[2016] JMCA Civ 52

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATES CIVIL APPEAL NO 2/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SILVERA ADJUDAH**	**APPELLANT**
AND	**CHERIETHA LALOR**	**RESPONDENT**

Appellant in person

Wilwood Adams instructed by Robertson Smith Ledgister & Company for the respondent

21 June and 21 November 2016

MORRISON P

[1] I have read in draft the reasons for judgment of my brother F Williams JA. I agree with his reasoning and have nothing useful to add.

F WILLIAMS JA

Background

[2] Mr Silvera Adjudah (the appellant) has appealed against an order of a Resident Magistrate for the parish of Manchester. By that order, made on 18 November 2014, the learned Resident Magistrate had dismissed the appellant's application to commit Ms

Cherietha Lalor, the mother of his child and the respondent herein, to prison for breach of a court order. The order that he claims that the respondent is in breach of is an order for him to have visitation rights in respect of his said child.

The order

[3] The said order granting him visitation rights was made on 1 March 2012 and contains the following terms:

> "UPON THIS MATTER COMING UP FOR hearing on the 1st day of March, 2012, in the Resident Magistrate's Court for the parish of Manchester Holden at Mandeville before His Hon. Mr. O. Burchenson, Resident Magistrate for the parish of Manchester. AND UPON hearing the Application of Silvera Adjudah, the following order was made:
>
> > By consent, access to applicant every 2nd Saturday from 9:00 a.m. to 3:00 p.m. DATED THE 1st DAY OF March 2012."

The application in the court below

[4] The application for attachment for breach of the order was heard in the court below over a period of some nine or so days spread over several months, beginning on 27 March 2014 and culminating with the court's decision on 18 November 2014.

The appellant's case

[5] The substance of the appellant's case is reflected in paragraphs 2, 3 and 4 of his affidavit sworn to on 21 December 2012, which was filed in support of his application. Those paragraphs read as follows:

> "2. That the mother has refused to give me visitation to my daughter ... on the days that are designated, which is

every 2nd Saturday of the month from 9:00 am to 3:00 pm.

3. That I was refused by Miss Lalor on the day I tried to get access to the child, September, October and November and on other days before. The day I would visit the child would be on the 2nd Saturday of the month.

4. That the mother has also refused to communicate with me prior to the date that I should go to visit my child. Such communication is necessary to arrange with her on the day that I would come to visit the child."

The respondent's case in the court below

[6] The defence advanced by the respondent is most easily found at page 27 of the record of proceedings, where the following explanation is given:

> "In court it was said he should come to my home between 9:00 a.m. to 3:00pm every other Saturday.
>
> He did not show up.
>
> I received a few calls from him on those Saturdays he was to come.
>
> I did not return those calls. I did not as there was a fixed location for him to come when he come he would get the child.
>
> I did not want him to drag me into arguments prior to visits.
>
> The days when he did not come, I did not try to find out where he was, why he did not come.
>
> He never ever come to the house between 9:00am and 3pm on those Saturdays.
>
> I was always present and ...always prepared for his visits. "

[7] The respondent otherwise spoke to a very strained relationship between herself and the appellant (at page 28 of the record):

> "I did not call him when I did not see him come because I was under a lot of pressure from the father. We could not agree on anything and there were continued arguments. I thought I would have a mental breakdown. So I decided not to answer. I tried to contact him to let bygones be bygones, recuperating from surgery and I had a young baby."

The ruling in the court below

[8] In the court's reasons for judgment, it gave two main bases on which its decision was made: (i) procedural irregularity in the making of the application; and (ii) on the facts of the case, the court not being satisfied beyond reasonable doubt that the case had been made out.

[9] The nub of the court's judgment is to be found in several paragraphs and the conclusion. This is how those paragraphs read:

> "78. ...I...find it very difficult to believe that the Applicant did in fact attend the Respondent's home, since the making of the Order to have access to the child.
>
> 79. I accept the Respondent's evidence that she prepared the child for the Applicant to come and collect her. The child was therefore accessible to the Respondent. Therefore, even if the Respondent did not answer the calls or the emails, the child was at the home ready to be collected between the times stated in the Order.
>
> ...
>
> 82. In the circumstances therefore, I find that the Respondent did not breach the Order. I find that she had made the child accessible to the Applicant at her home. There was nothing in the Order which stated where the Applicant was to have access to the child.

