Case No: B4/2008/0738

Neutral Citation Number: [2008] EWCA Civ 600
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE PRINCIPAL REGISTRY OF THE FAMILY DIVISION
(HIS HONOUR JUDGE COPLEY)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 30th April 2008

Before:

LORD JUSTICE THORPE
LORD JUSTICE MOORE-BICK
and
MR JUSTICE CHARLES

- -

Between:

K **Appellant**

- and -

P **Respondent**

- -

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Ms L Scott (instructed by Messrs Farrell Matthew & Weir) appeared on behalf of the **Appellant**.

Mr R Bridge (instructed by Messrs JD Spicer & Co) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Mr Justice Charles:

1. This is an appeal relating to the length of sentence imposed by HHJ Copley on 25 January 2008 in respect of breaches of a non-molestation order to which a power of arrest was attached.

2. The periods of the sentence were one of three months, which was an activation of a suspended order for three months, and then a period of twelve months for a breach of the injunction which had occurred on 25 October 2007. That breach entailed the appellant making a false 999 call to the police, as I understand it, making false allegations that the respondent to the proceedings was being attacked in her home with a knife. The suspended sentence had been ordered on 24 October for earlier breaches of the non-molestation order by the appellant telephoning and harassing the respondent.

3. There is a lengthy and sad history to this case of which HHJ Copley was clearly all too aware. There have been a number of breaches of non-molestation orders in the past. Also a suspended sentence has been made against the appellant by the Crown Court.

4. In general terms the allegations of breach of the relevant orders relate to threats to the respondent and there have been some assertions proved of physical damage to (for example) the respondent's motor car.

5. The parties are not married but they have a young child born in 2005. Part of the background relates to issues concerning contact to that child, who is a little boy. The history as I read it contains on/off issues relating to contact. Following periods of contact there seems to have been breakdowns between the parents, which may have been triggers to some, but it seems not all, of the breaches of orders by the appellant.

6. I give only that very brief history because, as the matter was argued this morning, the appellant did not seek to challenge the length of the sentence imposed by HHJ Copley on 25 January -- that is, the activation of the three-month period and the making of a sentence of twelve months for the 999 call. Rather the focus of the appeal was upon the failure of the judge to take into account a period of three months that the appellant had spent on remand from, I think, 25 October, or possibly 26 October to 25 January. Those periods of remand were to enable medical evidence or reports to be obtained. It seems that there were two instructions; one in respect of the contact issue and one in respect of the committal issue. As matters turned out, as I understand it, no psychiatric report was ever obtained in respect of the committal issue, but one was obtained in respect of the contact issue. Those periods of remand were ordered under section 48 of the Family Law Act 1996.

7. What is said is that the judge did not take that period of three months imprisonment into account when he made his order. It is clear that that is the case from a letter written by the judge on 8 March 2008 in response to queries relating to the order. What he said was:

> "When the matter came before me on 25th January 2007, I imposed a sentence of 12 months for a breach on 25th October 2007 and I activated the 3 month suspended sentence imposed on the 24th October 2007 making a total of 15 months.
> The suspended sentence was not, nor could it have been, activated by the remand in custody. [The appellant] will have to serve the sentence of 15 months, and it will be a matter for the Prison Authority to calculate his release date by reference to any time spent in custody on remand, and any automatic release provisions applicable to this sentence."

8. What is said is that, in taking that approach, the learned judge erred in law. In that context the appellant relied on a decision of the Court of Appeal in Sevketoglu v Sevketoglu [2003] EWCA 1570 and in particular paragraphs 6-8 of the judgment of Hale LJ, as she then was. Those paragraphs read as follows:

> "6. I say that all present had forgotten the effect of the legislation, which is very plainly explained in the case of Delaney v Delaney [1996] 1 FLR 458 by Sir Thomas Bingham MR at page 466:
>
> > "The basic rule is that a term served in custody before conviction or sentence counts against sentence. That is the rule laid down in s 67(1) and (1A) of the Criminal Justice Act 1967. But that is a rule which specifically does not apply to contemnors who are excluded from the ambit of that provision by s 104(1) of that Act".
>
> A little later he says:
>
> > "The position therefore remains that a period spent in custody before sentence will not go to reduce the sentence of a contemnor".
>
> 7. That is a particularly important consideration in the Family Law Act cases because the Family Law Act contains a specific provision which is not found elsewhere in the law of contempt, permitting remand in custody before the final

