

BATUNA ENTERPRISES -v- RATU

High Court of Solomon Islands

(Ward C.J.)

Civil Case No. 52 of 1990

Hearing: 11 April 1990

Judgment:

J. Corrin for the Plaintiff

A. Radclyffe for the Defendant

WARD CJ: This is a petition under section 50 (4) of the Magistrates Courts Act praying for the exercise of the Court's revisional powers in relation to a civil matter heard by the learned Principal Magistrate Central.

The Petitioner, who was the plaintiff in the lower court, obtained judgment in the sum of \$1,310.08 and costs. The defendant failed to attend a subsequent hearing of a judgment summons and the plaintiff sought a warrant of commitment to prison. However, the learned magistrate adjourned the case to allow the plaintiff to produce evidence of the defendant's means. At the adjourned hearing, the defendant appeared but was granted an adjournment for legal advice.

The adjourned hearing was on 1st February 1990 and the defendant again failed to appear. The plaintiff then applied for an order of committal or a warrant to arrest the defendant and bring him before the court to show cause why he should not be committed.

The learned magistrate dismissed the summons on two grounds:

1. He could not issue a commitment warrant without proof of the defendant's means under section 22(1)(g) of the Magistrates' Courts Act.
2. The affidavit of means was defective because it contained only hearsay evidence and the belief of the deponent and that the plaintiff needed, by O.6 r.17, to give reasons why affidavit evidence should be allowed before evidence in such form could be admitted.

He also stated that he had no power to issue a warrant and no authority was suggested to give him such power.

Thus a number of issues of some importance arise in this case.

By section 22 of the Magistrates' Courts Act, which substantially follows section 5 of the Debtor's Act 1869, the magistrates' court has jurisdiction to commit to prison for up to six weeks anyone who has made default in payment of any debt due from him in pursuance of a judgment of the court but subject to the proviso:

"Provided that such jurisdiction shall only be exercised where it is proved to the satisfaction of the Magistrate's Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected or refuses or neglects to pay the same"

Under the Magistrates' Courts (Civil Procedure) Rules O.34 r.7 -

"(1) No order for commitment of any judgment debtor under paragraph (g) of subsection (1) of section 22 of the Ordinance shall be made unless a summons (in this Order referred to as a judgment summons) to appear before the court and be examined on oath has been personally served upon the judgment debtor; and no judgment summons shall be served less than four days before the date fixed for the hearing thereof.

(2) A judgment summons shall be in the form of a writ of summons, but endorsed requiring the judgment debtor to appear on the return day of the summons to show cause why he should not be committed to prison for failure to pay the sum of the original judgment debt together with the costs of the judgment summons."

Thus the procedure there is clear. The court has power to commit a defaulting judgment debtor to prison for up to six weeks but, before it does so, it must -

- (a) be satisfied a judgment summons has been served on him at least 4 days before the date fixed for its hearing endorsed requiring the judgment debtor to appear and show cause why he should not be committed to prison.
- (b) be satisfied that he has, or has had since the order or judgment, the means to pay and has refused or neglected to pay.

There is nothing in the act or the rules covering the position if the judgment debtor fails to appear.

By section 57 of the Act -

"Subject to the provisions of any other law for the time being in force, the jurisdiction vested in Magistrates' Courts shall be exercised (so far as regards practice and procedure) in the manner provided by this Ordinance or by any other Ordinance for the time being in force relating to criminal or civil procedure, or by Rules of Court, and in default thereof, in substantial conformity with the law and practice for the time being observed in England in county courts, police courts and court of summary jurisdiction."

The position in the English county courts is covered by section 110 of the County Courts Act 1984:

"(1) If a debtor summoned to attend a county court by a judgment summons fails to attend on the day and at the time fixed for any hearing of the summons, the judge may adjourn or further adjourn the summons to a specified time on a specified day and order the debtor to attend at that time on that day.