It was just a day and a time. It was up to the parties to work out the details.

83. If the parties could not work out the details, but the Respondent made the child accessible, which I find as a fact she did, then I cannot say that I have been satisfied that she breached the Order.

...

CONCLUSION

86 Therefore I am compelled to dismiss the application as he failed to comply with the procedural requirement to serve an endorsed copy of the Order on the Respondent.

87 If I am wrong in that respect, then having heard the evidence of both parties, I am not satisfied, so that I can feel sure, that the Respondent has breached the Order of the Court."

[10] It may be useful to set out the main provisions of the law governing both the procedural aspect and the substantive aspect of the matter.

The procedural aspect of the matter

[11] The procedure that is to be followed in applications for attachment for breach of a court order is to be found in the Resident Magistrates Court Rules (the Rules). The relevant provisions are contained in Order XXII, Rules 32-34 of the rules, which read as follows:

"32. - Where a breach has been committed of an order in the nature of an injunction or of any other order, interlocutory or otherwise, within the competence of the Court which could in the Supreme Court be enforced by attachment of the person or committal, the party entitled to the benefit of the order shall, if desirous of obtaining an order of attachment, make application to the Clerk. The Clerk shall thereupon

prepare and issue for service a copy of the order sought to be enforced, sealed with the Seal of the Court and indorsed with a Notice according to the Form in the Appendix A. and the Clerk may, if the party by whom the order was obtained so desire, order the copy so indorsed to be served by the Applicant or his solicitor upon the party to be bound thereby, and in default of such order the said copy shall be issued to the Bailiff for service. In either case the copy shall be served in the same manner in which service of summonses may be effected.

33. - If the person bound by the order fails to obey it, the Clerk on the application of the party entitled to the benefit of the order, shall not less than three days after the service of the copy indorsed, as provided by the last preceding Rule, issue for service a notice under the Seal of the Court requiring the person who has failed to obey the order to appear at a Court to be held on the day and at the place to be named in such notice to show cause why he should not be committed for his contempt in neglecting to obey such order. The notice shall be issued for service and served personally, or it may be otherwise served if, after failure to serve personally, the judge shall so allow. By leave of the Judge the notice may be issued and served at an earlier period than is above prescribed.

34. - (a) On the day named in the notice mentioned in the last preceding Rule, the Judge on proof of service of the copy of the Order duly indorsed as provided by Rule 32 and of the above notice as provided by Rule 33 of this Order, and of the continued disobedience of the person in default, may order a warrant of attachment to issue either unconditionally, or on such terms as shall be just and may make such order as to costs as he may think fit: Provided that if the party in default appears either in person or by his Solicitor, proof of service of the copy of the order and notice shall not be necessary, unless the Judge shall otherwise order: Provided also that the warrant shall issue and may be executed forthwith without notice

> or service of the order authorizing its issue, unless the Judge shall otherwise order..." (Emphasis added)

The approach of the courts to applications for attachment

[12] The authorities show that the courts have taken a largely conservative and cautious approach to committing or attaching persons in this type of proceeding. A summary of a few of the authorities and the principles stated therein will be sufficient to demonstrate this:

> (a) **Iberian Trust, Ltd v Founders Trust and Investment Co Ltd** - [1932] All ER Rep. 176 - A penal notice is required to be endorsed on an order that is to be served on a respondent in committal proceedings.
>
> (b) **Gordon v Gordon** [1946] 1 All ER 247 - "[S]ince orders for committal and attachment affected the liberty of the subject, proceedings for contempt by disobedience of an order to do something outside the court could only be enforced if the rules relating to the process of committal or attachment had been strictly complied with."(headnote).
>
> (c) **In Re Bramblevale Ltd**. [1970] Ch 128 - "...where a person was charged with contempt of court, which was an offence of a criminal nature involving the liberty of the subject, his guilt must be proved beyond reasonable

doubt..." (headnote). (Per Lord Denning MR: i. "Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence [of contempt] is proved beyond reasonable doubt." - page 137 D-F: ii. "A: "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him.") (Emphasis added).

