

[2003–04 Gib LR 349]

ROCCA v. ROCCA

SUPREME COURT (Pizzarello, Ag. C.J.): February 9th, 2004

Family Law—domestic violence—power of arrest—inherent jurisdiction to attach power of arrest to injunction granted under Civil Procedure Rules—to be phrased to ensure that arrest possible only when breach observed personally by arresting officer

Constitutional Law—fundamental rights and freedoms—protection of life and personal security—Constitution, s.1(1) may require state to take steps to protect life and security of person—if appropriate, court may attach power of arrest for limited period to injunction made under inherent jurisdiction restraining domestic violence

The claimant applied for a permanent injunction with power of arrest restraining the defendant from approaching within 50 metres of the home and from coming within 30 metres of the claimant, and that the defendant shall not threaten, assault or contact the claimant.

There had previously been four injunctions made against the defendant, including one made on November 25th, 2003 under the inherent jurisdiction of the court and most recently one made under the Domestic Violence and Matrimonial Proceedings Ordinance 1998. This most recent injunction had been made on December 12th, 2003, when it was reported that the defendant had made threats to kill the claimant, and a power of arrest was duly attached under the Ordinance, valid until January 10th, 2004. The power of arrest could not be extended any further as the Ordinance imposed a time limit of nine months for such orders.

The claimant submitted that although the nine-month time limit inherent in the Ordinance prevented a lengthier order with power of arrest attached, the court should invoke the provisions of the Constitution to attach a power of arrest to the injunction granted on November 25th, 2003 under the inherent jurisdiction of the court, as where a claimant justifiably was in fear of death or serious harm the court should use all its powers to protect her. It would otherwise be in breach of its duties to protect her right to life and personal security under s.1(1) of the Constitution.

The defendant submitted that (a) the court had decided that no power of arrest should be attached to the injunction—it was only after claims of a threat to kill the claimant that such a power had been attached to

another injunction; (b) it had been incorrect for the court to attach the power of arrest at that time as there had been no reliable evidence of such threats and the power of arrest should only be attached where there was strong evidence of the risk of further violence, pursuant to the Domestic Violence and Matrimonial Proceedings Ordinance; and (c) there was no authority for attaching a power of arrest to an injunction granted under the court's inherent jurisdiction and to do so would therefore be improper.

Held, dismissing the application:

(1) The application for an injunction with a power of arrest attached would be rejected as no reliable evidence had been put forward of the threat to kill the claimant. The injunction granted on November 25th, 2003 still stood, but no power of arrest would be attached to it because, but for the claim of the threat, the situation was the same as on November 25th, 2003, when attaching a power of arrest had been refused. It was effectively the same test that would be applied when considering attaching such a power to an injunction granted pursuant to the Domestic Violence and Matrimonial Proceedings Ordinance, as this would only be done when there was cogent evidence of a risk of further violence (para. 11).

(2) Nevertheless, if the circumstances warranted it (which they did not here) the court had power, in the most extreme cases and for a limited period, to grant an injunction with a power of arrest attached in the exercise of its inherent jurisdiction. When such an injunction was granted, the terms of the order should be couched very carefully so as to preclude a police officer having to make an arrest other than on the basis of his own observations (paras. 11–12).

Cases cited:

- (1) *G, Re*, [1982] 1 W.L.R. 438; [1982] 2 All E.R. 32; (1982), 12 Fam. Law 119, considered.
- (2) *Harrison v. Lewis*, [1988] 2 FLR 339; [1989] FCR 765; (1988), 18 Fam. Law 477, considered.
- (3) *Osman v. UK*, [1999] 1 FLR 193; (2000), 29 E.H.R.R. 245; 5 BHRC 293; (1999), 29 Fam. Law 86, considered.
- (4) *Z v. UK*, [2001] 2 FLR 612; [2001] 2 FCR 246; (2002), 34 E.H.R.R. 3; 10 BHRC 384; (2001), 31 Fam. Law 583, considered.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.1(1): The relevant terms of this sub-section are set out at para. 6.

