23/78

FAMILY COURT OF AUSTRALIA at HOBART

McCULLOCH and McCULLOCH; ex parte MALES

Wood SJ

30 May 1978

(1978) 32 FLR 175; 4 Fam LR 118; [1978] 32 FLC 77,159 [¶90-426]; 43 CCH Australian Family Law & Practice, [55.110].

FAMILY LAW – FAILURE TO PAY AN ORDER FOR MAINTENANCE – APPLICATION FOR PERSON TO BE PUNISHED FOR CONTEMPT OF COURT – APPLICATION DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR – WHETHER COURT HAS POWER TO PUNISH PERSONS FOR A WILFUL DISOBEDIENCE OF A COURT ORDER: *FAMILY LAW ACT* 1975, SS107, 108.

HELD: Appeal allowed. Order for dismissal quashed. Remitted to the Magistrate for determination in accordance with the tenor of this judgment.
1. The Magistrate should at least have embarked upon the hearing of the evidence to determine whether or not Mr McCulloch had been wilfully disobedient of the decree, and the proceedings before the learned Magistrate miscarried in that the Court never proceeded to determine this question.

2. Section 108 which is prefaced by the phrase "notwithstanding any other provision of law" enables a Court to proceed to deal with a person for contempt if his failure to obey or comply with an order for the payment of money in a matrimonial cause is found to be a wilful disobedience of the order so requiring him to pay. The combined effect of sections 35 & 108 override the saving from imprisonment bestowed by Section 107.

3. Section 108 specifically provides that actions which are a wilful disobedience of a decree are punishable in the same way as contempt, and indeed it is hard to imagine any basis upon which the legislature would have created a structure such as the Family Court of Australia and given it a large jurisdiction to make orders for the payment of money, not only by way of maintenance but also by way of orders for settlements under Sections 79 and 80, and not to have provided a power in that Court to deal with wilful disobedience of those orders in the same way that other Courts of law can deal with such defiance of their orders.

WOOD SJ: This is an appeal from a decision of a Magistrate given in a Court of Petty Sessions at Hobart on the 11th November 1977 following an application by the Clerk of that Court that Laurence Henry John McCulloch be punished for contempt of court. The alleged contempt is the failure of Mr McCulloch to obey an order for maintenance which had been made in the Supreme Court of Tasmania in 1975 and registered in the Court of Petty Sessions at Hobart.

On the hearing of the application before the learned Magistrate, counsel for Mr McCulloch submitted according to the Magistrate's written reasons for judgment, "that the complaint (sic) did not disclose a cause of action as it was an application for enforcement of the original maintenance order made on the 1st July 1975 and the contempt provisions of the *Family Law Act* 1975 are not available for that purpose.'

Having heard argument, the Magistrate came to the conclusion that he had no power to punish Mr McCulloch for the contempt of court and he dismissed what he terms "the complaint".

The notice of appeal contains as its first ground the proposition that the learned Magistrate erred in law in holding that a Court of Petty Sessions exercising jurisdiction under the *Family Law Act* 1975 did not have power to impose a penalty pursuant to Section 108 of the *Family Law Act* 1975 for wilful disobedience of the decree for payment of maintenance. The second ground is that the learned Magistrate similarly erred in holding that in the circumstances of the application then before him, he was bound by the decision of *Virgis and Virgis* (1977 FLC 90-275). The orders

sought on appeal were that the order of the Magistrate be quashed and that the application be remitted to the learned Magistrate with such directions as this Court my deem meet.

The appeal was lodged by the Crown Advocate for Tasmania on the basis that Mr Males, who is the Clerk of Petty Sessions at Hobart, is a person aggrieved by the order of the Magistrate. The respondent was not represented on the hearing of the appeal — counsel appeared out of courtesy to say that he had no instructions.

