SHEELA WATI LAL

v.

RAMENDRA MAHESH CHAUDHARY

[HIGH COURT, 1989 (Byrne J) 15 December]

Civil Jurisdiction

Contempt of Court- alleged breach of Order of Magistrates' Court- whether alleged defect in the Order a defence.

Proceedings were brought for contempt of court, it being alleged that the Respondent had breached an order of the Magistrates' Court. The High Court HELD: that the charge against the Respondent had not been proved beyond all reasonable doubt and acquitted the Respondent, however it stressed that an alleged want of regularity in the order said to have been breached was not a defence to a charge of contempt.

Cases cited:

Barca v. The Queen (1975) 133 CLR 82
Chuck v. Cremer 1 Coop. Temp. Cott. 342
Comet Products UK Ltd v. Hawkex Plastics Ltd (1971) 1 All ER 1141
Hadkinson v. Hadkinson [1952] 2 All ER 567
In re Bramblevale Ltd [1970] 1 Ch. 128
McGreevy v. Director of Public Prosecutions [1973] 1 WLR 276
Peacock v. The King (1911) 13 CLR 619
Plomp v. The Queen (1963) 110 CLR 234
Thomas v. The Queen (1960) 102 CLR 584

S.M. Koya for the Applicant
N.S. Arjun for the Respondent

Byrne J:

The Respondent is charged with contempt of Court, the contempt alleged being first that he breached an undertaking given by him to the Juvenile Court at Suva on 13th June 1989 that he would return a child of his marriage to his wife Mumtaz Nazmin Begum, namely Ronika Rupanjali to that Court on 15th June 1989 at 11.00 a.m.; secondly that during the pendency of judicial proceedings in that Court and the pendency of an Order as to interim custody of the child Ronika Rupanjali he knowingly assisted his wife Mumtaz Nazmin Begum to remove her from Fiji to Sydney, Australia by Qantas Airways on 14th June 1989 and thereby placed the said child out of the jurisdiction of the Juvenile Court and this Court.

The evidence before me consists of a number of affidavits, six filed on behalf of the Applicant and two on behalf of the Respondent and oral evidence given on

their cross-examination by all but one of the various deponents. The uncontested evidence in the proceedings is that the child Ronika Rupanjali or Ronika Rupanjali Chaudhary as she is sometimes called, was born to Mumtaz Nazmin Begum at the Lautoka Hospital on 5th July, 1978 and that the Respondent is the child's father. About three months after the child's birth the Respondent and his wife who were in full time employment at the time, left the child with the Applicant who is her maternal aunt and apart from the period from June 1989 until the present time the Applicant has had the defacto custody of Ronika and has educated and maintained her with the applicant's now estranged husband.

On or about 27th April 1989 the Applicant sent the child who then held a Fiji Passport to spend a holiday with her natural parents in Sydney and on 3rd June 1989 the Respondent's wife returned to Fiji with Ronika and another child of his marriage, according to the Respondent, to spend a holiday with the Applicant who was then unwell and wanted to see the child. Ronika was then taken to the home of the applicant in Rewa Street, Suva,and it is then alleged the Applicant failed to return her to Mumtaz Nazmin Begum in breach of a promise given by the Applicant. This then apparently caused the child's mother to institute proceedings for *Habeas Corpus* in this Court against the Applicant, and the Applicant to begin legal proceedings in the Magistrates' Court (i.e. the Juvenile Court in Suva) on 12th June 1989 seeking an Order for custody of the child.

It then seems that following a telephone call from his wife, the Respondent flew to Fiji from Sydney on 10th June and on 12th June was informed by a Police Officer, the Respondent's brother-in-law, an Inspector Abdul, that the Applicant had obtained some kind of Court Order allowing her to have custody of the child.

The proceedings for *Habeas Corpus* were fixed for hearing before Palmer J at 3.00pm on 13th June. At about 10.45am on the same day the Respondent attended a meeting with the Resident Magistrate of the Juvenile Court in Suva, Mr. Moti Rai at which were also present the Respondent's wife, the Applicant, a Miss Patricia Jalal, the Public Legal Adviser of the Social Welfare Department of Fiji and Mr Vijay Maharaj the Barrister and Solicitor who had been instructed by the Respondent's wife in the *Habeas Corpus* proceedings.

Following discussions between the parties, and it seems the suggestion by Miss Jalal, Mr Moti Rai handed over Ronika to the Respondent and his wife for the purpose of allowing the child and her parents to decide whether it would be better for her to remain in Fiji with the Applicant or to return to Australia with her natural parents. I find as a fact that at that meeting the Respondent and his wife undertook to Mr. Moti Rai that they would return Ronika to him in his Court on 15th June 1989 and that all parties including the natural parents would also appear in his Court on that day. According to Mr Moti Rai whose evidence on this point was not contested, his object was that on 15th June he would seek further information from the child as to her wishes. Just before the meeting concluded, the Public Legal Adviser after discussions with the Respondent and

his wife and the Applicant requested that the Respondent surrender his Australian Passport to the Court as a sign of his *bona fides*; this the Respondent did.

