

HITUKERA -v- HYUNDAI TIMBER COMPANY LIMITED & MAEPEZA

High Court of Solomon Islands

(Muria ACJ)

Civil Case No. 132 of 1992

Hearing: 16 July 1992

Judgment: 23 July 1992

P. Lavery for the Applicant

Gorterson for the Respondent

MURIA ACJ: The plaintiff applied by Notice of Motion to attach the Camp Manager of the First Defendant (whom I shall call the "the Respondent") for contempt of Court in disobeying the order of this Court made on 13 May 1992.

The order of 13 May 1992 was an *ex parte* order made on the application by the plaintiff for an interim injunction which restrains the first defendant or its servants officers or agents from any further clearing of timber, plantation, garden or other areas or from commencing or continuing the construction of any building, structure or road or other thing or in any way extending the logging camp or any of its operation in any way whatsoever on the land in the customary ownership of the plaintiff or his family. The land concerned is situated at Malasova and it is edged in red on the sketch map accompanying the order. The order also restrains the second defendant from entering onto the said land for any purpose whatsoever without the permission of the plaintiff's solicitor.

The plaintiff now alleges that on Monday 8 June 1992 at about 10 a.m. he saw 3 separate buildings being built next to the workshop within the area of Buro land covered by the Court order. The plaintiff

says that before the order was granted there was no building on the site concerned.

The Respondent on the other hand says that the order of 13 May 1992 was not served on him and the defendants until the 18 May 1992. This was not disputed by the plaintiff. The respondent further says that the three houses concerned were the permanent power house, the oil store and petrol store.

The respondent, Mr Kim Yong Sung says in his affidavit evidence that construction of the camp began on 16 November 1991. All the clearing of the land had already been done before 18 May 1992. The respondent further deposed that as to the permanent power house, construction of it began on 16 April 1992. On 21 April the concrete floor was laid and on 29 April the generator was installed in the power house. However some of the wall sheeting to the wall frames at the back of the power house were put up since 18 May 1992.

I have seen photograph "C10" of the permanent power house and I am satisfied that it confirms Mr Kim's evidence.

On the oil store the respondent deposed that it was almost completed by 18 May 1992. The only work done after 18 May 1992 were the nailing of the wall boards and fitting in the door. I have observed photograph "C11" and it would appear to confirm the respondent's story.

As to the third building, the petrol store, Mr Kim deposed that the construction of that store began after 18 May 1992. He explained in his affidavit that the reasons for completing the construction of the oil store and the petrol store was to prevent overnight theft of oil and gasoline. He deposed that he suspected theft had taken place in late May whereby three of the thirteen drums of gasoline left were stolen and as such that justified his decision to complete the oil store and construct the petrol store. Having looked at photographs "C11" and "C12", I am satisfied they clearly reflect Mr Kim's story.

Counsel for the respondent submitted that although the order was made on 13 May 1992, it could not have any effect on the defendants or the Camp Manager until they were served with it. Thus counsel says, the effective date of the interim order must be 18 May 1992. For the respondent to be aware of the order of the Court he was to comply with, he must know the existence of the order. That must be done by serving a copy of the order on him. In this case, the plaintiff did not dispute that the order of the Court on 13 May 1992 was served on the respondent on 18 May 1992 on which date he was notified and was aware of the order of the Court. I accept counsel's argument that the effective date, for the purpose of these contempt proceedings, must be the 18 May 1992.

Turning to the actual evidence disclosed in the affidavits, it cannot be doubted that a breach of the Order had been made by the Camp Manager of the first defendant. In his affidavit Mr Kim clearly admitted that after the 18 May 1992, further work was done on the permanent power house and the oil store. He further admitted that the gasoline store was constructed after 18 May 1992. When one turns to the order of 13 May 1992, it clearly restrains the first defendant from "*commencing or continuing the construction of any building, structure or road* ". The first defendant's actions in this case must be proved to be in violation of the order of the Court. Such proof counsel for the Respondent says must be that of beyond reasonable doubt as stated by Lord Denning, M.R. in *Re Bramblevale Ltd* [1970] 1 Ch 128, at 137; [1969] 3 All E.R. 1062, at 1063 where he said:-

"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."