D. Hughes and *Ms. A. Balestrino* for the claimant;
J. Daswani for the defendant.

1 **PIZZARELLO, Ag. C.J.:** By way of a claim form issued on December 9th, 2003, the claimant seeks a permanent injunction with a power of arrest restraining the defendant from approaching within 50 metres of 19 Ark Royal House, Laguna Estate, Gibraltar and from coming within 30 metres of the claimant wherever she may be, and that the defendant, his servants or agents shall not threaten, assault or contact the claimant.

2 The reason for the application as set out in the application notice is that the defendant has breached orders for injunctive relief before and has now made threats that, when he is released from prison on December 12th, 2003, he will kill the claimant. She seeks the protection of a power of arrest so that the Royal Gibraltar Police will arrest the defendant, and hold him in custody until he is able to be brought before the court in relation to any breach.

3 This matter is allied to matrimonial proceedings in Action 2003 D. & M. No. 39, in which four injunctions have been made against the defendant. The first was made on April 10th, 2003, the others on August 14th, November 25th, and December 12th, 2003. A power of arrest has been attached in respect of three of these injunctions pursuant to the Domestic Violence and Matrimonial Proceedings Ordinance 1998, the last being on December 12th, 2003, when the injunction with a power of arrest was extended to January 10th, 2004, after which the nine months' time-limit allowed under s.4 of that Ordinance expired. The power of arrest had been enforced on several occasions and the defendant has been imprisoned as a result of his disobedience for varying terms.

4 The defendant in this action has on December 10th, 2003 issued a summons under liberty to apply pursuant to the order made on November 25th, 2003 in the action in the Divorce and Matrimonial jurisdiction for access to the children of the marriage.

5 Mr. Hughes submits that a question of principle arises in the present application and it is this: whether the court may attach a power of arrest in respect of an injunction issued under the ordinary jurisdiction of the court under the CPR. Under the CPR, a breach of an injunction will lead to contempt proceedings and of course a contemnor may be imprisoned, but that requires an application to be made to the court upon which a hearing before a judge will ascertain the facts. It is not a summary process and although the court can deal with such applications expeditiously, the procedure lacks the immediacy of a power of arrest. There is nothing in the CPR that expressly either empowers or prevents the court from attaching a power of arrest.

6 Mr. Hughes draws attention to a conflict of views in the Gibraltar courts. Schofield, C.J. has attached powers of arrest to CPR injunctions.

Pizzarello, A.J., purporting to follow English authorities, has ruled that the court does not have the power to do so unless it be under the Domestic Violence and Matrimonial Proceedings Ordinance. Mr. Hughes argues that the Supreme Court of Gibraltar may, unlike the High Court of Justice in England, invoke the provisions of the Gibraltar Constitution Order 1969 to attach a power of arrest as the Constitution provides for fundamental rights and freedoms. Section 1(1) of the Constitution states:

“It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—

- (a) the right of the individual to life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression, of assembly and association and of freedom to establish schools; and
- (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

7 The “right to life” guaranteed in the Constitution and in art. 2 of the European Convention on Human Rights and Fundamental Freedoms is not just satisfied by the state itself not taking life. He refers to *Osman v. UK* (3) ([1999] 1 FLR 193, at para. 115):

“The Court notes that the first sentence of Art. 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom* judgment of 9 June 1998, Reports of Judgments and Decisions 1998). It is common ground that the State’s obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing

before the Court that Art. 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”