(d) **Stewart v Sloley and others** - [2011] JMCA Civ 28 - per Morrison JA (as he then was) at paragraph [37]:

'[37] It seems to me that, from the material provided to the court, the following propositions are uncontroversial:

> (i) The court's jurisdiction to punish for contempt of court is long established, as "a punitive jurisdiction founded upon this, that is, for the good not of the [parties] to the action, but of the public, that the orders of the Court should not be disregarded, and that people should not be permitted to assist in the breach of those orders in what is properly called contempt of Court" (per Rigby LJ in **Seaward v Patterson**, at page 558);
>
> (ii) conduct alleged to be in contempt of court may be classified as "(a) conduct which involves a breach, or assisting in the breach, of

> a court order and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or more generally as a continuing process" (per Sir John Donaldson MR, in **Attorney General v Newspaper Publishing**, page 294);
>
> ...
>
> (iv) rules of court requiring the service of an order with a penal notice endorsed thereon in certain specified circumstances, as a precondition to committal or confiscation of assets as the punishment for breach of the order also have a long history, are not to be regarded as wholly technical and must be strictly complied with (**Iberian Trust, Benabo**)..."

(e) **Dodington v Hudson** (1824), 1 Bing. 410 - Per Gifford CJ: "All the authorities shew that before an attachment can be enforced, the party proceeded against must be proved to have committed a wilful disobedience of the order of the court..."

Discussion and analysis

[13] On the evidence that emerged in the court below, there was no proof of service of the order of which the respondent was alleged to have been in breach. The appellant sought to overcome this hurdle by saying that he had relied on the clerk in the court's office for the procedural aspects of his application to be dealt with. The clerk is the person to whom the application for attachment is to be made; and who is responsible

for preparing and issuing for service a copy of the order that is sought to be enforced (see Order XXII, Rule 32).

[14] If there was some deficiency in the procedure in the court's office, then it would be unfortunate (although no conclusive finding of fault on the part of the clerk can, in the circumstances of this case, be made). However, any such possible error or oversight on the part of the clerk could not be a reason for ignoring the guidance in the cases discussed above. Those cases speak to the importance of always considering the liberty of the subject and stipulate that preconditions to committal "...are not to be regarded as wholly technical and must be strictly complied with" (**Stewart v Sloley and others** - citing **Iberian Trust** and **Benabo**).

[15] In the absence of definitive proof of service of the order as required by rule 32, there can be no certainty that (as rule 33 stipulates), the notice of application was issued "not less than three days after service of the copy [order] indorsed..."

[16] I have considered the fact that rule 32 also requires a notice to be indorsed on the order that is to be served on the prospective respondent to an application for committal for contempt. That rule stipulates that the form to be followed is one to be found in Appendix A. A search of Appendix A reveals form No 203 as the relevant form, its wording being as follows:

"No. 203 - Notice to be Indorsed under Order XXII, Rule 32.
(Order XXII., Rule 32.)
To A. B., of
Take notice, that unless you obey the directions contained in this order, you will be liable to be committed to prison.

Dated this day of 19 .

Clerk of the Courts"

[17] This notice does not form a part of the document that is included in the record of proceedings and so that would be another reason why, procedurally, the application for attachment before the court could properly be regarded as having been defective. Here again the caution in cases such as **Stewart v Sloley and others**, for strict compliance with procedural requirements is apposite. Further, as observed by George C in **Ramdat Sookrat v Comptroller of Customs and Excise** (1992) 48 WIR 163, at page 168 c: "the alleged contemnor is entitled to take advantage of any procedural irregularities that may be available to him in order to avoid the consequences of his failure to comply".

