ATTORNEY GENERAL v. FLETCHER

Supreme Court
Spry, C. J.
13 November 1979

Contempt of court — disobedience to injunction — whether necessary to prove contumacity
Contempt of court — standard of proof
Injunction — whether prohibition absolute

The Attorney General applied for and was granted an interlocutory injunction restraining the defendant from continuing to occupy or from entering certain Crown land on which he had placed a vehicle which he was using as his home. He failed to comply with the order, saying that he had nowhere where he and his wife and baby could go. The Attorney General applied for an order of committal. He conceded that imprisonment was not appropriate but asked for some lesser penalty.

HELD: (i) When an injunction prohibits an act, the prohibition is absolute.

(ii) Although the defendant was in contempt, it would not in the circumstances be reasonable to punish him.

Cases referred to in the order

Fairclough v. Manchester Ship Canal Co. [1897] W.N.7; 41 Sol. J. 225
Steiner Products Ltd. v. Willy Steiner Ltd. [1966] 1 W.L.R. 986
Stancomb v. Trowbridge U.D.C. [1910] 2 Ch 190
Manchester Corporation v. Connolly [1970] 1 Ch. 420
In re Bramblevale Ltd. [1970] 1 Ch. 128
Knight v. Clifton [1971] 2 All E.R. 378
Worthington v. Ad-Lib Club Ltd. [1965] 1 Ch. 236
Attorney General at the Relation of the Leyton (Essex) U.D.C. v. Walthamstow U.C. [1895] 11 T.L.R. 533
Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd. [1966] 2 All E.R. 849
Ansah v. Ansah [1977] 2 All E.R. 638

Motion

This was an application for an order of committal for contempt of court.

C. Finch for the Attorney General
P. M. Triay for the defendant

16 November 1979: The following order was read—

This is an application under RSC Ord. 52, r.3, for an order of committal as punishment for contempt of court.

The defendant is a Gibraltarian. He arrived in Gibraltar on 5 April 1979, with his wife and child. About 14 June, he requested permission from the Director of Tourism to park a vehicle in the Caravan Parking Site at Sir Herbert Miles Road for use as a temporary home. This was refused and on 19 June, he was given notice to remove the vehicle but failed to do so. On 28 June 1979, the Attorney General took out a writ for a permanent injunction to restrain the defendant from continuing to occupy or from entering the site.

On 4 July, the Attorney General moved the Court for an interlocutory injunction to the same effect, and this was granted but subject to a thirty days suspension. At the end of that period, the defendant had not vacated the site. He was warned of the consequences of failure to comply with the order of the court. Not only did he not leave, but he erected a small fence around or near his vehicle.

The defendant had, on 20 June, telephoned the Director and stated that he had nowhere else to go. On 3 July, he applied to be included on the housing list and later, following a report by the Family Care Officer, he and his wife and child were categorized as "homeless" by the Family Care Unit. The Government has at present no accommodation available, either permanent or emergency.

On 11 September the Attorney General applied for and was granted leave to apply for an order for committal.

Two questions arise on the present application: first, is the defendant in contempt, and, secondly, if he is, what action is appropriate.

On the first question, Mr Finch, for the Attorney General, submitted that there had been contumacious disregard of the court's order. He submitted, relying on *Fairclough v. Manchester*

Ship Canal Co. (1), *Steiner Products Ltd v. Willy Steiner Ltd.* (2) and *Stancomb v. Trowbridge U.D.C.* (3), that far from being casual, accidental or unintentional, the breach had been deliberate, as was shown by the fact that a reason had been given for non-compliance. Moreover, that reason was not a valid excuse: for this, Mr Finch relied on *Manchester Corporation v. Connolly* (4), in which Lord Diplock utterly rejected a defence of necessity advanced on behalf of tresspassers who said that they had nowhere to go.

Mr P. Triay, for the defendant, began by submitting that it was for the Attorney General to prove the contempt beyond reasonable doubt (relying on *In re Bramblevale Ltd.* (5)) and that he had failed to do so. I accept the first part of the submission, as to the standard of proof, but not the second. It is the facts that establish the contempt that have to be proved beyond reasonable doubt and here there is no dispute as to fact. The only issue is whether the admitted facts constitute a contempt.

Secondly, Mr Triay submitted that the defendant's disobedience was not contumacious. When referred by the court to *Knight v. Clifton* (6), Mr Triay felt constrained to argue that the relevant dicta were not good law, on the basis that an order by way of equitable relief could not be absolute, and he argued that the *Steiner* case and *Worthington v. Ad-Lib Club Ltd.* (7) were still good law.

The question when disregard of an order of court amounts to contempt has had a curious history. It begins in 1895 with *Attorney General at the Relation of the Leyton (Essex) U.D.C. v. Walthamstow U.C.* (8). No report is presently available, but a quotation which appears in *Worthington's* case indicates that Chitty, J., was of the opinion that wilful disobedience for the purposes of Ord. 42, r.31, "did not involve obstinacy." I observe in passing that the present rule, RSC Ord. 45, r.5, omits the word "wilful" but I do not think the omission makes any practical difference.

