88/76

FAMILY COURT OF AUSTRALIA — FULL COURT at MELBOURNE

In the Marriage of SAHARI

Evatt CJ, Pawley and Watson JJ

7 September 1976

(1976) 25 FLR 475; 11 ALR 679; 2 Fam LR 11,126; [1976] 25 FLC 75,396 (¶90-086)

FAMILY LAW – DISOBEDIENCE OF COURT ORDER – CONTEMPT OF COURT – MATTERS TO TAKE INTO ACCOUNT WHEN DEALING WITH A PERSON ALLEGED TO BE CONTEMPT OF COURT: *FAMILY LAW ACT* 1975, S108.

Custody and access orders were made by the Family Court wherein the husband was restrained from molesting, assaulting, abusing or provoking his wife. Some eight days later, the wife made an *ex parte* application alleging assault etc.; the court then vacated the access order and after receiving an affidavit from the husband, found him guilty of contempt and imprisoned him for 28 days.

It was argued that there was no contempt within s108 of the *Family Law Act*; that there was no wilfulness; that the penalty was too severe and that as the husband had not been liable to cross-examination, he had been denied natural justice. The initial part of the judgment provides a useful treatise of the contempt powers. This has been included in the draft as a reference source.

The Court: "We propose therefore in this judgment to examine the following questions before returning to the facts in this appeal:
(a) the general principles dealing with the disobedience of court orders;
(b) how those principles relate to the provisions of the *Family Law Act*;
(c) the relationship between those principles and the criminal law;
(d) the procedures available when an order is made under Part VII or section 114; and
(e) the procedure to be followed when contempt is alleged because of disobedience of an order made under the Act.

HELD: Appeal allowed. Order for imprisonment vacated.
1. When the various reported authorities from the common law countries together with the Phillimore Report (*Report of Contempt of Court* (Cmnd 5794)) are examined the following principles emerge in relation to civil contempt:—

(a) a person can be found guilty of contempt of court only if he knows the order he is required to obey and is in breach of that order;
(b) the precise breach of the order must be proved beyond reasonable doubt;
(c) the court may then punish (*inter alia*) by imprisonment:
(i) until the order is complied with; or
(ii) to uphold the authority of its orders;
(d) as to (c)(i) imprisonment should only be imposed if there is no alternative method available to achieve the remedy the breached order seeks to effect;
(e) as to (c)(i) the sentence may be indefinite as the defendant has 'the keys of his release in his own pocket' but imprisonment should not continue when compliance is no longer possible.
(f) where the defendant breaches an order and his breach is apparently a criminal offence, the court has to exercise a discretion whether to hear the contempt charge or adjourn it and await the outcome of the criminal proceedings (if any);
(g) in the exercise of that discretion the court will need to consider *inter alia* the gravity of the offence and the urgent need (if any) to protect the applicant or prevent repetition of the offence;
(h) in the hearing of contempt proceedings the defendant should have the same rights and privileges as a person charged summarily with a criminal offence;
(i) contempt procedures should be used sparingly and imprisonment invoked only as a last resort.

2. When the *Family Law Act* and *Regulations* are totally viewed, when the atmosphere and procedures of the Family Court are studied and the basic concept of the Court as 'the helping court' is adhered to, the use of the contempt power should be seen as an exercise of last resort. If counselling fails or is inappropriate, the powers under ss70 and 114 remain. Only if these have failed or are inappropriate should the contempt provisions be invoked. Legal practitioners, who have their own

duties under the Act, should be loathe to advise the invoking of the contempt power until all other avenues of compliance or agreement have been reasonably considered and explored. Nevertheless cases will remain where invocation of the contempt power is the only appropriate course. Where such a course is necessary the relevant procedures must be strictly complied with.

THE COURT:

A. General principles dealing with the disobedience of court orders

We start with the short summaries in *Halsbury*.