I accept that in a contempt of court case the standard of proof must be that stated by Lord Denning M.R. in the above case. As such no distinction is necessary when it comes to the standard of proof required in any contempt of court case, be it regarded as a civil contempt or criminal contempt. Its character is that of criminal which may well result in the contemnor being sent to prison.

The comments by Russell LJ in *Knight -v- Clifton* [1971] 2 All E.R. 378, 381 are also appropriate to refer to where the learned Law Lord stated:-

"Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent. To hold that was established on only part of the evidence before the judge would be manifestly unjust."

It is perhaps along this line of thinking that Salmon LJ thought that it was meaningless to classify contempts of court as criminal or civil contempts when he stated in *Jennison -v- Baker* [1972] 1 All E.R. 997, at 1002 that:-

"Contempts have sometimes been classified as criminal or civil contempts. I think that, at any rate today, this is an unhelpful and almost meaningless classification."

I venture to adopt the views stated by the learned Law Lords as entirely appropriate when considering cases of contempt of court in Solomon Islands. Much more so the standard of proof as expounded by Lord Denning M.R. is compatible with the spirit of the Constitution under the entrenched provisions which safe-guard the rights and freedom of the individuals in Solomon Islands.

However, although I accept the law as stated in the above cases, the facts of those cases are different to those in the present case. In *Re Bramblevale Ltd.* the Managing Director of the company was ordered to produce books of the company. He failed to do so. However there was no evidence to sufficiently show that on the dates he was ordered to produce the books he had the books in his possession to be able to produce them. The contempt therefore had not been proved.

In *Knight -v- Clifton* an interlocutory injunction was issued restraining the defendants from doing any act or thing whereby the plaintiffs may be hindered or obstructed in the free use of the right of way shown and coloured green on the plan annexed to the order. The

defendants did some light ploughing into the plaintiff's right of way. However there was no sufficient evidence which could factually establish to the satisfaction of the court that the light ploughing had hindered or obstructed the plaintiffs in the free use of the way. The court refused to attach the defendants for contempt.

In the present case, the respondent Mr Kim admitted he was served with a copy of the order on 18 May 1992. The order was served on Mr Kim by the plaintiff's solicitor who explained the nature of the order to Mr Kim. However despite the service of the order and the explanation of the order given to Mr Kim he decided to do exactly what the order prohibits by continuing to do further work on the power house in putting up some wall sheeting to the wall since 18 May 1992, nailing up the wall boards and fitting the door to the oil store after 18 May 1992; and constructing a gasoline store building after 18 May 1992. Mr Kim has admitted all these in his affidavit. There is therefore sufficient, even more than sufficient, evidence to factually establish that after the service of the order on him on 18 May 1992, Mr Kim did further work of construction on the power house, further work of construction on the oil store and constructing a completely new gasoline store building, all of which were in breach of the order. The justification which Mr Kim gave for his action was to prevent what he suspected to be overnight thefts of gasoline and oil. There was no evidence of theft, whatsoever. All that he deposed was that he (Mr Kim) received a report from his clerk that there were 16 drums of gasoline in stock on 25 May 1992 and that three days later he found there were only 3 drums left. He then stated in paragraph 11 of his affidavit:-

"I strongly suspected that this was as a result of overnight thefts. It became apparent to me that i had to take urgent action to stop theft of oil and gasoline by constructing secure stores. It was only after this incident that I decided that the oil store should be completed and the gasoline store built. I was aware of the Court order but I thought that the urgency of the situation justified my decision. I was reluctant to get the police at Gizo involved and stir up resentment with the local population. I thought that prevention was the best thing to do".

I have some sympathy for Mr Kim being in charge of such a major operation and having to take measures like the ones he did. But that can hardly be a justification for disobeying what is a clear and specific order of the Court. There can be no such thing as a justifiable contempt of court: *AG -v- Times Newspaper Ltd [1973] 3 All E.R. 54*, at p. 56 per Lord Morris.

On the evidence before the Court I am satisfied beyond reasonable doubt that the respondent, Mr Kim Yong Sung has committed a contempt of Court.

I turn now to consider what the appropriate punishment is in this case based on the facts as established.

