

IN THE COURT OF APPEAL

ST. VINCENT

Magisterial Criminal Appeal
No. 1 of 1973

Between: ESTELITHA HOMER Appellant
and
DAVID HOMER Respondent

Before : The Honourable The Acting Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Louisy (Ag.)

K. John for appellant
A. Williams for respondent

1973, May 22

JUDGMENT

CECIL LEWIS, C.J. (Ag.)

This is an appeal from a decision of the Magistrate of the Second District dismissing the appellant's application for maintenance.

The appellant and the respondent are wife and husband. They were married in 1968, and lived together at a place called Farm. There are six children of the marriage living. On the first of June, 1971, the respondent left his wife and went to live with a woman called Chelita Pompey and when the wife's application was brought he was still living with this woman at Hopewell.

In August 1971 the wife went to an hospital where she had another baby. There her husband came to see her and met her already dressed about to leave the hospital. She went to live with her mother as she had nowhere else to go. She subsequently attempted to return to the house in which herself and husband originally lived but her husband told her if she did so he would either kill her or pay someone to kill her. He has not maintained her since he left her. She gave evidence that he works as a contractor and has a car which he lets out on hire. She asked the magistrate on that evidence to make an order that her husband pay a "reasonable" sum for her maintenance.

/Section....

Section 3 of the Maintenance Ordinance No. 1/1949 states that it shall be the duty of every man to provide reasonable maintenance for his wife. Section 13 of this Ordinance sets out various grounds on which a maintenance order may be granted by the court and these include the case where a husband who is under a duty to maintain his wife wilfully neglects or refuses to do so, and also the case where he has deserted her. The wife's complaint was based on both of these grounds which the magistrate found established, but she dismissed the wife's application because in her opinion no evidence was adduced to show that the husband was possessed of sufficient means to provide reasonable maintenance for his wife. I shall return to this later. I must however comment on the magistrate's findings as regards desertion. She said she found the respondent guilty of constructive desertion but the circumstances of this case do not reveal any such thing as constructive desertion. This is a case of ordinary desertion where a husband left his wife and went to live with another woman. In point of fact when she wanted to return to live in the matrimonial home he refused to let her do so and threatened her. His intention was clearly to bring cohabitation between them to an end and this amounted to desertion.

The appellant gave evidence that her husband works as a contractor and that he has a car which he hires. That in my opinion was evidence of means. She did not quantify his means, that is to say, she did not say how many dollars a month he was earning but she did give evidence which showed that he was capable of earning money and where such evidence is given it has been held that an order for maintenance may be made. This point is brought out very clearly in the judgment of Sir. F.H. Jeune, President, in the case of Earnshaw v. Earnshaw, (1896) Probate 160. In this case the learned President said at page 162:

"Now, if the justices had applied their minds to this question it would be difficult to disturb their decision; but they were advised by their clerk that it was not necessary for the prosecution to show that the appellant had means or the capability of earning means. It is clear, however, to my mind that, before they could find him guilty of this offence of wilfully neglecting to maintain his wife, they must be satisfied either that the appellant had actual earnings in his possession, or that he had the capability of earning money: it would, I think, be enough if he could earn money but wilfully abstained from doing so."

/The.....

The position here is that the wife has established that her husband works as a contractor and has a car which he hires and so it is obvious that he is capable of earning money. That evidence having been given and no evidence in rebuttal being adduced by the husband or any witness on his behalf, the wife has established a prima facie case that "he had the capability of earning money," and that he was in breach of his legal duty to maintain her.

In these circumstances the learned magistrate was wrong in dismissing the complaint and the appellant was entitled to an order for maintenance even for a nominal sum. This would establish her right to maintenance and she would thus be able at some later date to bring a fresh application to vary the order for maintenance if the occasion so warranted. The appeal will accordingly be allowed, and the matter remitted to the Magistrate to make an order for a nominal sum. Costs, \$25 to the appellant.

P. Cecil Lewis
Acting Chief Justice

ST. BERNARD, J.A.

I agree.

E.L. St. Bernard
JUSTICE OF APPEAL

LOUISY, J.A. (Ag.)

I agree.

Allan F. Louisy
Justice of Appeal (Ag.)