SAINT LUCIA

IN THE COURT OF APPEAL

MAGISTERIAL CIVIL APPEAL NO. 3 OF 2003

BETWEEN:

LORNA FARREL

Appellant

and

NATHANIEL ST. VILLE

Respondent

Before:

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| The Hon. Mr. Adrian Saunders | Justice of Appeal |
| The Hon. Mr. Brian Alleyne, S.C. | Justice of Appeal |
| The Hon. Mr. Hugh A. Rawlins | Justice of Appeal [Ag.] |

Appearances:

Mrs. Wauneen Louis-Harris for the Appellant
Mrs. Kim St. Rose for the Respondent

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2004: February 20;
April 26.

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JUDGMENT

[1] RAWLINS, J.A. [AG.]: This case came on appeal against an order that a Magistrate of the Family Court made on the 5th day of April 2003. By that order, the learned Magistrate dismissed an application that the Appellant, Ms. Farrel, made for a maintenance order against the Respondent, Mr. St. Ville. The Learned Magistrate dismissed the application because she found that it was not proved on the evidence. She said that the evidence that Ms. Farrel gave was inconsistent and, at times, questionable. She also found that Ms. Farrel's evidence was not corroborated in material particular for the purposes of section 5(1) of the Affiliation

Act, Cap. 8 of the Laws of St. Lucia, Revised Edition 1959, as amended ("the Act".).

[2] We delivered an oral Judgment on the day when we heard the appeal. We promised to deliver a written Judgment subsequently for the guidance of the Family Court and the public. In the order that we made, we remitted the case for a trial de novo (new trial) before a Magistrate of the Family Court. We made no order as to costs. In this written Judgment, we outline, first, the grounds of appeal and the objections to the appeal. Second, we consider the relevant statutory provisions. In the third place we consider the merits of the appeal.

## The Grounds of Appeal and Objections

[3] One ground on which the appeal was brought is that the decision of the Learned Magistrate is erroneous in law. Learned Counsel for Ms. Farrel, Mrs. Wauneen Louis-Harris, submitted that the application for the maintenance order was made within the time that is stipulated in section 3 of the Act. She said that Ms. Farrel went to the offices of the Family Court to lay her complaint on 5th January 2000. The child, Nadiege, was born on 10th January 1999. Mrs. Louis-Harris submitted, further, that the evidence that Ms. Farrel gave and the results of a blood test were sufficient to meet the requirement of corroboration for the purpose of section 5 of the Act.

[4] Mrs. Louis-Harris also submitted that the Magistrate failed to accept that the blood test corroborated Ms. Farrel's evidence in material particular. She stated, further, that the Learned Magistrate failed to consider the conjoint effect of the results of the blood test and Mr. St. Ville's refusal to take a DNA test. She enjoined this Court to order him to take the DNA test. She said that this Court could do so in its inherent jurisdiction and within the powers that are circumscribed by section 1140(1) of the Civil Code.

[5] Another ground for the appeal is that the Learned Magistrate's dismissal of the application for the maintenance order was altogether unwarranted having regard to the evidence. Mrs. Louis-Harris stated that the Reasons for Decision that the Magistrate gave on 29th September 2003 relied on what the Magistrate referred to as inconsistencies. She said that when these are examined, it would be found that they do not amount to inconsistencies at all.

[6] Learned Counsel for the Respondent, Mrs. St. Rose, raised objection to the appeal on two jurisdictional grounds. The first was that the Magistrate had no jurisdiction to hear the matter because the application was made out of time. The second objection was that the case was unlawfully reinstated after the Magistrate dismissed it at the first hearing. Mrs. St. Rose insisted that when the matter was dismissed the Magistrate became *functus officio* and further hearing of the matter and the decision were nullities. We now outline the issues that we considered.

## The Issues

[7] We thought that it was necessary to consider, first, whether the application was out of time. The second issue that we considered was whether the Magistrate was in fact *functus officio* upon dismissing the case on 9th May 2000, and therefore lacked jurisdiction to reinstate it and to hear it after it was reinstated. A third issue arose during the hearing of the appeal. It became apparent that the Magistrate who started the trial did not conclude it. In her reasons for decision, the second Magistrate considered evidence that the first Magistrate took. The question therefore arose whether she could lawfully have done this.

## The Relevant Statutory Provisions

[8] Section 3 of the Act is pivotal in this case. It is therefore fully reproduced, as also is section 4. Section 5(1) is also mentioned for its purport and effect.