It is desirable to make some comments on the forms used in these proceedings and the persons who are parties to them. On the latter aspect of the matter, it might at first sight be considered unusual that in proceedings *inter partes*, the appellant should be a public officer. In this case, this fact has arisen because the initial proceedings for arrears of maintenance under the order were instituted pursuant to authority given by Mrs McCulloch to the Clerk of Petty Sessions at Hobart and dated the 1st July 1975. Mrs McCulloch later gave a further authority in like terms on the 1st September 1977 and all enforcement proceedings which have been taken under this order to date have been taken by the Clerk of Petty Sessions at Hobart. The proceedings taken by the Clerk of Petty Sessions for enforcement are allowed for by Section 106(b) and Regulation 132(7). These provisions do not allow him to take proceedings for contempt, but only proceedings for enforcement.

However, so far as the proceedings for contempt of court are concerned, Regulation 137(4) provides

> "If a person alleges that another person has wilfully disobeyed a decree of a court, he may file in that court, an application in accordance with form 6, together with an affidavit setting out the details of the alleged wilful disobedience".

That regulation does not require that the person who commences proceedings alleging contempt of court must be a party to the proceedings and to this extent, it is in contrast with the provisions of Regulation 133(2) empowering (*inter alia*) a person entitled to institute proceedings for enforcement of decrees to make application to the Court for an oral examination; it is in contrast to Regulation 134(2) specifying the category of persons who may take garnishment proceedings; it is in contrast to Regulations 135(1) specifying the categories of persons who may apply for an order for seizure of property, and also in contrast to Regulation 136(1) empowering the Registrar or party to proceedings under the Act to apply for a sequestration order. Proceedings under Section 108 for contempt of court are in effect proceedings alleging an offence, and such proceedings may, at common law, be instituted by any person on the basis that that person is exercising the right of any member of the public to lay an information and to prosecute an offence. (See *Lund v Thompson* (1959) 1 QB 283.) Consequently, the proceedings taken by the Clerk of Petty Sessions for the alleged contempt committed by Mr McCulloch are justifiable on the basis that Regulation 137(4) does not require that the person who makes such application be a party to the proceedings, nor an officer of the Court, nor any other authority recognised under the Act, and this regulation reflects the common law.

It is desirable at this stage to set out the history of the proceedings so that the basis of the allegations against Mr McCulloch become apparent. On the 1st July 1975, the Supreme Court of Tasmania by decree nisi dissolved the marriage between Mr and Mrs McCulloch, and pursuant to this decree, ordered him to pay to his wife the sum of $30 a week for the maintenance of his three children and 10/- per week for her. This decree was registered in the Court of Petty Sessions at Hobart on the 5th December 1975 at which date maintenance arrears were $722.40. On the 22nd July 1976 a summons was issued under Regulation 133 requiring Mr McCulloch to attend the Court of Petty Sessions on the 27th August 1976 to be orally examined on all matters relating to his refusal or failure to comply with the order. He did not appear on that day, and a warrant was issued for his arrest by the presiding Magistrate. Pursuant to that warrant he was brought before the Court on 2nd September 1976 and remanded first to the 17th September 1976 and later to the 1st October of that year. However, Mr McCulloch again did not appear on the last remand date and a further warrant for his arrest was issued. He appeared on the 8th October and disputed the arrears. The learned Magistrate records in his reasons for judgment that "the complaint was proved", but there was in fact no complaint before the Court merely a summons requiring Mr McCulloch to attend for examination pursuant to Regulation 133. The inference, however, to be drawn is that the amount of the alleged arrears was proved to the satisfaction of

the Court, and an examination of Mr McCulloch's means was made. He was ordered to pay $100 immediately and thereafter $100 per week to cover current maintenance and arrears. He did not comply with this order and on the 11th February 1977 an application (erroneously referred to by the learned Magistrate as a summons) was made that Mr McCulloch be punished for contempt by reason of his failure to comply with the order for payment of maintenance and arrears made on the 8th October 1976.