> 'It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specified act or to act in breach of an undertaking given to the court by a person ... Although contempt may be committed in the absence of wilful disobedience on the part of the contemnor, committal or sequestration will not be ordered unless the contempt involves a degree of fault or misconduct. Thus accidental and unintentional disobedience is not sufficient to justify sequestration or committal, but the respondent may be ordered to pay the costs of the application.
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> 'Evidence is by way of affidavit but if a person sought to be committed wishes to give oral evidence on his own behalf he is entitled to do so. The defendant is not a compellable witness in proceedings against him for criminal or civil contempt. If however, a defendant chooses to give evidence voluntarily, he cannot as of right refuse to be cross-examined. The court has a discretion whether to allow cross-examination on the affidavit. Contempt of court must be proved beyond reasonable doubt.'

(Halsbury's *Laws of England*, 4th ed., Vol 9, pars. 52, 53, and 96).

Two recent decisions of the English Court of Appeal emphasise the exceptional and criminal nature of contempt proceedings. In *Re Bramblevale Ltd* (1969) 3 All ER 1062, Lord Denning MR said (at 1063):

> '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. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scales against him.'

A detailed analysis of the methods of trial to be used in applications relating to disobedience of court orders appears in the judgment of Lord Denning MR in *Comet Products UK Ltd v Hawkex Plastics Ltd* (1971) 1 All ER 1141 (at 1143-1145):

> 'This case raises questions of some importance. Counsel for the plaintiffs submitted that in proceedings of this kind the defendant can be compelled to give evidence even against himself. Counsel pointed out that this is a case of civil contempt and not criminal. The difference is well known. A criminal contempt is one which takes place in the face of the court, or which prejudices a fair trial and so forth. A civil contempt is different. A typical case is disobedience to an order made by the court in a civil action. I cannot accept counsel's submission. Although this is a civil contempt, it partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal charges have always been applied to such a proceeding. I see that Cross J in *Yianni v Yianni* (1966) 1 All ER 231, (1966) WLR 120, so decided; and furthermore we ourselves in this court, in *Re Bramblevale Ltd* (1969) 3 All ER 1062, (1970) Ch 128 said that it must be proved with the same degree of satisfaction as in a criminal charge. It follows that the accused is not bound to give evidence unless he chooses to do so. In this connection I quote what Bowen LJ said in *Redfern v Redfern* (1891) p139 at 147, (1886-90) All ER Rep 524 at 528:
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> > "It is one of the inveterate principles of English Law that a party cannot be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture ... no one is bound to incriminate himself."
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> This was not always the law in the case of civil contempt. In the days of Sir William Blackstone, 200 years ago, civil contempt was an exception to the general principle. In those days a plaintiff was entitled to deliver interrogatories to the defendant, which the defendant was bound to answer on oath. In his *Commentaries* 18th Ed, 1829, Bk. 4, p287 Sir William Blackstone said that —
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> > "this method of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance."
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> and he went on to say that (at p288) —

> "by long and immemorial usage, (it) has now become the law of the land."

I am prepared to accept that such a rule did exist in the days of Sir William Blackstone. But I do not think it exists any longer today. The genius of the common law has prevailed. I hold that a man who is charged with contempt of court cannot be compelled to answer interrogatories or to give evidence himself to make him provide his guilt. I reject the submission that the defendant is a compellable witness in the contempt proceedings against him.

Counsel for the plaintiffs then referred to the *Evidence Act* 1877, s1, which provides:

> "On the trial of any indictment or other proceeding for a nuisance to any public highway, river, or bridge, and on any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding and the wife or husband of any such defendant, shall be admissible witness and compellable to give evidence."

And counsel said that taking those words literally, this was for the purpose of enforcing a civil right and therefore the defendant was compellable to give evidence. I must say that that section seems to me to be clearly directed to public nuisances and public offences of the kind described and not to apply to a civil contempt such as we have to consider today. That section is a very special provision dealing with a very special subject-matter.

