

ST. CHRISTOPHER/NEVIS

IN THE COURT OF APPEAL

MAGISTERIAL APPEAL NO. 12 of 1987

BETWEEN:

FREDERICK SMITHEM - Defendant/Appellant

and

MARLIN NISBETTE - Complainant/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: Emile Ferdinand for the Appellant
Henry Browne for the Respondent

1988; March 8,
Oct. 3.

JUDGMENT

SIR LASCELLES ROBOTHAM, Chief Justice

On October 28, 1987, the appellant was adjudged to be the putative father of a male child born of the respondent on June 10, 1978. He was ordered to pay towards the maintenance of the said child, the sum of \$15.00 per week until the child attains the age of 16 years.

The complaint was not made to the Magistrate's Court until the 13th October, 1987, when the child was 9 years old, and no previous complaints had been filed. When the matter came on for hearing, paternity was denied.

This issue on appeal to this Court, is not that there was no evidence on which the appellant could have been adjudged the putative father, but that the Magistrate had no jurisdiction to hear the case, as none of the statutory conditions precedent to the issuing of a summons as set forth in section 123 of the Magistrate's Code of Procedure Act Chapter 46 had been fulfilled or satisfied.

Section 123 reads-

"Any single woman who may be with child, or who may be delivered of a child, may either before the birth of such a child, or at any time thereafter upon proof that the man alleged to be the father of such child has within twelve months next after the birth of such child paid money for its maintenance or otherwise assisted to provide for its support, or at any time within twelve months next after the return to the State of the man alleged to be the father of such child, and upon proof that he ceased to reside in the /State....

State within twelve months next after the birth of such child, make application to a Magistrate for a summons to be served upon the man alleged by her to be the father of the child..... and such Magistrate shall upon such application being made issue his summons to the person alleged to be the father, to appear before the Magistrate and to show cause why he should not be compelled to maintain such child."

Having quoted in extenso the relevant section, it is now necessary to examine the chronological order of the dates and events leading up to the application for the summons, as disclosed by the evidence of the respondent, and her witness. The respondent gave evidence before the Magistrate stating that the child was born on 10 June, 1978. At the date of the birth, the appellant was away from the State of St. Kitts and was actually living in St. Martin. When in fact the appellant did return to St. Kitts, the child was 1 year and 6 months old. The respondent's mother Clementina Nisbette stated that the appellant never contributed towards the Hospital fees, as he was in St. Martin when the child was born. She further said that when he came back in 1981 and the child was 1 year and 6 months old, he gave her \$60.00 U.S. towards the purchase of food and clothes for the child. It is therefore established out of the mouth of the respondent and her mother that no monetary payment was made by the appellant as the alleged father within twelve months of the birth of the child, nor did he provide any other form of support within the said period.

Based therefore upon this evidence of the respondent and her mother, it is clear that when the application for the summons was initially made 9 years after the birth of the child, the first two conditions precedent as stipulated by section 123 had not been satisfied, in that (1) the complaint was not laid before the birth or within twelve months from the birth of the child, and (2) there was no proof of payment of money or of other assistance by way of support, within twelve months of the birth of the child.

The respondent however, it having been established that the appellant was out of the State before the child was born and that he only returned when the child was one year and six months old, could still have had her summons properly issued if she had applied for it within twelve months of the appellant's return to the State. This means that it would have to be done before the child was two years and six months old. Regrettably however, she sat down on her rights and did not make the complaint until the child had turned nine years of age.

At the trial Counsel for the appellant called no evidence and relied on his submission that no basis for the issue of the summons in accordance with section 123 had been established, but he was overruled by the Magistrate who went on to make the order. In this the Magistrate was clearly wrong.

Halsbury's Laws of England (3rd edition) Vol. 3, para. 177
 which is relevant to our jurisdiction states the manner of making the application by the mother thus:-

"An application may be made either at any time before the birth, in which case the complaint must be substantiated on oath, or at any time within twelve months from the birth.

If the putative father has ceased to reside in England before the birth, or within twelve months after, the application may be made within twelve months after his return.

After the expiry of the above periods, no application by the mother can be made, except where the putative father has within twelve months after the child's birth paid money for the child's maintenance....."

These United Kingdom provisions are contained in the Bastardy Laws Amendment Act 1872, 35 and 36 Victoria C. 65, section 3 and are in pari materia with our section 123 of Chapter 46. These periods of twelve months were increased in the United Kingdom to three years by the Affiliation Proceedings (Amendment) Act 1972) sec. 2(1). Bromley's Family Law (Sixth edition) Chapter 16, page 597 under sub-heading "Time Limit upon application for Summons states:-

"In order to prevent the mother from commencing proceedings some time after the birth of the child when the defendant might find it difficult to adduce rebutting evidence the summons must be applied for within one of the following periods.

- (1) Before the birth of the child; or
- (2) within three years of the child's birth; or
- (3) at any time if the defendant has paid money for the child's maintenance within three years of its birth; or
- (4) within twelve months of the defendant's return to England if he ceased to reside in England either before the child's birth, or within three years after the birth.

The appeal therefore must be allowed, and the order made by the Magistrate set aside. It is with reluctance that the Court must come to this conclusion, but the behaviour of the appellant cannot be applauded. He succeeded on a legal point, but this apart, there was evidence before the Magistrate on which he could have been adjudged the putative father. His moral responsibility, as opposed to his legal liability, to maintain the child seems clear, and it is to be hoped that he will recognize this.



L.L. ROBOTHAM,
 Chief Justice



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E.H.A. BISHOP,
Justice of Appeal



A handwritten signature in cursive script, appearing to read "G.C.R. MoE", written over a horizontal line.

G.C.R. MOE,
Justice of Appeal.