[9] The side note to section 3 of the Act states "Putative father to be summoned on application of mother". The section provides:

> "3. Any single woman who may be with child or who may be delivered of a child may –
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> (a) before the birth of the child, or
> (b) at any time within twelve months from the birth of the child, or
> (c) at any time thereafter upon proof that the man alleged to be the father of the child has within twelve months next after the birth of the child paid money for its maintenance, or
> (d) at any time within the twelve months next after the return to the Colony of the man alleged to be the father of the child, upon proof that he ceased to reside in the Colony within the twelve months next after the birth of the child,
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> make application to the Magistrate of the district in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child the woman shall make a deposition upon oath stating who is the father of the child, and such Magistrate shall thereupon issue his summons to the person alleged to be the father of the child to appear before the Magistrate on some day to be named in the summons."

[10] Section 4 of the Act is under the rubric "Condition of issue of Summons". It states:

> "It shall be lawful for the Magistrate, on any application for a summons under this Ordinance, to refuse to issue such summons if he is not satisfied that there is reasonable cause to believe that the man alleged to be the father of the child is in truth and in fact the father of such child, and that such application is made bona fide and not for any purpose of intimidation or extortion".

[11] Section 5(1) of the Act is quite verbose. It is under the rubric "Order for Maintenance". It permits a Magistrate of the District in which a summons was issued to hear the evidence on the application if he or she is satisfied that the respondent had seven days notice of it. If the Magistrate is satisfied that the evidence of the mother is corroborated in some material particular, the Magistrate may adjudge the respondent to be the putative father of the child. The Magistrate may then proceed to order the putative father to make such weekly payments that are reasonable for the maintenance and education of the child, within the upper limit that is stipulated. The Magistrate may also order the putative father to pay

expenses incidental to the birth or death of the child, if the child died before the order is made. The Magistrate may also make orders for costs and for retroactive payments in certain circumstances.

Was the application late?

[12] The child was born to Ms. Farrel on 10th January 1999. Ms. Farrel has insisted that Mr. St. Ville, with whom she had an intimate relationship for some time, is the father of the child. Mr. St. Ville denies paternity. However, he admits that he had an intimate relationship with Ms. Farrel for some time. He said that it ended in February 1998. He has not contributed to the maintenance of the child.

[13] When Ms. Farrel went to the Family Court Office on 5th January 2000 to lay her complaint and to apply for the maintenance order against Mr. St. Ville, a Clerk entered the complaint into the Complainant Book on that date. However, the Clerk asked Ms. Farrel to return at a subsequent date for the filing of the application. She returned on 31st January 2000. Her application was formally filed and a Magistrate then issued the summons.

[14] Mrs. St. Rose submitted that the application was filed on the 31st January 2000, and this took it outside of the time that section 3(b) of the Act stipulates. She said that this provision requires strict compliance and this is evidenced by the Forms that are provided in the Schedule of the Act for the application. She insisted that no application is made until the Form is completed and filed. She submitted that the application was out of time because Ms. Farrel did not complete and file the Form within the twelve months that section 3(b) of the Act stipulates.

[15] Form No. 3 of the Schedule to the Act provides the application Form for a complaint on which a summons is to be issued under section 3(b) of the Act. The complaint must be taken before a Magistrate, who should date and sign it. The Magistrate must then issue the summons on the complaint or application in Form 4

of the Schedule. It is issued to the person whom the complainant alleges is the father of the child. The Magistrate for the District must sign the summons.

[16] It is clear that this process is administrative in nature. Form 3 of the Schedule is not merely an application. It is in fact a complaint. If a single mother goes to the offices of the Family Court and lays her complaint within 12 months of the birth of the child pursuant to section 3(b) of the Act, the completion of the administrative process and the time taken for that completion to take place is then dependent upon the administrative efficiency of the office.

[17] In this case Ms. Farrel lodged her complaint on 5th January 2000. This was within the stipulated time. She thereby did what was within her power to bring her complaint or application in a timely manner. She was asked to return at a date that was convenient for the administrative process of the Court. It would be quite anomalous and unjust for the Court in turn to shut out her application or complaint.

[18] There will be occasions when a single mother in the position of Ms. Farrel will go to the Family Court to lay a complaint and a Magistrate will not be available to take it and issue the summons. This is an ever present reality, particularly because of the paucity of Magistrates in our courts. It may also be inconvenient for the staff at the office to process the application at the time that the complaint is laid. For all practical purposes, their application would be made when they present their complaint at the office. We are concerned that this Act, which is intended to provide for the children of single mothers, or the administrative processes that the Act engenders, should not militate against the maintenance or well being of the children.

