Neutral Citation Number: [2022] EWCA Civ 1574

Case No: CA-2022-001135

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
Mr Justice MacDonald
FD21F00024

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2022

Before :

LORD JUSTICE BEAN
LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

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Between :

HIS MAJESTY'S ATTORNEY GENERAL	**Claimant/ Respondent**
- and –	
ELAVI DOWIE	**Defendant/ Appellant**

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- -

The **Appellant** appeared in person
Kathryn Howarth (instructed by the **Treasury Solicitor**) for the **Respondent**

Hearing date : 29 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 1 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Introduction

1. This is an appeal by Mr Elavi Dowie against an order made in family proceedings, by which he was committed to prison for eight months for contempt of court. The order was made by MacDonald J on 13 April 2022 and was expressed to take effect at the conclusion of a sentence of imprisonment that Mr Dowie is currently serving for related criminal offences.

2. The background is that from 2015 onwards Mr Dowie was involved in proceedings about his children in the Family Court at Preston. On 8 September 2017, the proceedings ended with District Judge Turner giving a substantial judgment. Among his orders was an order under section 91(14) of the Children Act 1989 restraining Mr Dowie from making further applications for 18 months without the permission of the court, and a non-molestation order, including an injunction against the publishing of images of the children and their mother.

3. On 7 December 2018, Mr Dowie applied to the court for permission to apply for a further child arrangements order. This application was severely delayed, in part because on 11 December 2018 Mr Dowie was imprisoned for 10 months at Liverpool Crown Court for breaches of the non-molestation order and in part because of the pandemic.

4. On 29 November 2019, at Liverpool Crown Court, Mr Dowie was made the subject of a restraining order under the Protection from Harassment Act 1997.

5. On 2 June 2020, Mr Dowie posted a video to YouTube titled *'An Open Message To His Honour Judge Brown: Here Is The Evidence'*. It included recordings from the private law proceedings: cross-examination by Mr Dowie of a psychologist, cross-examination of the Cafcass officer by Mr Dowie and exchanges between Mr Dowie and the District Judge.

6. On 17 June 2020, Mr Dowie posted a second video titled *'False Allegations In The Family Court'*. It included further recordings from the same proceedings: the District Judge asking questions of the mother and cross-examination of the mother by Mr Dowie, including about an allegation of rape.

7. On 20 June 2020, Her Honour Judge Bancroft, the Designated Family Judge for Lancashire, wrote to the Attorney General's Office to inform the Attorney General about the first video. She said that she considered it to be, on the face of it, in breach of the Administration of Justice Act 1960, the Contempt of Court Act 1981 and section 97(2) of the Children Act 1989.

8. On 1 July 2020, Mr Dowie posted a third video titled *'CAFCASS And The Destruction Of My Children's Rights'*. It included a recording of evidence-in-chief given by the Cafcass officer.

9. On 7 August 2020, having seen all three videos, the Attorney General wrote to Mr Dowie, who replied on 2 September 2020, accepting that he had made a series of recordings of hearings, claiming that he had reported himself to the police and that Her

Honour Judge Singleton KC had given him permission to use the recordings, something that she had not done.

10. In March 2021, the Attorney General applied for permission to make an application for an order committing Mr Dowie to prison for contempt arising out of his alleged interference with the administration of justice. Keehan J adjourned the application.

11. On 12 August 2021, Mr Dowie was convicted at Bradford Crown Court on an eight-count indictment concerning breaches of the non-molestation order and the restraining order. He was sentenced to eight years' imprisonment.

12. On 22 November 2021, MacDonald J granted permission for the Attorney General to bring committal proceedings.

13. On 4 January 2022, the Attorney General wrote to MacDonald J confirming that she would proceed in prosecuting the contempt proceedings. She considered this course to be proportionate and added that the Solicitor General considered the prosecution to be in the public interest. She duly issued a summons in these terms:

> "i) Mr Dowie published information on YouTube by way of videos uploaded by Mr Dowie on 2 June 2020, 17 June 2020 and 1 July 2020 relating to proceedings which were brought under the Children Act 1989 and heard in private before the Family Court at Preston concluding in 2017, contrary to s.12 of the Administration of Justice Act 1960.
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> ii) Mr Dowie published on YouTube by way of videos uploaded by Mr Dowie on 2 June 2020, 17 June 2020 and 1 July 2020 the recording of proceedings heard at the Family Court in Preston concluding in 2017, contrary to s.9(1) of the Contempt of Court Act 1981."