8 In a proper case, submits Mr. Hughes, where a complainant is justifiably in fear for her life, it is surely incumbent on the court to use all the armoury at its disposal to avert such a tragedy. Mr. Hughes extends the concept; he submits that the power should not be limited to fear of death but to any situation where a complainant may be at risk of serious bodily injury, *i.e.* right to security of the person. The more serious the anticipated injury, the more reason why a person should be protected. In the present case, on October 13th, 2003, the court granted an injunction with a power of arrest to November 13th, 2003. On November 25th, 2003, the defendant was restrained by order under the inherent jurisdiction without an attached power of arrest. On December 12th, 2003, when it was reported to the judge that the defendant had made threats to kill the claimant, the judge did not hesitate to attach a power of arrest under the Domestic Violence and Matrimonial Proceedings Ordinance, valid until January 10th, 2004, after which it could be extended no longer under that Ordinance. Regardless of whether the court thinks it necessary and appropriate for the power to extend for longer, Pizzarello, A.J.’s ruling fetters the court unnecessarily, as the present case shows. If there is a need to continue the protection of a power of arrest beyond the nine months provided by the Domestic Violence and Matrimonial Proceedings Ordinance then it should be done and therefore the ruling should be reconsidered. To hold that the court has no power to attach a power of arrest, when such a power exists in cases under the Domestic Violence and Matrimonial Proceedings Ordinance, would introduce an unjustifiable distinction into the degree of protection afforded by the court according to the situation of the victim of domestic or indeed other violence. Thus a woman who happens to have married a person who subjects her to violence, or a woman who cohabits with a violent partner, will be able to obtain a power of arrest but a woman who does not cohabit with the perpetrator of violence will not be able to obtain such protection.

9 Mr. Hughes submitted that the court has never been asked to consider the matter in conjunction with the Constitution, and that is a substantial difference with English law. Mr. Hughes submits that a complainant is worse off in Gibraltar having an ordinary injunction in her favour because it is notorious that the police (acting in his submission under a mistake of law) will not arrest when there is a breach of the injunction without a power of arrest—notwithstanding that the facts which comprise the breach themselves amount to a criminal offence upon which they can and

should act independently of anything the order might say. Hence the protection of the law guaranteed by the Constitution becomes a mirage when on the contrary it should be real. It is inconsistent with the Constitution's protection of the security of the person to leave such a claimant with the remedy of an application for the contemnor's committal—it will then be too late. The court should be able to make an order restraining a miscreant in an appropriate case and if the court were to consider that a power of arrest should attach to help the law and did not do so, the court would itself be in breach of the constitutional provisions because it would not be protecting the subject. If protection is offered under the statutory provisions of the Domestic Violence and Matrimonial Proceedings Ordinance, why not under the Constitution? That Ordinance protects for nine months and there must be occasions when those nine months may not be long enough: the Constitution does not have such time limits.

10 Mr. Daswani relies on the practical issues of the present case. While the court had made restraint orders with power of arrest on November 25th, 2003, the judge was, on the evidence which he had heard in Action 2003 D. & M. No. 39 in the judicial separation, not minded to attach a power of arrest to the injunction he then granted under the inherent jurisdiction of the court to keep parties away from each other. That is to say, the judge was satisfied that a power of arrest was not necessary because he was of the view that the defendant was trying to change his ways and there was no evidence that there was a risk of future violence. On December 12th, 2003, the claimant made her application to the court for a restraint order with a permanent power of arrest to be attached on the grounds that the defendant had said he would kill her. But there was even then no reliable evidence led to show that. Nevertheless, the judge did attach a power of arrest under the Domestic Violence and Matrimonial Proceedings Ordinance on the understanding that Mr. Montegriffo, the Probation Officer, had reported this to be the case and the judge adjourned to January 5th, 2004, as access to the children over the Christmas period was also in issue on the application that the defendant had issued on December 10th, 2003. On January 5th, 2004, Mr. Montegriffo did not attend court and it transpired that it was not to Mr. Montegriffo that the defendant had made the threat but to someone else who had reported it to Mr. Montegriffo. The case to attach a power of arrest in the present action, submits Mr. Daswani, had not been made out by any evidence even if the court did have the power to do so. A power of arrest should only be attached where the evidence is strong. No medical or other independent corroborative evidence has been adduced. This remedy must be exercised sparingly and the provisions of the Domestic Violence and Matrimonial Proceedings Ordinance show an intention by the legislature that the court is obliged to consider periodical review of

the evidence before it imposes a power of arrest sanction. Mr. Daswani submits the court has jurisdiction to attach a power of arrest only under the Domestic Violence and Matrimonial Proceedings Ordinance. There is no authority to support Mr. Hughes's argument. His reliance on *Osman* (3) is misconceived. That case has little relation to the present case and concerned victims of a shooting: it was a wholly exceptional case. Here, the court has dealt with the present case according to domestic law and it is not necessary to invoke the principles enunciated under European case law, and he refers to *Z v. UK* (4).