The learned Magistrate finds that this summons (sic), which was returnable on the 4th March 1977, resulted in a conviction being recorded against Mr McCulloch. There is no certificate of conviction on the Court file, but if he were convicted, it must have been on the basis that he was in contempt of court, and in purported exercise of the powers contained in section 108. Such information as is available to me on the file from the Court below indicates that the learned Magistrate now appealed from was not the Magistrate who apparently recorded a conviction against Mr McCulloch on the return of the application for contempt on the 4th March 1977. On the 2nd September 1977, further proceedings were taken by the Clerk of Petty Sessions by way of an application that Mr McCulloch be punished for contempt of court. The application requests:

> "That the respondent husband be punished for contempt of court in that he having been convicted for contempt of court on the 4th March 1977, namely that he failed to obey an order of the Court to pay maintenance to his wife and children in the sum of $30 per week to the Clerk of Petty Sessions, Hobart, has since that date failed to comply with the order. It is hereby alleged that the respondent failed to comply with the order and is therefore in contempt of court".

Whatever may be said about the draftsmanship of this application, the purpose of it was to institute a fresh application against Mr McCulloch for a further contempt of court committed subsequent to the 4th March 1977 by reason of his continued failure to obey the order of the Court that he pay maintenance for his children in a substantial sum and for Mrs McCulloch in a nominal sum, although the amount of this aspect of the order has not been referred to in the application.

The learned Magistrate, in his reasons for judgment, and when setting out the chronology of the proceedings, states that on the 2nd September a summons was issued charging the husband with contempt and he appeared before him in answer to the summons. I point out again that the proceedings before the court were not by way of a summons but by way of applications, as required by Regulation 137. These are perhaps minor errors in terminology which I have pointed out and they do not affect the nature or validity of the proceedings, before the learned Magistrate, but they do appear to point to some confusion in the mind of the Clerk of Petty Sessions as to the nature of the proceedings he was instituting in order to bring before the Court the issue, first of all, whether Mr McCulloch was in arrears with his maintenance payments, secondly, the amount of those arrears and thirdly, the procedure to be adopted to determine whether or not Mr McCulloch is in contempt of court. The error and confusion appears to have been perpetuated throughout the whole course of the matter. In general, all proceedings under the *Family Law Act* are commenced by application and complaints are not part of the procedural machinery used by the Act although summonses are used for some purposes (e.g., Regulations 113 & 133.)

In essence, the learned Magistrate came to the conclusion that he was bound by the decision of Emery J (as he then was) in *Virgis and Virgis* (*supra*) and he concluded his reasons for his decision by stating in effect that although he respectfully disagreed with the decision of Emery J in that case, he was, on the hearing of the application before him, exercising jurisdiction under the *Family Law Act* in a court inferior in the hierarchical structure to the Family Court of Australia, and was bound by the decisions of that Court where they be those of a single Judge or of the Full Court, unless such decisions can be distinguished, and he found no basis for distinguishing His Honour's decision in *Virgis and Virgis*.

I find it a misconception of the proceedings before the learned Magistrate, however, that counsel should have submitted to him by way of preliminary objection that the complaint did not disclose a cause of action. There was, as I have pointed out, no complaint before the Court, but an application, and on the face of it, the application disclosed an allegation that Mr McCulloch was in contempt of a decree of the court. The learned Magistrate reluctantly acceded to this preliminary objection, but would certainly have found otherwise had he not felt himself bound by *Virgis and Virgis*.

In permitting himself to entertain this application and accede to it, I think that the learned

Magistrate has misdirected himself. The questions before him were first whether Mr McCulloch was in contempt of court and then what powers were available to punish Mr McCulloch for such wilful disobedience of the order as may have been found to have been committed by this man. There is a distinction between proceedings for enforcement and proceedings for contempt. It seems to me that the Court should at least have embarked upon the hearing of the evidence to determine whether or not Mr McCulloch had been wilfully disobedient of the decree, and the proceedings before the learned Magistrate miscarried in that the Court never proceeded to determine this question. For this reason alone, I would allow the appeal and remit the matter for hearing with a direction that the Court below determine whether or not Mr McCulloch is in wilful disobedience of the order for maintenance, and consequently in contempt of court.