Counsel for the respondent submitted that commitment to prison is wholly inappropriate in this case. He urged that the case can sufficiently be met by the payment of costs of the applicant unless the contemnor's conduct is very contemptuous and a flagrant disrespect to the Court. Counsel cited in support, Halsbury's Laws of England, 4th Ed., Vol. 24, paragraph 1109; Barrie and Lowe's Law of Contempt, pp. 392 - 3; and *Ansah -v- Ansah [1977] Fam. 138*, at 144 which is quoted in Barrie and Lowe's Law of Contempt.

I think it is necessary when considering punishment for contempts of court to bear in mind the necessity of this branch of the law and purpose of the court's contempt jurisdiction. On these, the most important consideration must be the maintenance of the proper administration of justice. This had been succinctly stated by Lord Morris in *A.G. -v- Times [1973] 3 All E.R. 54* at 66 where he said:-

"In an ordered community courts are established for the pacific settlement of disputes and for the maintenance of law and order. In the general interests of the community it is imperative that the authority of the courts should not be imperilled and that recourse to them should not be subject to unjustifiable interference. When such unjustifiable interference is suppressed it is not because those charged with the responsibilities of administering justice are concerned for their own dignity: it is because the very structure of ordered life is at risk if the recognised courts

of the land are so flouted that their authority wanes and is supplanted."

Like in any other developing country, the Courts in Solomon Islands must be vigilant to see that their authority is not imperilled or treated with contempt. This is particularly so at this embryonic stage of the development of the judicial system in this country. As such the courts here will also exercise their contempt jurisdiction for the purpose and in accordance with the principles stated by Lord Morris in *A.G. -v- Times Newspapers Ltd*

Whether the contemnor is to be committed to prison or not depends on the gravity of the contempt as proved. As Lord Morris also stated at page 67 in *A.G. -v- Times Newspaper Ltd* "According to the measures of its gravity, it may call for punishment or penalty going beyond the payment of costs." Imprisonment however, has always been one of the sanctions in cases of contempt.

In this case, no evidence was produced to show that further clearing of the area had occurred. I accept that the Camp Manager's decision to complete the oil store and gasoline store constructed was with a genuine motive of preventing loss by thefts of company properties, although as I have said that is not a justification for disobeying the order of the court. I also accept that Mr Kim had offered an apology to the Court. But I cannot overlook the fact that Mr Kim knew of the order and what was required not to be done under the order. I do not accept the suggestion that Mr Kim is not an English speaking person and therefore could not comprehend the nature of the order. I am very much inclined to believe that the respondent is an intelligent and highly educated person which is evidenced by his own affidavits. Even if he were not so educated, the solicitor for the plaintiff who served the order on him took the sensible course of explaining the order to the respondent. There is in my view a certain measure of contumacy in the actions taken by the respondent in this case.

The suggestion by counsel for the respondent that because the order contained no penal provision, the respondent was not aware of

the grave consequences of non-compliance with the order. Unfortunately I cannot accede to that suggestion for much the same reasons as I have already explained in this judgment. All orders of the courts must be obeyed whether they contain penal provisions or not and failure to do so may amount to contempt of Court. But I do take counsel's point on the absence of a penal provision in the order for the purpose of deciding the appropriate penalty to be imposed on the respondent. I feel as a matter of practice in applications for attachment that even where contempt is proved, a penal notice is essential to be endorsed on the order before the commitment sanction can be imposed on the contemnor: see *Hampden -v- Wallis (1682) 26 Ch. 746*.

Having found that the respondent, Mr Kim Yong Sung was in contempt of Court in this case, I feel the circumstances justify a financial penalty rather than committing him to prison. I shall therefore make the following order:

1. The Respondent Mr Kim Yong Sung shall pay a fine of \$1,000.00 by 4 p.m. today 23 July 1992, in default of which a commitment warrant shall be issued committing the said respondent to prison for a period of 30 days.
2. I order that the respondent be further restrained from repeating his acts of contempt. Failure to comply with this order shall result in the respondent being liable to imprisonment.
3. I do not think I can make the order sought in paragraph 3 of the Notice of Motion and I do not do so.
4. I order the respondent to pay the applicant's costs of this application.

(G.J.B. Muria)
ACTING CHIEF JUSTICE