11 In so far as the application by the claimant is for an injunction coupled with a power of arrest, I reject it. There is at present still in force the injunction I made on November 25th, 2003, under the inherent jurisdiction of the court and following the CPR, and that stands notwithstanding that I made a further order on December 12th, 2003, under the Domestic Violence and Matrimonial Provisions Ordinance. The reason that I reject it is that I agree with Mr. Daswani that there is no evidence before me that the defendant uttered the words "to kill her." But for these words, the situation is the same today as it was on November 25th, when I refused to attach a power of arrest. Mr. Montegriffo, the probation officer to whom I was told it had been said, did not come forward to say so. I was told that he would write a report but I have not seen one and on the second occasion when I had expected to see him (January 5th, 2004) he did not appear and it transpired that the words had not been said to him. Nothing has been filed to fill that lacuna. The defendant has a bad record for breaching injunctions but a power of arrest is only available under the Domestic Violence and Matrimonial Proceedings Ordinance if there is cogent evidence that there is risk of further violence. The legislature has thought fit to let a power of arrest run for nine months at three-monthly intervals for review. It is clear that is because it is not right or proportionate to burden a person with such draconian consequences unless it is absolutely necessary. Equally, a power of arrest under the inherent jurisdiction (if it is available) would also only be attached in the most extreme cases and in my opinion only for a limited period.

12 So, may a power of arrest be attached to an injunction which is not granted under the Domestic Violence and Matrimonial Proceedings Ordinance? Naturally, having decided as I have that, for lack of evidence, I will not attach a power of arrest, be it under the Domestic Violence and Matrimonial Ordinance or under the inherent jurisdiction, what I say next is not necessary to dispose of the application. *Osman* (3), which Mr. Hughes quotes, is an extreme case but I can see the parallel in the situation of the present case. I am attracted by his argument. Gibraltar does have a written Constitution and that casts its beneficial influence on all cases. The authorities I had considered when refusing to attach a power of arrest to an injunction not under the Domestic Violence and

Matrimonial Proceedings Ordinance, namely *Re G* (1) and *Harrison v. Lewis* (2), made the important point that a court has no power to attach a power of arrest which had the effect of delegating to the tipstaff or a constable the power to decide whether or not there was a breach of the order. These cases related to wardship proceedings, but in my view the point I have indicated is sound and of general application. In my judgment, as at present advised, the court may in my view issue an injunction with a power of arrest if the circumstances warrant it, but the terms of the order must be couched very carefully to prevent a constable from having to make any arrest other than from his own observations. For instance, if the order prohibits approaching 50 metres from a house, a constable will have no problem in executing a power of arrest if the subject is 10 yards from the prohibited location right under the constable's nose. It would not be enough for the constable to be told that the subject was there or had been there because that would mean he would have to decide whether there was a breach or not. These factors will have to be dealt with whenever it arises in some future case.

13 I want to make a last point and that is the suggestion that Mr. Hughes makes of the police. It is not one I pay any attention to. If the situation is as Mr. Hughes suggest it is, that would be wrong, but there is no evidence put before me to substantiate anything he says (I am not prepared to take a statement from the bar on such a fundamental issue), and if there were, then I would want a representative of the police to answer it.

14 I have not yet received a report from the Social Services regarding the children and therefore that aspect arising out of the defendant's application is adjourned to a date to be fixed by the Registrar as soon as the report is received and will be transferred, heard and continued in the main Action 2003 D. & M. No. 39.

15 The claimant's application dated December 9th, 2003 is dismissed.

Application dismissed.