The effect of the dismissal

[19] The grounds on which the Magistrate first dismissed the case, after only a brief hearing are not clear. They are not stated in the Record. It is clear, however, that

at the stage when it was dismissed, the case was not tried on the merits. The Record shows that the hearing of the application commenced in the Family Court on 9th May 2000. The first note in the Record states:

> "Both parties present. Blood tests have established that the defendant, Nathaniel St. Ville, is not excluded as the father of the child, Nadiege, born on January 10, 1999."

[20] The Record then shows that Ms. Farrel commenced evidence on oath. Very shortly into her evidence in chief, however, she said that Mr. St. Ville never paid her any money with respect to the child either during her parturiency or after the birth of the child. At that point the Magistrate, having verified this statement, stopped the case and dismissed the application. No reasons were given for this action. It is obvious, however, that the Learned Magistrate proceeded on the understanding that Ms. Farrel's application came under section 3(c) of the Act. It was apparently dismissed because Mr. St. Ville had not paid any maintenance within 12 months after the birth of the child.

[21] However, Ms. Farrel made her application for the maintenance order in Form 3. It was therefore brought under section 3(b) of the Act. It was not out of time for the purposes of this provision. The Record shows that the case was reinstated on 24th May 2000. It appears that the Court then realized that the case was properly brought under section 3(b) of the Act, and was not out of time. The hearing continued on various days. The application was eventually dismissed on 25th April 2003. The learned Magistrate dismissed the application on the ground that Ms. Farrel did not prove her case on the evidence.

[22] It is noteworthy that in paragraph 4, page 1, of her Reasons for Decision that were given in writing on 29th September 2003, the learned Magistrate stated:

> "Much has been made of the fact that this matter was "dismissed" on the 9 May 2000, but was then reinstated by the court on the 24 May 2000. Although, it is clear that the fact of the dismissal and reinstatement was the subject of much legal argument, the fact remains I accept that the matter was rightly reinstated and as such the complainant is required to

> prove that the defendant is the father of Nadiege, proof of financial support is therefore not required".

[23] We agree that the Magistrate acted correctly, on the applicable principles, when he decided to reinstate the case. We think, however, that the procedure by which it was reinstated was incorrect, as we shall show in Paragraph 31 below.

The applicable principles

[24] It is trite principle that a Magistrate is *functus officio* after he or she has discharged the judicial duty to hear a matter and announce the decision of the court. When this is done, a Magistrate cannot rescind the decision and retry the case. Where therefore a Magistrate hears a case and convicts a person or dismisses the case, the Magistrate is *functus officio*. He or she is not usually at liberty to re-open the case even to correct an error.

[25] It is not always easy to determine whether a Magistrate has announced the decision of the court in a case. The question arose in R. v Essex Justices, ex parte Final. Same v Same [1962] 3 All E. R. 924. In this case, the Court of Queens Bench issued certiorari to quash a decision that Justices made in a case that involved a traffic offence. They had heard the evidence and announced that they would have fined the defendant. Counsel for the defendant then embarked upon further submissions. The Justices thereupon dismissed the case. On appeal, the Court of Queens Bench held that when the Chairman of the Justices announced the fine, they were *functus officio* because they had announced their decision. The Court of Queens Bench also issued mandamus directed towards the Justices that required them to substitute the conviction and the sentence of the fine in the Register.

[26] In our view, the judgment of Salmon J. (as he then was) is particularly instructive for the purposes of our case. He stated the basic principle at page 927D thus:

> "It is quite plain on authority that once a decision by Magistrates is announced in open court, that decision so announced amounts either to an acquittal or to a conviction, as the case may be. Once the Magistrates have convicted or acquitted, they are functus officio and cannot alter their decision."

[27] The Learned Judge then stated that the only apparent exception to this general rule is exemplified in R. v Marsham, Ex. p. Pethick Lawrence [1911–13] All E. R. 639. In this case, after a Magistrate convicted an accused person, it was discovered that one of the witnesses had not been sworn. When this was realized, the Magistrate said, in effect, that there had been a mistrial. He retried the case. The accused was convicted. On appeal, it was held that the Magistrate acted correctly because the first purported trial was a nullity. Salmon J. said that, in effect, there was no trial at all and, therefore, nothing to prevent the Magistrate from hearing the case according to law. The Judge said that in these types of cases, where the original proceedings are nullities, a Magistrate is merely going on to try a case that was never tried. (See page 927E–F of the Judgment).

