



is unanswerable and is unlimited in its application to any circumstances in which a charge of adultery may arise before a court of summary jurisdiction."

The trial proceeded and the appellant gave evidence in support of the grounds alleged in her complaint. She stated that the respondent and herself were married in 1968 and the marriage went well for a short while. The husband refused to give her money and would slap her everytime she asked for money to buy clothes. When she asked for food he would slap her also and he has done this, at least, about eight/<sup>or nine</sup>times. On the third September, 1971, (that is the day on which she left the home) she stated that she was washing in a tub when her brother-in-law Elijah Harford took a hose and sprayed her with it. She complained to the husband saying "look how your brother wet me". The brother said to her husband "Frank, kick her up, kick her up." The husband replied, "my foot is too good to kick her, the quicker she leaves the place and go the better for her." Then he took a piece of rope and struck her on her buttocks with it. She went away and on her return the respondent told her to go to Mr. Archibald and make right for her coffin. She went to the police station and left the home.

The husband, with the support of his brother, gave evidence that on the 3rd of September, 1971, the brother found her committing an act of adultery. Elijah Harford, the brother of the respondent, stated that on that date he was going to feed a cow, and when he reached a part of the field, he saw the appellant with a man having sexual intercourse. The man ran away and so he was unable to identify him, but it was a brown skinned man. He said he saw the appellant take her pantie and put in her bosom and he saw the erection of the man's penis. Later in the day in the presence of her husband, the witness accused the appellant of adultery.

Counsel for the appellant contended that the evidence

/of .....

of adultery should not be accepted in the circumstances of this case. It was a serious allegation and though it was not one which required corroboration yet in the circumstances of this case, the evidence of Elijah Harford should not have been accepted without corroboration.

In my view, looking at the history of the relationship alleged between the appellant and the husband's brother, his evidence alone should not have been accepted on so serious a charge. Elijah Harford lived in a house belonging to the respondent and the evidence disclosed that he and the appellant were not on good terms. In my view, it was unreasonable for the magistrate to accept the evidence of a person who appeared to be so hostile towards the respondent. In those circumstances, in my view, adultery had not been properly proved and especially when no particulars were given before the trial or at the trial.

Counsel for the respondent urged this Court to accept the facts found by the magistrate on the charge of adultery. He stated it was a rule of law that where an inferior court who is in a position to see and hear the witnesses make a finding of fact based on the evidence of a witness, this Court should not disturb that finding. He cited the case of Powell and Wife v. Streatham Manor Nursing Home (1935) A.C. 243. I am fully aware of the proposition stated in this case, and the principle is well established that where an inferior court who sees and hears the witnesses, makes a finding of fact this Court will not normally interfere, but in these circumstances, I, for myself, feel it was unreasonable on the evidence to make a finding that adultery had been proved.

The second ground of appeal was that the learned magistrate erred when he found desertion had not been proved. Counsel contended that though the magistrate found some facts in the case he did not find all the facts, and the court is able to infer that on the question of cruelty, the magistrate believed the appellant. He stated that in his reasons for  
/decision .....

decision the magistrate stated -

"On the facts I was satisfied that there were altercations between the complainant and the defendant, and that one of the occasions was on the 3rd of September, 1971 the complainant was seen by Elisha Harford having sex with a man."

A little lower down the page he said -

"I believe the complainant was struck with a rope by the defendant".

and then he said -

"In short I believe the evidence of Elisha Harford."

The magistrate appeared to believe all the evidence relating to the charge of adultery and the circumstances under which the appellant was struck with the rope related by Elisha Harford. In his reasons the magistrate also stated -

"However the wife had the right to pledge her husband's credit for necessities. The acts complained of were not sufficiently grave and weighty to constitute persistent cruelty, bearing in mind that husband and wife will at times have little indifferences, (sic). The complainant had deserted the husband ..... .. and there was no constructive desertion."

In my view, that statement shows that the magistrate accepted the evidence of the complainant in regard to the acts of cruelty complained of. He might not have believed her in respect of the circumstances under which she was struck with the rope, but he accepted the fact that she was struck with the rope. It appears to me that the magistrate came to the wrong conclusion. He inferred that these acts were not sufficient to constitute cruelty. In my view, if a husband refuses to support his wife, continually slaps her whenever she asks for clothes, and slaps her when she complains of insufficient food together with the fact that he struck her with a rope his conduct is sufficiently grave and weighty for the wife to cease to continue to live with her husband ~~and to desert him~~. In other words, the /husband .....

husband would be guilty of desertion and not the wife, and I so hold. Must the wife wait until he gives her a black eye or he does something which might take him to the criminal court?

In these circumstances, I would allow the appeal and I would remit the matter to the magistrate with the direction to make an order for maintenance in favour of the wife, and, if required, to take evidence of means.

I would allow the appeal with costs.

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E.L. St. Bernard  
JUSTICE OF APPEAL

LEWIS, C.J. (Ag.)

I agree.

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P. Cecil Lewis  
ACTING CHIEF JUSTICE

LOUISY, J.A. (Ag.)

I agree.

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Allan Louisy  
ACTING ~~CHIEF~~ JUSTICE  
OF APPEAL

LEWIS, C.J. (Ag.)

The order of the Court is that the appeal be allowed, the matter be remitted to the magistrate's court to make a maintenance order in favour of the appellant and to take evidence of means if required. Costs \$50 to the appellant.

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P. Cecil Lewis  
ACTING CHIEF JUSTICE