appellant's sister's home. No date is given of this latter occasion.

Therefore the only date specified of the two occasions described by Respondent was 23rd September, 1972. Yet she gave evidence that she expected the baby in September 1972. Could she really have expected the baby in September on the basis of sexual intercourse for the first time (in cross-examination) on 23rd September? In our view this evidence rendered her complaint somewhat questionable and should have alerted the learned Resident Magistrate to the necessity of looking carefully to such corroboration as would have been forthcoming.

One Ethel Wallace purported to provide the corroboration. The relevant part of her evidence was as follows:-

> "Know Defendant for a long time. About 7.30 p.m. one night I was going to shop. I saw a car slow down beside me. I heard someone call to me. Noticed Complainant and Defendant only were in car. Complainant and Defendant were sitting in front of car. Defendant was driving car. Have seen Defendant's car at Complainant's gate several times at nights about 9 p.m. When I saw Complainant and Defendant in motor car they were going away from Complainant's house. It was in July, 1972 that I saw Complainant and Defendant in motor car. Several times after I had seen Complainant and Defendant in motor car. I saw Defendant's car at

Complainant's gate."

The only date this witness could specify as seeing the couple in the motor car was "July, 1972". Although indeed the witness said that she had seen them several times after, the Respondent gave no date whatsoever as to when sexual intercourse had taken place in the motor car. It certainly could not have been in July since the Respondent clearly re-stated in cross-examination: "we never had sex until September."

We consider the evidence of the Respondent and her witness as curious and vague and imprecise. We recognise that the test is whether the facts given in evidence show a probability that the evidence of the mother is true. (Simpson v. Collinson (1964) 2 W.L.R. 387). We cannot say that this evidence can pass that test. Indeed we find that this case, having regard to the Respondent's evidence, falls in the category of "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." (See Judgment of Sir Joscelyn Simon, P., in Clifford v. Clifford (1963), 107 Sol. Jo. 515).

Appellant's Attorney, with good reason, declined to lead evidence and relied on a submission impugning the corroborative evidence. The appeal is taken on that ground since the learned Resident Magistrate proceeded to make an order against Appellant, noting that she found that there was corroboration and without also noting what fact or facts she considered capable of amounting to corroboration as required of Resident Magistrates by the case of Allen v. Dwyer (1964) 6 W.I.R. 261.

In our view the evidence of Ethel Wallace, vague and imprecise as it was, could not be said to amount to corroboration in any material particular raised in the curious evidence of the

mother. This Court is of the opinion that the learned Resident Magistrate should have acceded to the submission made and ruled against the Complainant. The appeal must therefore be allowed and the order set aside.