The parties then dispersed, the Respondent and his wife taking the child to the home of his brother-in-law in Wailoku where the Respondent spent the night.

I now turn to the relevant evidence and the law applicable to these proceedings.

The first witness called on behalf of the Applicant was Mr. Moti Rai who to a large extent repeated the contents of his affidavits sworn on 11th August and 13th September 1989. In cross-examination he was asked under which Section of the Juveniles Act Cap. 56 he acted in making an Order for interim custody of Ronika to the Applicant and he replied, "Section 63 (2)" He then said that it was his understanding of this Section that if a person has defacto custody of a child for a time and no steps were taken by the natural parents to obtain custody, the defacto custodian had the right to claim custody provided the natural parents were notified of the application. He added that in his view Section 63 Sub-section (1) allowed a Juvenile Court to review an Order for custody on the application of a child's parent if the Court was satisfied that the parent had abandoned the child. He said that it was his understanding of Section 63 that a stranger could make application for custody of a child under the Section and that the Section also empowered a Juvenile Court to make interim custody orders.

The second witness called was Miss Patricia Jalal who was not cross-examined on the affidavit she swore on 13th September 1989 and in which inter-alia she stated in paragraph 12 that the Respondent had undertaken to return Ronika to Mr. Moti Rai's Court on 15th June. The Applicant herself then gave evidence. She said in cross-examination that her allegations in her affidavit of 21st June that she believed the Respondent intentionally assisted his wife to take the child out of the jurisdiction of this Court and the Magistrates' Court so as to defeat the course of justice were not based on fact but only on her belief.

The Respondent then gave evidence amplifying certain matters to which he had deposed in his affidavit in answer to the present application sworn on 6th September 1989. He said that he did not know that he was taking part in any Court proceedings when he appeared before Mr. Moti Rai but he agreed in cross-examination that he and his wife had given an undertaking to the Magistrate that they would return the child to him on 15th June. I was not at all impressed by the Respondent's efforts to attempt to "play down" the nature of the undertaking which he had given to the Juvenile Court. I shall come back to this later. The Respondent said that after leaving the Juvenile Court with Ronika they did some shopping in Suva and then went to his brother-in-law's house in Wailoku.

He began to drink with some friends and an argument then developed with his wife. His wife fought with him and, apparently criticised him for drinking and then said that she was leaving with Ronika to spend the night in an hotel. He said his wife was not happy that the Applicant had taken Ronika, and that the argument

lasted about fifteen minutes, the time being 4.00 pm. He said he presumed that his wife had gone to her parents' house and did not believe her when she said she was taking their child to an hotel. This was because at all previous times his wife had stayed with her parents and he believed this was where she intended to go for the night. It was for this reason that he did nothing to try to bring Ronika back to him. He said he continued to drink until about 4.00am on 14th June and that because of this he did not get up that day until about 12.00 noon. Sometime during that day he was told as a result of a telephone call that his wife had taken Ronika back to Australia.

In cross-examination he admitted that he had done all he could to assist his wife in serving the Writ for *Habeas Corpus* on the Applicant and that after one unsuccessful attempt to see Mr. Moti Rai to explain what had happened he made no further attempts. I find him an unsatisfactory witness in certain respects who told some obvious falsehoods. He first said that he did not know that the applicant had obtained some kind of Court Order in respect of Ronika but, when pressed, agreed that in his affidavit of 6th September he had sworn that he knew the Applicant had obtained a Court Order entitling her to keep Ronika in her custody. He also said in evidence that his brother-in-law, Inspector Abdul, had told him nothing about arranging the meeting with Mr. Moti Rai on 13th June but admitted that this was a direct contradiction of what he had said in the affidavit of 6th September. He denied that on 21st June he had gone to the Australian Embassy in Suva to try to obtain another passport and said that his only purpose was to complain at having being asked by Miss Jalal to surrender it. I do not believe the Respondent on this. Finally he said he had read paragraph 10 of the affidavit of the Applicant sworn on 21st June in which the Applicant stated that her Counsel had telephoned Mr. Hall of the Australian Embassy on 20th June concerning the Respondent's passport. He then agreed that in his own affidavit of 6th September he had sworn that he was unaware of the contents of paragraph 10 of the Applicant's affidavit.

The only other witness called on behalf of Respondent was Mr. Vijay Maharaj the solicitor but I do not consider that his evidence greatly assists me.

I have had the benefit of comprehensive submissions from both Counsel who between them cited some 24 authorities, all of which together with several others and various references to text books, I have read for the purpose of preparing this judgment. It is convenient to deal first with a submission by Mr. Arjun on which he spent considerable time. Basing himself on the evidence of Mr. Moti Rai and particularly his statement that in making an interim custody order in favour of the applicant he acted under Section 63 of the Juveniles Act, Mr. Arjun then went on to argue that it was clear that the Learned Magistrate had no jurisdiction to make any interim custody order for the Applicant and that if this were true, the Respondent could not be held to be in contempt of an order which Mr. Arjun submitted was a nullity.

