CROOS AND ANOTHER
v.
DABRERA

COURT OF APPEAL
ISMAIL, J., (P/CA)
TILAKAWARDENA, J.
C.A. NO. 63/96
D.C. COLOMBO NO. 14930/L
NOVEMBER 11, 1998.

Contempt of court – Enjoining Order – Contravention – Constitution Art. 105 (3) – Judicature Act s. 55 – Proof beyond reasonable doubt – Jurisdiction of Court of Appeal – Actus Reus – Mens rea – Disobedience – Wilful – Strict liability – Rule 31 old English Rules of the Supreme Court.

The plaintiff-petitioners as trustees filed action seeking a declaration of title and eviction of the accused-defendant from the premises in question. Plaintiff also obtained an enjoining order restraining him from leasing, letting, mortgaging, alienating or entering into any kind of transaction which could jeopardise the rights of the plaintiffs as trustees, until the final determination of the action.

Whilst the said enjoining order was in force the accused-defendant had entered into an agreement to sell the premises in question. The defendant had further initiated negotiations with the Commissioner of National Housing to have the property vested under CHP law. On being charged for contempt of court.

Held: *Per* Tilakawardena, J.

> "Action taken with regard to acts of contempt is based on the premises that a well regulated laws of a civilised community cannot be sustained without sanctions being imposed for such conduct. It is important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law because without such respect, public faith in the administration of justice would be undermined and the law itself would fall into disrepute."

(1) The offence of contempt of court under our law is a criminal charge and the burden of proof is that of proof beyond reasonable doubt.

(2) Under Rule 31, old English Rules, an act of disobedience would become an act of contempt only if it was 'wilful'. Wilful was taken to mean that which, where the terms of an injunction were broken it was not necessary to show that the person was intentionally

contumacious or not he intended to interfere with the administration of justice. Yet where the failure or refusal to obey the order of court was casual or accidental or unintended, it would not be met by the full rigours of the law.

(3) There is a difference between disobedience to injunction and undertakings given to court and disobedience to a declaratory order or a judgment or decree of court. Our law therefore strictly does not need a proof of a wilful *mens-rea.*

(4) If the act was done after obtaining legal advice, it may be a mitigatory factor and relevant in certain circumstances only to prove *bona fides.*

Cases referred to:

1. *Johnson v. Grant* – 1923 SC 787.
2. *In Re Bramblewale* – 1969 1 All ER 1012.
3. *Cornel & Co., Ltd. v. Mitsuit & Co. Ltd., and Taisai Corporation* – CA 883/96 CAM 11.11.98.
4. In Re *S. M. A. Cader and another* – 68 NLR at 293.
5. *Fairelough & Sons v. Manchester Ship Canal* (No.) of 1897 – 41 Sol Jo 225.
6. *Dayawathie and Pius Pieris v. Dr. S. D. M. Fernando* and others – 1988 2 SLR 314.

APPLICATION for a Rule NISI on respondent to show cause against being punished for contempt of court.

Wijeyadasa Rajapakse with *Kuwera de Soysa* for the plaintiff-petitioners.

Sanath Jayatillake with *Rangith Karunaratne* for the defendant-respondent.

Cur. adv. vult.

January 20, 1999.

SHIRANEE TILAKAWADENA, J.

The plaintiff-petitioners as trustees of the "John Leo de Croos Trust", filed action in the District Court of Colombo, to have the defendant accused evicted from premises bearing assessment number 33, Horton Place, Colombo 7, and to seek a declaration of Title concerning the premises.

The plaintiff-petitioners obtained an enjoining order dated, 28.03.90, which stated *inter alia* that:

"You are hereby ordered to be restrained from leasing, letting, mortgaging, alienating or entering into any kind of transaction with regard to the property described in the schedule which could jeopardize the rights of the plaintiff's as trustees of the above trust until the final determination of this action."

The terms of the order are unambiguous, and clearly restrained the defendant-accused from entering into any transaction whatsoever as regard the premises in suit referred to above.

The said order was served on the defendant-accused on 30.04.90. The Fiscal Officer (K. K. Gunadasa) who had re-served the said order gave evidence of the service of the order. He had also tendered an affidavit deposing to the fact of having served the order. The register maintained by the court was marked P10 and the notebook of the Fiscal maintained P9. The endorsements contained therein were readverted to.

Despite the receipt of the said notice and whilst the aforesaid enjoining order was in force, the accused-defendant had entered into an agreement dated 02.02.92, bearing No. 242 which was notarially executed and attested by Notary A. Keerthiratne. Under this agreement, the defendant-accused purported to sell and convey the aforesaid premises in a sum of Rs. 2 million to a third party, and had accepted by way of an advance a sum of Rs. 50,000. The fact that this agreement to sell had indeed been entered into was not contested. The purported agreement was produced and marked P1. and corroborated by the oral testimony of Notary A. Keerthiratne.