[28] There was no lawful ground on which the Magistrate could have dismissed Ms. Farrel's application on the first day of hearing in May 2000. The Magistrate had not heard the case at all. He was therefore not *functus officio*. In the circumstances, the Magistrate was quite correct to reinstate the case.

Hearing by Two Magistrates

[29] As we observed earlier, during the course of the hearing it became apparent that the Magistrate who gave the final decision in this case did not hear the application from the outset. The name of the Magistrate before whom the trial commenced on 9th May 2000 is not entered in the Notes of Evidence. The case was dismissed by that Magistrate. The Notes of Evidence show that after the case was reinstated, the first trial day was 5th June 2001. The Notes do not give the name of the Magistrate who presided then. Ms. Farrel gave her evidence in Chief on that day.

She was cross-examined when the case continued on 11th June 2001. On 9th July 2001, Learned Counsel for Ms. Farrel closed her case. Learned Counsel for Mr. St. Ville made a no case submission on the ground; *inter alia*, that the Magistrate was *functus officio* after he dismissed the case on 9th May 2000.

[30] The case was next heard on 5th November 2001. The Notes do not indicate the Magistrate who heard the matter on that day. The Magistrate took the evidence of Anne Marie Joseph and Antoinette Stevens, Clerks of the Family Court. Ms. Stevens said, in effect, that she accepted the application for lodging in Form 3 under section 3(b) of the Act because Ms. Farrel came to lodge the complaint five days before the first birthday of the child. She said, further, that she accepted the complaint after she consulted the Magistrate who was Mr. Magloire. She said that it was the Magistrate who asked her to reinstate the case. In the result, fresh summonses were sent to the parties.

[31] We pause at this juncture to make an observation and two suggestions. We observe that the evidence of Ms. Stevens shows that the case was reinstated by what amounted to an administrative procedure. It is our view that this was a judicial duty. We suggest that it should always be treated as such. The case was purportedly dismissed by judicial pronouncement from the Bench. It should have been reinstated by judicial pronouncement in open court with the parties and their Counsel present.

[32] The second suggestion is that the Notes of Evidence should, in addition to Counsel for the Parties, always provide the name of the presiding Magistrate on each occasion that a case is called. It will also be helpful if they show the Counsel who appears for each Party on each occasion, as well as Counsel who leads examination in chief, cross-examination and re-examination.

[33] We noted that the case was fixed and called on various occasions after 5th November 2001. There was no further hearing, however, until October 2002. A

note that is just before the entry of the date on 8th October 2002 states: "Current Magistrate, Christine Phulchere presiding". The Magistrate heard submissions and adjourned the matter for decision. On 14th February 2003 the Magistrate ruled that Mr. St. Ville had a case to answer. The trial continued. Mr. St. Ville gave evidence and was cross-examined. Some questions arose with respect to a DNA test. The case was adjourned to facilitate DNA testing. When the hearing of the case resumed on 25th April 2003, there were no results from the DNA tests because Mr. St. Ville did not attend. The application was then dismissed on the merits.

[34] The written decision of the Magistrate indicates that she considered the evidence that she took. It also indicates she also took into consideration evidence that was taken before she came to the case. It seems clear that she did not hear the evidence that Ms. Farrel gave or see her when she was cross-examined. The part heard trial by the first Magistrate should have been vacated and a new trial ordered and conducted. In the end, the Magistrate made a decision partly on evidence that was heard by another Magistrate. That decision cannot be sustained. It was mainly for this reason that we decided to remit this case to the Family Court for a fresh trial.

The DNA Test

[35] Mrs. Louis-Harris urged us to either remit this case for a new trial before a Magistrate of the Family Court, or, in the alternative, to remit it with a direction that the Parties proceed to take the DNA test. We noted that the Notes of Evidence for 14th February 2003 indicate that after much urging, Mr. St. Ville agreed to submit to a DNA test. The case was adjourned to 25th April 2003 to facilitate it. The Notes for this latter date reveal that Mr. St. Ville did not attend to have the test done. The Magistrates' Courts have no power to compel a person to submit to a DNA test. This Court has no power to order a person to submit to DNA testing for the purposes of affiliation proceedings.

[36] It was in the foregoing premises, that we allowed the appeal and remitted the case for hearing *de novo* before a Magistrate of the Family Division, and made no order as to costs before this Court.

[Sgd.]
Hugh A. Rawlins
Justice of Appeal [Ag.]

I concur.

Adrian Saunders
Justice of Appeal

I concur.

Brian Alleyne S.C.
Justice of Appeal