[18] It is true that the proviso in rule 34 states that proof of service of the order and notice will not be necessary where the party said to be in breach appears either in person or by his solicitor. However, the same proviso gives the judge discretion whether or not to do away with the requirement for service. Despite finding on the return day that the proceedings before it amounted to a nullity, however, the court proceeded to hear the application. The court below was faced with circumstances in which: (i) not only was service of the order in issue; but also (ii) there was great uncertainty about the indorsement on the order of the penal notice; and (iii) although the order in the record of proceedings states "by consent", there is no recital of who was present at the time of the making of the order and the order is not signed by the parties. In these circumstances it would have been reasonable (if not expected) for the court below to

have ordered, on the first day that the matter went before it, that the proceedings be commenced *de novo*. Doing so would have saved the time and costs occasioned by the matter being heard over an additional eight days in addition to the several other mention dates.

[19] Had the court below made that clear and definitive order, it would have been an exercise of its discretion permitted by rule 34, which, on the evidence available, could not be faulted.

[20] I find as a fact that the proceedings in the court below were defective for want of strict compliance with the procedural requirements outlined in the Rules. That finding is sufficient to dispose of the appeal. However, as the court below also dealt with the substantive application, it is necessary for me to give some attention, however briefly, to the substance of the application itself.

The substance of the application

[21] In considering this aspect of the matter, it is best to have regard to the wording of the order itself. The relevant part of it reads:

> "By consent, access to applicant every 2nd Saturday from 9:00a.m. to 3:00p.m."

[22] The maker of the order no doubt had the not-unreasonable expectation that, in the interest of the child, the parties would have co-operated in ensuring that the order would have seen a smooth implementation. It is likely that, for that reason, the wording of the order was left to the bare essentials.

[23] Against the background of the need for this co-operation to a successful implementation of the order, each side in essence contended that it was a lack of co-operation from the other side that led to the application for attachment coming before the court. The appellant contended that, despite numerous telephone calls and electronic mail (e-mail) messages to the respondent, he was unable to make contact with her and so gain access to his child. The respondent, in answer, spoke to a background of a strained relationship and of having to tolerate what amounted to harassment by the appellant and of doing what she thought was necessary to comply with the court order.

[24] To my mind, the failure in the implementation of the order could easily have been due either to the contention of the appellant on the one hand; or to the contention of the respondent on the other; or to a combination of both, with each party being a contributor to the same extent or to varying degrees. The exact circumstances would have been a matter for the court below to resolve, giving consideration to its assessment of the credibility of the parties.

[25] This scenario calls to mind the words of Lord Denning MR in **In Re Bramblevale**. What was before the court below was a situation in which there were, at the very least, (in the words of Lord Denning): "...two equally consistent possibilities open to the court...". In such a situation the conclusion by the court below could only have been that: "...it is not right to hold that the offence is proved beyond reasonable doubt".

[26] In these circumstances it would have been difficult (if not impossible) for there to have been any finding of contempt by the alleged contemnor, there having been a challenge for the court below to conclude that: (i) there was any failure to comply with the order by her; or (ii) that any failure on her part to comply with the court order was deliberate or wilful. What is more, a reading of rule 34 indicates that, in any case, even if all the matters of service have been satisfactorily dealt with and a respondent's continued disobedience to an order had been established, the judge "...may order a warrant of attachment to issue..." (emphasis added). Thus, the Rules give a judge a discretion to decide whether to order the warrant - even where all the conditions have been satisfied.

[27] In the instant case, it could never successfully be argued that all the conditions had been met. There is also a high standard of proof. What the appellant had to establish in order to have succeeded on appeal was that this was an improper exercise of the discretion vested in it by the court below. This he has failed to do.

[28] Finally, the fact that the decision of the court below rested to some extent on its findings of fact and assessment of the evidence, the approach that this, an appellate court, should take in dealing with this appeal is well settled and has been expressed in numerous cases. To take one such case, it is best to have regard to the words of Lord Sumner in **SS Hontestroom (Owners) v SS Sagaporack (Owners)** [1927] AC 37, 47:

> "... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial

> judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.
>
> … If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should … be let alone."

[29] It was for these reasons that when the matter came before us on 21 June 2016, I concurred in the making of the following orders:

(i) Appeal dismissed

(ii) No order as to costs.

EDWARDS JA (AG)

[30] I too have read the draft reasons for judgement of my brother F Williams JA and agree. I have nothing further to add.