D. S. Rupasinghe, an Attorney-at-law, who was called as a witness by the defendant-accused, admitted having advised the defendant-accused in this transaction. Rupasinghe stated that he was the Attorney-at-law of the defendant-accused in case in the District Court which issued in enjoining order. He stated that his client and he had been aware of the terms of the enjoining order. He also stated that he had acted on the advice of another senior counsel.

Furthermore, it was evident from his testimony that, Rupasinghe has acted as a broker for the sale of the premises under the agree-

ment. He stated that he had an oral assurance of Mr. J. N. A. Croos, the 1st plaintiff in the case, that the case will be withdrawn in the event of the sales agreement being honoured.

If this was an intention to adjust this matter by having obtained such an assurance, it would have been expected of an Attorney-at-law to intimate the same to court and obtain permission for the execution of the sales agreement.

Submissions on behalf of the defendant-accused were made, that the "reservation clauses" contained in clauses 1 to 7 of the sales agreement excluded her from being liable for the violation of the foregoing Order. This is untenable as this would mean that every enjoining order could be violated with impunity, based on 'reservation clauses'. It must be viewed in the light of the fact that parties cannot indirectly do what they are directly restrained in law from carrying out.

It was clear from the consideration of the totality of the evidence that the agreement had been executed in patent contravention of the enjoining order, dated 28.03.90.

The defendant-accused had also by letter dated 2.02.93, marked as P2, initiated negotiations with the Commissioner of National Housing to have this property vested under the Ceiling of Housing and Property Law, No. 1 of 1973. She has also given her consent to the same by the affidavit marked as P4. Her acts pertaining to the vesting of the house and premises had directly led to a consequential vesting order dated 27.04.93 marked as P3. In order to have this order vacated, the plaintiffs were compelled to pursue the matter before the Ceiling of Housing and Property Board of Review and the Court of Appeal. The conduct of the defendant-accused, therefore had the effect of rendering nugatory the enjoining order. Clearly, the defendant-accused had acted in contravention of the enjoining order when she initially sent P2 to the Commissioner of Housing.

The defendant-accused had also let the premises in suit, to Mr. Weerasinghe. This was proved by oral evidence as well as the documentary evidence contained in the affidavit of the defendant accused marked P4. This document has not been controverted.

The defendant-accused neither gave oral testimony nor did produce any documentary evidence.

The charges of "contempt of court" were preferred against the defendant-accused by this court under powers vested in it, in terms of Article 105 (3) of the Constitution read with section 55 of the Judicature Act. The charges preferred against her were for acting in violation of the enjoining order of 28.3.90, by the execution of the sales agreement No. 242 marked P1; and wilfully and fraudulently making arrangements with the Commissioner under the Ceiling of Housing and Property Law by the furnishing of the affidavit P4, and thereby acting in comtempt of the authority of the District Court.

The charge of contempt of court, was classically defined in the case of *Regina v. Kopito,* by Goodman, J. as "the scandalizing of the court, in that the words or the acts are likely to bring the court and Judges into disrepute.

The action taken with regard to acts of contempt is based on the premises that a well regulated laws of a civilized community cannot be sustained without sanctions being imposed for such conduct. It is therefore thought important to maintain the respect and dignity of the court and its officers, whose task it is to uphold and enforce the law, because without such respect, public faith in the Administration of Justice would be undermined and the law itself would fall into disrepute.

The Lord President Clyde in *Johnson v. Grant*[1] stated: "the phrase contempt does not in the least describe the true nature of the class of offence with which we are concerned . . . . the offence consists in interfering with the administration of law, in impeding and perverting the course of justice, it is not dignity of the court that is offended a petty and misleading view of the issues involved – it is the fundamental supremacy of the law which is challenged".

The offence of contempt of court under our law is a criminal charge and the burden of proof is that of, proof beyond a reasonable doubt.

Even if contempt is not always a crime, it bears a criminal character and therefore, it must be satisfactorily proved. Lord Denning, M R in *Bramblewale*[2] stated that "a contempt of court must be satisfactorily proven. To use the all time honoured phrase it must be proven beyond reasonable doubt.