14. The hearing took place on 3 March 2022. On 11 March 2022, MacDonald J handed down a judgment in which he held that Mr Dowie was guilty of contempt of court. Sentencing was adjourned to 1 April 2022 but was further adjourned to 13 April 2022 to ensure that the hearing was listed as a public hearing. On that date, Mr Dowie was committed to eight months in prison, effective from the end of his current custodial sentence. He was ordered to pay the Attorney General's costs, summarily assessed at £9,400.

15. On 10 June 2022, Mr Dowie appealed. On 18 August 2022, permission to appeal not being required, Macur LJ granted an extension of time and gave listing directions for the appeal hearing.

16. On 18 October 2022, Mr Dowie's renewed applications to the Court of Appeal (Criminal Division) for leave to appeal against his criminal conviction and sentence were both refused.

17. Since the judge's decision, the Solicitor General has secured the removal of the videos from YouTube.

The hearings before the judge

18. Mr Dowie represented himself before the judge, while the Attorney General was represented by Ms Kathryn Howarth.

19. The judgments of MacDonald J can be found at [2022] EWFC 25 and [2022] EWFC 33. In the first judgment he addressed a request by Mr Dowie to cross-examine the legal advisor to the Attorney General's Office:

> "4. The evidence in support of the application made by the Attorney General is in the form of an affidavit from Kate Mulholland, Legal Adviser to the Attorney General's Office, which affidavit contains a number of exhibits. At the outset of the hearing Mr Dowie indicated that he wished to cross-examine Ms Mulholland. However, in circumstances where the statement of Ms Mulholland simply relates, in short terms, the factual background to the application and the enquiries made by the Attorney General and where, as I will come to, Mr Dowie admits those facts, I exercised my case management powers to refuse to require the attendance of Ms Mulholland for cross-examination. In short, I was satisfied that in circumstances where none of the facts contained in Ms Mulholland's affidavit were disputed by Mr Dowie, it was neither necessary nor proportionate to require her attendance at the hearing. To adopt the formulation used by the Administrative Court in *HM Attorney General v Pelling* [2005] EWHC 414 (Admin) at [17], there were no relevant facts requiring any further elucidation."

20. Then, the judge directed himself on fifteen procedural requirements for a committal hearing to be properly constituted. He set out the factual background and the relevant law. He considered in some detail the mental element of contempt and expressed these conclusions:

> "47. Drawing all these threads together, it seems to me that the legal framework in which the application by the Attorney General can be summarised is as follows as regards the position in respect of *mens rea*:
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> i) For alleged contempts under s.9(1) of the Contempt of Court Act 1981 falling *within* the strict liability rule, the Attorney General is required to prove beyond reasonable doubt that Mr Dowie knowingly took a tape recorder or other recording device into court with the intention of using it and, where publication has taken place, that Mr Dowie knowingly published the information so recorded.
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> ii) For alleged contempts under s.9(1) of the Contempt of Court Act 1981 that fall *outside* the strict liability rule, it is necessary for the Attorney General to additionally prove beyond reasonable doubt that Mr Dowie intended to interfere in the due administration of justice.

> iii) For alleged contempts under one of the exceptions set out in s.12 of the Administration of Justice Act 1960, the Attorney General is required to prove beyond reasonable doubt that Mr Dowie knew that the published information was within one of the prohibited categories, in the sense of knowing that the proceedings are being heard in private, *and* intended to interfere in the due administration of justice.
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> 48. I am satisfied that the Attorney General has proved beyond reasonable doubt that Mr Dowie brought into court for use and used an instrument for recording sound without the leave of the court and that he published the resulting recordings of legal proceedings by uploading videos containing the recordings to YouTube on 2 June 2020, 17 June 2020 and 1 July 2020, thereby also publishing information relating to proceedings under the Children Act 1989 before a court sitting in private. I am further satisfied that Mr Dowie knew that the proceedings he recorded were proceedings that were being heard in private. Finally, in circumstances where I am satisfied that Mr Dowie's actions did not fall within the strict liability rule under s.1 of the Contempt of Court Act 1981, I am satisfied that he intended by his actions to interfere with the due administration of justice..."