Next, in 1897, there is *Fairclough's* case, of which a brief report appeared in the Weekly Notes and a fuller report in the

(1) [1897] W.N.7.
(2) [1966] 1 W.L.R. 986.
(3) [1910] 2Ch. 190.
(4) [1970] 1Ch 420.
(5) [1970] 1 Ch. 128.
(6) [1971] 2 All E.R. 378.
(7) [1965] 1 Ch 236.
(8) (1895) 11 T.L.R. 533.

Solicitors' Journal (1) which is, unfortunately, not available here. The Weekly Notes report contains a statement that

> "casual, or accidental and unintentional disobedience to an order of the Court is not enough to justify either sequestration or committal; the Court must be satisfied that a contempt of Court has been committed — in other words, that its order has been contumaciously disregarded."

This was a decision of the Court of Appeal.

It was referred to in *Stancomb's* case, in 1910, but Warrington, J., said

> "In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order."

The next case was in 1965, *Worthington's* case, in which Stirling, J., rejected the approach of Warrington, J., and considered himself bound by the decision of the Court of Appeal in *Fairclough's* case, still relying on the Weekly Notes report, but saying that failure to obey an order might be said to be a deliberate disregard of it in circumstances where no real trouble had been taken to obey it.

The following year, in *Steiner's* case, Stamp, J., after considering *Worthington's* case, reverted to the *Fairclough* case, interpreting "contumaciously" as meaning "wilfully."

Two months later, in *Re Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd.* (2) the judgment of the Restrictive Practices Court, read by Megaw, P., referred to the Solicitors' Journal report of *Fairclough's* case as showing that the words quoted above and cited or referred to in all the cases, were obiter dicta and, moreover that the court had only been dealing with the penalties of imprisonment and sequestration and had expressly recognised that a person might be ordered to pay damages and costs even though his breach was

(1) 41 Sol. J. 225.
(2) [1966] 2 All E.R. 849.

neither contumacious nor reckless. The court followed the judgment of Warrington, J., in *Stancomb's* case and, on the particular facts with which it was dealing, held that certain breaches of undertaking were contempts of court, even though they were

> "things done, reasonably and despite all due care and attention, in the belief, based on legal advice, that they were not breaches."

Finally, in 1971, came *Knight's* case in the Court of Appeal, in which Russell and Sachs, L.JJ. expressly approved the decision in the *Mileage Conference* case, so far as it was held that contumacity need not be proved. Sachs, L.J., said

> "In other words, it is my view that when an injunction prohibits an act, that prohibition is absolute and is not to be related to intent unless otherwise stated on the face of the order."

Those opinions may very technically be described as obiter, but that they were very carefully weighed is indicated by a remark of Sachs, L.J., when, after referring to the conflict of authority, he added

> "(now resolved by our judgments today)."

I have dealt with this matter at what may seem inordinate length because if *Worthington's* and *Steiner's* cases were to be followed, I should have held that the defendant's conduct was not contumacious. I think, however, that the proper approach is to be found in *Knight's* case and that this court ought to follow it. On that basis, there can be no doubt that the defendant is in contempt and I so hold.

Before leaving this subject, I would remark with respect that the notes appearing in the Supreme Court Practice, 1979, under RSC Ord. 45, r.5 (45/5/4) do not appear to be wholly reliable.

It remains to consider what should be done. Although this is an application for committal, Mr Finch conceded that imprisonment would not be appropriate. I agree. "Committal orders are remedies of last resort" (per Ormrod, L.J., in *Ansah v. Ansah* (1)). I would go further I cannot see that it would be proper to punish the defendant at all. Mr Finch has argued that the pro-

(1) [1977] 2 All E.R. 638

perty rights of the Crown must be protected: as an abstract statement, I agree. The difficulty here is that no one has been able to suggest any place where the defendant can go. Mr Finch suggested from the Bar that the defendant could find some place to go if he made sufficient effort and he suggested that the defendant might be able to stay with relations. The defendant has, however, sworn in his affidavit that he has been to estate agents, relations and friends trying unsuccessfully to find a home. I cannot act on a supposition, unsupported by evidence and negatived by the defendant's evidence.The defendant's relations may have no space available or they may not want him: he cannot force himself upon them. He says that he cannot afford to take a flat on the open market. Where is he to go? Gibraltar is all Crown land except for a limited amount of private property. Wherever he goes without consent he will be a trespasser. It has not been suggested that, being a Gibraltarian, he should be forced to leave Gibraltar.

I cannot agree with Mr Finch that this case is on all fours with the *Manchester Corporation* case. I think the reference in that case to the defendants having nowhere to go was meant in a different sense, particularly as it was linked with a reference to preserving their way of life. I do not think it was suggested that there was nowhere in all England where they could go, but rather that they had no place of their own in the Manchester area. I respectfully agree that the defence of necessity in that case had no merit. Here, it seems to me, the argument is really one of inability to comply. I cannot see that it would be any true compliance with an order not to trespass on Crown land for the defendant to move to another piece of Crown land and trespass there. In the *Manchester Corporation* case, Lord Diplock remarked

> "it is not within the Court's power, and no part of its function, to provide solutions to sociological problems which call for administrative action by central or local government....."

It seems to me that that is what I am really being asked to do in these proceedings.

I think the only course I can take is to refuse the motion and that I now do, at the same time warning the defendant that he is in

continuing contempt of court and that a fresh motion of committal may be brought if it can at any time be shown that he has some place where he can go, even though it may be a place which he regards as unsatisfactory. He is under a duty to the court to comply with its order as soon as he can.