> disposal. It has been said on at least one occasion in this court, therefore, that when considering what is the appropriate period of imprisonment to impose in respect of a contempt of court, the judge should bear in mind that any time spent on remand will not be deducted and therefore take it into account, and indeed should take it into account doubly.
>
> 8. That, for example, was stated by me in the case of McKnight v Northern [2001] EWCA Civ 2028 at paragraph 17. That was a case where the learned judge had clearly not taken into account the seven days which the appellant contemnor had served on remand and this court accordingly reduced the term of imprisonment which the judge imposed by a period of 14 days to take account of that. It may well be that the legislation for consideration in this case has been, or is to be, amended in due course, but for the time being, the situation is that that was not taken into account in calculating the time to be served. Judges must take it into account in calculating the period in prison to be imposed. It is quite clear in this case what the judge had in mind and I would therefore allow the appeal and substitute for the period of 2 months' imprisonment the period of seven days' imprisonment, which will enable the husband to be released immediately."

9. Ward LJ agreed and commented that it seemed to him that the law reporters should consider whether or not it was appropriate to report that case and for editors of text books to record it. So far as my researches and those of counsel are concerned, that has not happened. It is also the case that HHJ Copley was not referred to that decision or to Delaney v Delaney when the matter came before him.

10. At the time of that decision, as is indicated by the judgment, the relevant legislation was contained in the Criminal Justice Act 1967. It is now contained in the Criminal Justice Act 2003 and, in particular, reference should be made to sections 240-242 of that Act. The definition section in 242(1) also needs to be read with section 305, which has the same effect as the earlier legislation considered by the Court of Appeal in the earlier cases, namely that periods of imprisonment imposed by way of punishment for contempt fall outside that statutory regime.

11. It follows, in my judgment, that the conclusion set out by Hale LJ in the case I have cited still applies, and therefore the judge should have taken the period spent on remand into account in this case. In my judgment, in doing so, as Hale LJ points out in paragraph 7 of her judgment, he should also have had regard to the point that the basic rule in other cases is that time served on

remand is to count as time served as part of the sentence. It therefore counts towards the days to be served before the person is to be released.

12. The provisions relating to release are now contained in section 258 of the Criminal Justice Act 2003. They provide that a person sent to prison for contempt has to be released after he has served one half of the period stated in the sentence. In my judgment, therefore, the judge has erred in his failure to take the period on remand into account.

13. In my judgment, and this effectively became common ground before us today, the correct course for the judge would have been for him to recognise that a period of three months on remand had been served by deducting six months from the period of twelve months he imposed for the breach of the non-molestation order by the 999 call. That would have resulted in him passing a sentence of six months for that breach and three months in respect of the suspended sentence on 25 January and so nine months in total. Of that the appellant would have had to have served four and a half months, unless he purged his contempt, giving a total served of seven and a half months, and thus half of the fifteen months imposed by the judge. As I have said, it became common ground before us that the periods imposed by the judge were appropriate and no challenge was made on the basis that there was any misapplication of the guidance given in Hale v Tanner [2000] 2 FLR 879

14. As a tailpiece to this judgment, I would echo the words of Ward LJ that it seems to me that notwithstanding the introduction of s. 42A Family Law Act 1996 it would be of assistance to practitioners and judges dealing with issues arising under the Family Law Act and in respect of committal applications if Sevketoglu v Sevketoglu and perhaps this case (which refers to the position under the Criminal Justice Act 2003) were to be reported and noted in the relevant text books together with Delaney v Delaney. These cases clearly cover matters which judges dealing with punishment for contempt for breach of non-molestation, occupation, and other orders should have in mind.

15. As a final comment, I note that we were told today that directions are being given on 7 May, relating to the contact issues. For my part I would join with what I was told was the attitude of HHJ Copley, namely that a fact-finding hearing is not necessary before a CAFCAS report is completed in this case. It seems to me that the sooner a regime of supervised contact is set in place and a means of transporting the child to and from that contact is devised which ensures that trigger events do not take place between the parents, the better the interests of these parties and their child will be served.

Lord Justice Thorpe:

16. I agree.

Lord Justice Moore-Bick:

17. I also agree.

Order: Appeal allowed