21. At paragraphs 49-61, MacDonald J gave reasons for his conclusions.

22. In the sentencing judgment, the judge addressed the question of consecutive sentences as follows:

> "10. Within this context, the additional question that falls for consideration when dealing with the principles governing sentencing is whether, if it decides to impose a custodial sentence, the court can impose that sentence consecutive to Mr Dowie's current term of imprisonment, or whether that sentence must be concurrent. In this regard, the decision of the Court of Appeal in the case of *R v Anomo* [1998] 2 Cr App R (S) 269 is instructive.
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> 11. In *R v Anomo*, the Court of Appeal was concerned with the question of whether the Crown Court could pass a sentence of imprisonment to run consecutively to a sentence of imprisonment imposed by the County Court for a civil contempt. Having regard to the terms of s.47 of the Senior Courts Act 1981, the Court of Appeal held that, just as the County Court and High Court had power to impose consecutive sentences of imprisonment, the Crown Court had power to impose a term of imprisonment for contempt to take effect consecutively to another sentence, including a sentence of imprisonment to run consecutively to a sentence of imprisonment imposed by the County Court for a civil contempt. The basis of the court's reasoning was the existence of clear authority for the proposition that consecutive sentences can be passed at common law, the Court of Appeal noting the rationale for this position articulated by Wilmot CJ in *Wilkes* [1770] 19 St Tr 1075:

> "We cannot explore any mode of sentencing a man to imprisonment, who is imprisoned already, but by tacking one imprisonment to the other, or as is done in the present case. It is not letting the judgment for the first offence vary the punishment, or influence the quantum of it in the other: but only providing, from the situation of the delinquent to effectuate the punishment the Court thought his crime deserved... the necessity of postponing the commencement of the imprisonment under the second judgment arises from the party's own guilt which had subjected him to a present imprisonment."

> 12. In these circumstances, and having regard to the common law power of this court to impose consecutive sentences, I can see no principled reason why this court should not impose a custodial sentence for contempt to run consecutive to any current custodial sentence imposed by the Crown Court if the circumstances of the case so justify, subject always to that consecutive sentence not exceeding the maximum term that this court has the power to impose. To adopt the words of the Court of Appeal in *R v Anomo*, this approach accords with good sense and the principles of good sentencing."

23. Sentencing, the judge held that there was no factual overlap between the matters for which Mr Dowie was serving the criminal sentence and the matters of contempt. He then identified aggravating features. Mr Dowie had not only covertly recorded private proceedings, but he had published deeply private matters relating to the mother and the children. He had publicised serious and entirely unfounded allegations against the judge, counsel, the psychologist and the Cafcass officer. He had refused to remove the offending videos from the internet. He had previous convictions for breaches of court orders. In mitigation, Mr Dowie had never denied making and publishing the videos.

The appeal

24. Mr Dowie appealed on a number of grounds, which can be refined in this way:

    1) The committal hearing was wrongly said to have taken place in private.

    2) Mr Dowie was wrongly denied the opportunity to object to the use of CVP.

    3) Mr Dowie was wrongly denied the chance to cross-examine Ms Mulholland.

    4) There was a breach of the presumption of innocence and/or judicial bias.

    5) The sentence was manifestly excessive.

    6) It was wrong to impose a consecutive sentence.

    7) It was wrong to make a costs order.

25. At the hearing of the appeal, Mr Dowie appeared via CVP link from prison. He had not filed a skeleton argument as provided for by Macur LJ and at the outset of the hearing he announced that he was pursuing the appeal only in relation to the costs order.

The reason he gave was that he thought it unlikely that the appeal would be allowed in other respects and that he would need transcripts, which he could not afford.