The jurisdiction of the Court of Appeal to punish for contempt, where the acts complained were committed in the original courts was discussed in the case of *Cornel and Co., Ltd v. Mitsui and Co., Ltd. and Taisei Corporation*[3]. Following the decision of In *Re S.M.A. Cader and another*[4] at 293, Wigneswaran, J. has held that for both the special power prescribed in part LXV of the Civil Procedure Code to punish summarily offences of contempt of court committed in *facie curiae,* and offences committed in the course of any act or proceeding in the original court does not effect the power of the Court of Appeal to punish for contempt under Article 105 (3) of the Constitution.

When considering the charge of contempt of court, the *actus reus* committed by the defendant-accused was discussed in great detail in the earlier part of the judgment. On the evidence it has been proved beyond a reasonable doubt that there has been disobedience and a non-compliance of the explicit terms of the enjoining order dated 28.3.90.

It is also necessary consider the *mens rea* pertaining to this charge. Under Rule 31 of the Old English Rules of the Supreme Court, an act of disobedience would become an act of contempt only if it was "Wilful". "Wilful" was taken to mean that while, where the terms of an *injunction* were broken it was not necessary to show that the person was intentionally contumacious or that he intended to interfere with the administration of justice, yet where the failure or refusal to obey the *order* of court was casual or accidental and unintentional, it will "not be met by the full rigours of the law". [Borrie and Lowe's Law of Contempt, at p. 100-104 following Lord Russell, CJ. in *Fairelough & Sons v. Manchester Ship Canal*[5].

In the case of *Dayawathie and Peiris v. Dr. S. D. M. Fernando and others*[6] Justice Jameel has distinguished the *mens rea* in the

offence into two categories and held that there is a difference between the *mens rea* in cases where there has been a disobedience to injunctions and undertakings given to court on the one hand, and those in which disobedience has been to a decree and judgment on the other. He has held that "while in the former, the act itself, unless it has been accidental, casual or done unintentionally, was held to be culpable. In the latter instance, there must be something more. Namely a deliberate disdain of the court or a disregard for, or a defiance of the court and its decree".

In the former case there is strict liability. Where the order is coercive every diligence must be exercised to observe it to the letter. In such circumstances there is no need to show that the person charged with contempt was intentionally contumacious or that he intended to interfere with the administration of justice. Unless the act was accidental, casual or done unintentionally it is culpable.

In the latter case mere disobedience without more is insufficient. A party cannot sacrifice his right of appeal nor is it permissible to obtain execution in the guise of contempt proceedings. Where the law expressly provides for execution of decrees contempt proceedings cannot be resorted to. In the latter type of disobedience the contemner should have acted in defiance of the order or wilfully refused to obey it. Deliberate disdain of the court, or a disregard for, or defiance of the court and its decree is required.

Therefore it is clear that in our law, there is a difference between disobedience to injunctions and undertakings given to court and disobedience to a declaratory order or a judgment or decree of court.

Our law therefore strictly does not need a proof of a wilful *mens rea,* when an injunction is given by a competent court. Nevertheless according to the facts disclosed in the evidence pertaining to this case, it is apparent that there has been a wilful disobedience of the enjoining order. The fact that the enjoining order had been served on the defendant-accused and that she was fully aware of its terms has not been contested. In addition, even in the agreement entered into her the "reserve clauses" contained therein, was to secure a defense even at the time of entering the agreement. The evidence of all the

witnesses in the court and the documents referred to disclose that the disobedience to the enjoining order has been deliberate and wilful this has been proved beyond a reasonable doubt.

Another matter to be considered is whether the legal advice given to the defendant-accused would exonerate her from liability. The veracity of this evidence has already been dealt with in the earlier part of the order. Assuming however that she had acted solely on legal advice, nevertheless under our law she cannot disclaim liability on this basis.

In the case of *Dayawathie and Pius Pieris v. Dr. S. D. M. Fernando and others* (supra) it was held that the plea, that the act was done after obtaining legal advice is not conclusive, but it may be a mitigatory factor and relevant in certain circumstances only to prove *bona fides.*

In this case no direct plea was taken, but even upon a consideration of the above it is clear that the defendant-accused had deliberately contravened the explicit provisions of the enjoining order of the court, and it cannot be said that she had acted *bona fides.* It is clear from the facts that her acts were both deliberate and wilful.

Submissions were also made that the charges have not been properly framed. Objection has never been taken on the charges, and it is clear from the cross-examination that the charges were clearly understood by the defendant-accused. In any event, no prejudice has been caused and we hold that the objections to the charges are without a basis and untenable in law.

In all the circumstances of this case we hold that the charges against the defendant-accused has been proved beyond a reasonable doubt and we hold her guilty as charged.

ISMAIL, J. (P/CA) – I agree.

Rule made absolute.

Defendant-respondent – guilty as charged.