(2) If -

- (a) a debtor, having been ordered under subsection (1) to attend at a specified time on a specified day, fails to do so; or*
- (b) a debtor who attends for the hearing of a judgment summons refuses to be sworn or to give evidence;*

the judge may make an order committing him to prison for a period not exceeding 14 days in respect of the failure or refusal.

(3) In any case where the judge has power to make an order of committal under subsection (2) for failure to attend, he may in lieu of or in addition to

making that order, order the debtor to be arrested and brought before the court either forthwith or at such time as the judge may direct."

That practice must be modified to suit the circumstances here. Unlike the County Courts in England, the Magistrates' Courts have no power to commit for contempt as is effectively the power in 110(2). However, subject to that, I see no reason why the power to issue a warrant for the arrest of the judgment debtor should not apply. Under our law, the requirement under O.34 r.7 (2) is that the summons should be endorsed requiring the debtor's attendance to show cause. I do not feel it is necessary further to adjourn to order his presence. He has been given the opportunity to show cause but has not taken it. Thus where the debtor fails to attend after service of the judgment summons and the creditor has been unable to produce evidence of means, the court should issue a warrant for his arrest.

Where the debtor fails to appear after service and the magistrate has heard evidence sufficient to satisfy himself of the debtor's means and neglect or refusal to pay, he may order an immediate order of commitment as was requested in this case.

Whilst the latter course may be reasonable in some cases, in many the court would be wiser to issue a warrant of arrest first and, in cases where there is insufficient evidence as to the debtor's means, he can only do that.

In this case the magistrate was concerned that the affidavit evidence was not sufficient because it was entirely hearsay or the opinion of the deponent. He was correct so to find. This is a punitive order and, if the court is to be satisfied, it must do so on the basis of proper evidence.

The evidence must be of his means to pay but it need not be direct evidence of his actual means. The burden of proof is on the plaintiff and the requirement is that it should be evidence of a "reasonably direct character" of his means; *Nesom v. Metcalfe* (1921) 1 KB 400 @ 408. It could for, example, be evidence of reasonable employment or of his style of life or evidence of purchase of some item costing substantially in excess of the judgment sum so long as the evidence is sufficient to satisfy the court that he has or has had the means to pay.

When considering the standard of proof required, different consideration will, of course, apply if the defendant has failed to appear or, having appeared fails to answer. Thus affidavit evidence of the debtor's profligate life style is prima facie evidence of means to pay but may be displaced by his evidence. If, however, he fails to answer, it could be sufficient in itself; see for example *Chand v. Lewis* (1882) 9 QBD 178.

Once the court is satisfied of his means, it must also be satisfied that the debtor refuses or neglects to pay. Without that, a committal order cannot be made.

I finally pass to the matter of the affidavit evidence. Although the magistrate went on to consider and reject the contents of the affidavit filed by the plaintiff as to the means of the debtor, he had initially objected to it on the grounds that sufficient reason had not been shown to allow evidence in that form.

O.6 r.17 reads -

"In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial of any cause or matter shall be examined orally and in open court; but the court may at any time for sufficient reason to be recorded in the record direct that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the court may consider just....."

In a case such as this where it is clear that the debtor has not appeared and is unlikely to appear, it is reasonable for the plaintiff to produce evidence by affidavit of

relatively formal matters such as the employment of the debtor. Where it is not going to be challenged, it would be an unnecessary burden to require an employer to attend court. That would appear to me to be sufficient reason to allow affidavit evidence. If at the hearing, the debtor does appear and wishes to challenge the evidence, the witness can be required to attend.

Thus, in this case, I have ruled that the court had power to issue a warrant of arrest or an order of commitment but only, in the latter case, after evidence sufficient to satisfy it that the debtor had the means and was unwilling to pay.

In this case, the magistrate correctly found there was no evidence and dismissed the summons. I see no reason to interfere with that. However, it is clear the debtor had been served and had failed to appear after the adjournment. Thus I return the case to the learned magistrate and direct that he issue a warrant for the arrest of the debtor.

(F.G.R. Ward)
CHIEF JUSTICE