26. This appeal concerns decisions that are contained in two very full judgments and there has never been any need for transcripts. However, Mr Dowie was correct to take the view that his appeal in respect of the findings of contempt and the sentence had no real prospect of success, but that is because it had no merit. As the appeal has not been formally withdrawn, it will be necessary to explain.

27. But before doing so, I should refer to a Respondent's Notice filed by the Attorney General in which she invites the court to uphold the decision for reasons that are different in one respect. She submits that MacDonald J was wrong to conclude that it was a necessary component of the *mens rea* for contempt under section 9(1) of the Contempt of Court Act 1981 and under section 12 of the Administration of Justice Act 1960 for the Appellant to have intended to interfere with the administration of justice. It is, she submits, enough for the recording or publication to have been deliberate and to have been done in the knowledge of the statutory prohibitions.

28. We did not hear argument about this issue because the judge found that Mr Dowie did in fact intend to interfere with the administration of justice. The legal ruling was therefore unnecessary to his decision (i.e. it was *obiter*) and it can similarly make no difference to the outcome of the appeal (so anything we said about it would be *obiter* as well). Furthermore, neither the judge nor this court heard full legal submissions about it. Accordingly, while the Attorney General's argument appears to me to have considerable substance, it is best for it to be adjudicated upon after full argument in a case where it might affect the outcome.

29. I will briefly consider the grounds of appeal in turn. The first four concern process and the remaining three concern sentence.

30. (1) Public hearing. Mr Dowie rightly argued that a committal hearing of this kind must be held in public. He complained that this principle was breached by a preamble spoken by the judge's clerk at the start of the hearing on 3 March 2022, when she said that the hearing was being held in private. He also relied on orders made by the judge on 12 October 2021 and 22 November 2021 that refer to "family proceedings" and "the Children Act 1989" as showing that the court was trying to pass off the contempt proceedings as private matters.

31. This ground of appeal is hard to understand and totally without merit. The titles of both judgments state that the hearings took place in public and in the first judgment MacDonald J expressly directed himself on the procedural requirement that a committal hearing must be listed publicly and held in open court. The sentencing hearing on 1 April 2022 was incorrectly listed as being in public but, by administrative error, at a different court. For that very reason it was adjourned until 13 April 2022. The conclusion is that these hearings were in public. In the absence of a transcript it is not possible to confirm what the judge's clerk said on the first occasion, but any inadvertent statement of that nature would clearly be of no consequence.

32. (2) Use of CVP. Mr Dowie said that, contrary to assertions in the judgments, the use of CVP was not agreed by all parties. He himself did not agree and was not given the opportunity to say so.

33. I reject this ground of appeal. Mr Dowie has appeared in a number of hearings via CVP and has never raised any objection.

34. (3) Opportunity to cross-examine Ms Mulholland. Mr Dowie submitted that not being allowed to cross-examine Ms Mulholland was a breach of his Article 6 ECHR rights.

35. I reject this ground of appeal for the reasons given by the judge. This case management decision was not only lawful but obviously correct.

36. (4) Breach of the presumption of innocence and/or judicial bias. Mr Dowie alleged that the email from the Attorney General to MacDonald J on 4 January 2022 was improper. The section addressing the Solicitor General's view on whether the prosecution was in the public interest includes, as a factor supporting it being in the public interest, that "a ruling by the High Court on this [matter] could be provided to YouTube with a request that these posts be removed". Mr Dowie said that this pre-judged his guilt and that it was an attempt at illegal behaviour by the Attorney General as MacDonald J had no jurisdiction over YouTube. Further, Mr Dowie alleged that correspondence between the Attorney General and MacDonald J is, in itself, evidence of judicial bias.

37. I reject this ground of appeal. The Attorney General communicated with the court in terms fully set out by the judge. There was nothing underhand or improper in the letter. It did not assume Mr Dowie's guilt or suggest that the court had any jurisdiction over YouTube. Overall, far from exhibiting bias, the judge was impeccably correct in his treatment of the application.

38. (5) Length of sentence. Mr Dowie submits that his sentence was manifestly excessive.

39. I disagree. Pernicious and persistent contempt of this nature will almost always warrant a custodial sentence. The maximum sentence for contempt of court is two years. Here there were a number of aggravating features and very little mitigation. There can be no possible complaint about the length of the sentence.