However, to take that view is not to deal with a basic matter upon which the learned Magistrate was asked to rule, namely whether the provisions of s107, which provide that after the commencement of the F*amily Law Act* no person shall be imprisoned or otherwise placed in custody by reason of contravention or failure to comply with an order for the payment of money made in a matrimonial cause, has the effect of providing that howsoever this contravention or failure arises, there can be no imprisonment even if such contravention or failure is a wilful disobedience and contempt of the court under the provisions of Section 108. As I understand the decision of Emery J in *Virgis and Virgis* (*supra*), His Honour took the view that the proceedings before him were proceedings for enforcement of maintenance, that the Act contains specific enforcement proceedings, and these exclude the power to commit for contempt. With great respect, it does not appear to me that Emery J adverted to the provisions of section 108 of the Act which provides in sub-section 1 as follows:—

> "Notwithstanding any other provision of law, a Court having jurisdiction under this act may punish persons for contempt in the face of the Court when exercising that jurisdiction or for wilful disobedience of any decree made by the Court in the exercise of jurisdiction under this act".

In his judgment, His Honour adverts to the provisions of Section 35 which provide as follows:

> "Subject to this and any other Act, the Family Court was the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court."

His Honour observes that he, knowing of no provision in any other act to prevent the application of the contempt provisions, is put on guard to see if there is some provision in the *Family Law Act* which, but for sections 70(8) and 114(5), would prevent the operation with respect to Sections 70 and 114 of the contempt provisions.

I take the view, with great respect, that Section 108 which is prefaced by the phrase "notwithstanding any other provision of law" enables a Court to proceed to deal with a person for contempt if his failure to obey or comply with an order for the payment of money in a matrimonial cause is found to be a wilful disobedience of the order so requiring him to pay. The combined effect of sections 35 & 108 in my view, override the saving from imprisonment bestowed by Section 107. I do not think that it was the intention of Parliament to create a situation whereby a person could, for example continuously wilfully disobey an order for maintenance in circumstances where he has the means to pay and yet not be liable to punishment for this disobedience merely because, in the words of section 107 his disobedience is a contravention of or failure to comply with the order and is not punishable by imprisonment. Section 107 and the regulations associated with it relates to the enforcement of orders, and imprisonment is precluded as a method of enforcement. But contempt is another matter again.

Section 108 specifically provides that actions which are a wilful disobedience of a decree are punishable in the same way as contempt, and indeed it is hard to imagine any basis upon which the legislature would have created a structure such as the Family Court of Australia and given it a large jurisdiction to make orders for the payment of money, not only by way of maintenance but also by way of orders for settlements under Sections 79 and 80, and not to have provided a power in that Court to deal with wilful disobedience of those orders in the same way that other Courts of law can deal with such defiance of their orders. Perhaps the matter of imprisonment as a penalty has been over-emphasised and allowed to permit the other penalties available for contempt to be overlooked. It should be observed that imprisonment is not the only punishment available for contempt. Section 108(5) allows for penalty by way of requiring and giving of security for good behaviour. In the context of these proceedings, the good behaviour required of Mr McCulloch in

relation to his future obedience of the order could well be his regular payments of the amounts due under it. Alternatively, Mr McCulloch could be fined.

Section 108, it seems to me, expressly creates a general power in this Court to punish for contempt and wilful disobedience of its orders. I gain some support for this view from the *dicta* of the Full Court in *Sahari and Sahari* (1976 FLC 90-086) at p75407 where in their joint judgment Evatt CJ Pawley and Watson SJJ state:

> "Section 107 clearly prohibits imprisonment for maintenance and other failures to pay money orders. A code for enforcement of such orders must now be found in the regulations although in a case of wilful disobedience Section 108 probably still has application".

I refer also to the decision of Connor J in *Delly and Delly* (1977 FLC 90-215) where in proceedings not unlike those which are the subject of this appeal, His Honour, in dealing with the same argument as was raised before the learned Magistrate says of Section 107(1):

> "This provision, however, cannot be read on its own, as sub-section 1 of Section 108 provides as follows (and His Honour then set out those provisions). I think that the combined effect of these two provisions is that if the non-payment of maintenance constitutes a contempt of court, e.g. because the defaulter has the means and ability to pay and has wilfully refused to do so, then notwithstanding section 107(1) contempt proceedings may be taken under section 108(1)".

I am therefore of the view that this appeal should be allowed and the order for dismissal be quashed and the matter be remitted to the learned Magistrate for determination in accordance with the tenor of this judgment.