Mr. Koya argued on behalf of the Applicant that even though the Learned Magistrate stated he made his order under Section 63 it was open to me to find that he had actually acted under Section 41. I tend to prefer Mr. Arjun's submission on this point because it seems to me that an order under Section 63(2) can only be made by a Juvenile Court when it has before it an application for custody of a child by its parents and not by any other person. However, even if Mr. Arjun is correct and on this I find it unnecessary to make any final judgment, it seems to me that his submissions cannot be reconciled with other law.

In *Halsbury's Laws of England* Vol 9 of the 4th Ed. in the section dealing with contempt of Court the opening sentence of paragraph 55 reads as follows:

> "Orders improperly obtained: The opinion has been expressed that the fact that an order ought not to have been made is not a sufficient excuse for disobeying it, that disobedience to it constitutes a contempt, and that the party aggrieved should apply to the Court for relief from compliance with the order."

There are several cases then cited to support this statement including Hadkinson v. Hadkinson [1952] 2 All E.R. 567. In that case at page 569 Romer, L.J. delivering the first judgment of the Court said this:

> "It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and, until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck v. Cremer (1 Coop. Temp. Cott. 342):
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> "A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it ..... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid - whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

From my readings of the cases it seems that this passage from Lord Cottenham, L.C. has never since been questioned so that on the material in the present case I believe it was open to the applicant to lay the present charges against the Respondent. The question which I must now consider is whether on all the evidence the Respondent is guilty of the charges. It is customary to classify contempt of Court as either (1) criminal contempt, consisting of words or acts, obstructing or

tending to obstruct or interfere with the administration of justice or, as in the present case, contempt in procedure, otherwise known as civil contempt consisting of disobedience to the judgments, orders or other process of the court. But although the subject has been thus classified, nevertheless it is now clear law that the standard of proof of the charge of contempt of court regardless of whether it be criminal or civil contempt is that of the criminal law, namely proof beyond reasonable doubt - see - In re Bramblevale Ltd (C.A) [1970] 1 Ch. 128 particularly per Lord Denning M.R. at page 137. This statement of the law has been confirmed in numerous other cases, only one of which I need mention here namely Comet Products UK Ltd v Hawkex Plastics Ltd [1971] 1 All E.R. 1141.

It is conceded by Mr. Koya for the Applicant that the evidence against the Respondent is circumstantial. It is based on the inferences which it is said I should draw from the conduct of the Respondent at the relevant times. It may also be said in my view that the case against the Respondent is based to a large extent on hearsay and presumption. I refer particularly to paragraphs 7, 8, 9, 10 and 11 of the Applicant's affidavit of 21st June.

I take the law as to circumstantial evidence in Fiji to coincide with what was said in the High Court of Australia in Barca v. The Queen (1975) 133 C.L.R-8Z at p. 104; 50 A.L.J.R. 108 at p. 117.

> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': Peacock v. The King (1911), 13 C.L.R. 619 at p. 634. To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable their to draw': Plomp v. The Queen (1963), 110 C.L.R. 234, at p. 252; see also Thomas v. The Queen (1960), 102 C.L.R. 584, at pp. 605-606. However, 'an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury From finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence. Peacock v. The Queen at p. 661. These principles are well settled in Australia. It was recently held by the House of Lords in Mc Greevy v. Director of Public Prosecutions, [1973] 1 W.L.R. 276, that there is no duty on a trial judge to direct the jury in express terms that before they could find the accused guilty they should be satisfied that the facts proved were inconsistent with any other reasonable conclusion than that the accused had committed the crime. That decision goes only to the form of direction necessary to be given to the jury, and although its effect may be

> that the practice in this respect is less rigid in England than in Australia, it does not reflect upon the correctness of the principles stated, which are really principles of logic and common sense."

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Although I have been critical of parts of the Respondent's evidence, I bear in mind that these being in the nature of criminal proceedings, the Respondent was strictly under no obligation to give evidence at all yet he chose to do so. His evidence leaves me with a strong suspicion about the truth of his claim that he knew nothing before-hand of his wife's intention to take their child out of Fiji. Strong suspicion can never constitute satisfaction beyond reasonable doubt and here it seems to me there is a reasonable doubt as to whether or not the Respondent in any way connived in the departure of his wife and the child from Fiji. He said, and he was not broken on this in cross-examination, that when his wife stated that she was going to leave with their child to spend the night of 13th June in an hotel he simply did not take her seriously because he knew that when previously in Fiji she always stayed with her parents and, he presumed that in this instance she was going to do the same. Of course it may be said that his alleged drinking bout with his friends was merely an after-thought and a convenient explanation for his subsequent behaviour. This may be true but the Court's duty when there is any reasonable doubt about the evidence called by the prosecution or in this case the Applicant is to dismiss the charge or charges. In a case such as this it seems to me the form of Scottish Verdict of 'not proven' would be more appropriate, but the law of Fiji does not allow me to return such a finding.

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For these reasons I accordingly dismiss the charges against the Respondent and I direct that his Passport be returned to him forthwith from the Suva Magistrates' Court.

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(Application dismissed.)

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