40. (6) Consecutive sentence. Mr Dowie argues that it was wrong in principle to defer the commencement of his sentence. I reject that argument too. The judge was right for the reasons he gave to hold that he had the power to impose a sentence starting at a later date. Any other conclusion could lead to perverse and unfair outcomes. A person serving a sentence cannot be immune to a separate penalty for contempt. Moreover, the judge was right to exercise the power in this case. The criminal sentence and the contempt sentence were imposed for different purposes. In the first case it is to punish serious offences against the victims, while in the second case it is to punish serious interference with the administration of justice and to deter similar conduct by Mr Dowie and others. There has been no breach of the totality principle.

41. None of these grounds of appeal had any merit whatever and we informed the parties that we would dismiss the appeal in relation to the findings of contempt and the custodial penalty.

42. That leaves the ground of appeal in respect of costs. Mr Dowie submitted that he has no home and no assets and that on his release he will be unemployed and unable to return to his home area. He argued that by making a substantial costs order that he can have no prospect of paying the court is setting him up to fail. The judge should have

looked to see whether there was any realistic prospect of him being able to meet the liability before making the order.

43. The only part of the sentencing judgment that concerns the order for costs (other than a paragraph explaining why Mr Dowie should not be liable for the costs of one hearing adjourned through no fault on his part) is the last paragraph, in which the judge merely stated that he was satisfied that it was appropriate to order that Mr Dowie pay the costs of the Attorney General. No claim was made in respect of solicitors' costs. Counsel's fees were claimed at £9,498.22. In the resulting order the costs were summarily assessed at £9,400. Ms Howarth confirmed to us that there was no other discussion of costs at the hearing before the judge. She also confirmed that the Attorney General's Office was not aware of any evidence to contradict what Mr Dowie told us about his lack of assets.

44. The award of costs is an exercise of a wide discretion, governed by the general principles in Part 44 of the CPR of reasonableness and proportionality; contempt cases are not in some special category: see *Secretary of State for Transport v Cuciurean* [2022] EWCA Civ 661, following *Attorney-General v Crosland* [2021] UKSC 15. In these cases, and others before them, it was held that costs will normally follow the event in committal proceedings and a contemnor will normally be ordered to bear the costs of the proceedings in addition to any penalty imposed. However, the court will seek to make an order which is fair, just and reasonable in all the circumstances. It may consider the contemnor's means when making an order for costs, but it is not required to do so.

45. I therefore accept that orders for costs may properly be made against persons who are unable to comply with them, including because they are in prison. However, in this case it was apparent that the court was adding a custodial sentence to one already being served, so the contemnor could not pay costs immediately, and he had no apparent ability to do so at any future time. In these specific circumstances, which differ considerably from those found in the authorities cited above, it was in my view necessary for the judge to have considered Mr Dowie's means and explained why he was nonetheless making the costs order. Had he done so, even in the broadest of terms, his decision would likely have been unassailable. As it is, there is no indication of how the discretion was exercised and that must be an error of approach. It would be open to us to remit to the judge for reconsideration but, as the effect of the error is so limited, it is more suitable for us to end the proceedings with an order of our own. We have regard to the seriousness of Mr Dowie's contempt and his abysmal history, but also to the length of time he will be in custody and the importance of his changing his ways after he is released. In all the circumstances we consider that a lower sum, not to be enforced without leave of the court, is the proper order to make. I would add that the court will in all likelihood permit enforcement of the order if Mr Dowie becomes able to pay or if he commits any further offences or contempts of court of this nature.

46. Our order is therefore that:

    1) We dismiss the appeal from the findings of contempt.

    2) We dismiss the appeal from the custodial penalty.

3) We allow the appeal from the order for costs and substitute an order that Mr Dowie shall pay the costs of the Attorney General, summarily assessed in the sum of £2,500.

4) We direct that the costs order should not be enforced without the leave of a judge of the Family Division.

5) We make no order in respect of the costs of the appeal.

Lady Justice Asplin :

47. I agree.

Lord Justice Bean :

48. I also agree.