I think counsel for the plaintiffs was on much stronger ground when he said that here the defendant had filed an affidavit which had been put before the court and therefore he was liable to be cross-examined on it. He referred us to *Clarke v Law* (1855) 2 K & J 28 and *Re Quartz Hill etc. Co ex parte Young* (1882) 21 Ch D 642. Those cases seem to show that in ordinary civil proceedings in Chancery, if an affidavit is filed and used before the court, the defendant, when he is threatened with cross-examination, cannot get out of it by saying that he will withdraw his affidavit. If he has filed an affidavit, and, in addition, if he has gone on to use it in the court, then he is liable to be cross-examined on it if the court thinks it right so to order. I would not say that the mere filing is sufficient, but I do say that when it is not only filed but used, the defendant does expose himself to a liability to be cross-examined if the judge so rules.

So that brings me to the final question; ought a judge to rule that the second defendant should be cross-examined on his affidavit? It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case. I can understand that if the cross-examination could be limited to the particular circumstances of this alleged contempt, then it might be right to permit it. But in the course of the discussion, and particularly that of this morning, it has become plain that the plaintiffs through their advisers, desire a much wider cross-examination than that. Counsel for the plaintiffs has referred us to the importance of a wilful intent, or a fraudulent intent, in passing off actions. He says that he wishes to probe that the second defendant intended to deceive. He quoted the well-known sentence of Lindley LJ in *Slazenger & Sons v Feltham & Co* (1889) 6 RPC 531 at 538. "Why should we be astute to say that he cannot succeed in doing that which he is straining every nerve to do?" Counsel for the plaintiffs wishes to cross-examine to show, not only that, in this new carton, the second defendant was intending to deceive, but also to show that he had the intent all the way along, and in particular that he had the intent in regard to the original Home Hair Trimmer. It seems to me that such a claim to cross-examine does mean that he will be investigating the whole of the circumstances of the second defendant, including the circumstances leading to the original action. However much he may disclaim it, it seems to me plain that counsel for the plaintiffs, if he were to cross-examine, would claim to investigate the second defendant's state of mind from the beginning, and to cross-examine as to credit, as to character and so forth, all the way along the line.

Now the question is: ought leave to be allowed to cross-examine the second defendant in such a way, and on such a scale, in these proceedings? Here we must have regard to the fact that this is in the nature of a criminal charge. It is not a claim to recover compensation from the defendants. It is a claim to enforce the injunction. The only permissible object of this application is to punish the second defendant – to impose sanctions against him – for wilful disobedience to an order of the courts. When the defendant is faced with such a charge, I feel that the genius of the common law should prevail. The common law would not wish him to be cross-examined in the way that is suggested. Such a cross-examination would range over the whole of his state of mind on other occasions and in other circumstances, whereas the one issue is whether there has been a passing-off of this red carton. If this cross-examination were to be pursued, I can see question after question put, and objection after objection raised, extending over a long time. I do not think that would be appropriate in what in effect is a criminal charge of this kind. Therefore as a matter of discretion, as it is, the cross-examination ought not to be allowed. I think the judge would not have allowed it if he had known the range of cross-examination which it is sought to apply in this case.

> Seeing, however, that cross-examination is not to be allowed, it means that the judge might think it right to disregard the affidavit, or to give it very little weight. That would be for him. In the circumstances, I do not think that cross-examination should be allowed.'

It is to be noted that a considerable portion of this statement is based upon a procedural requirement that the court's leave to cross-examine is apparently necessary. Under the *Family Law Regulations* such leave is not generally required. Regulation 63(13) provides:-

> 'A party to proceedings may require that the deponent of an affidavit attend for cross-examination and, if the deponent fails to attend, the court may refuse to allow the affidavit to be used in the proceedings, or may adjourn the hearing until the deponent attends for cross-examination.'

In *Danchevsky v Danchevsky* (1973) 3 All ER 934 the use of the contempt power only as a last resort was emphasised. Lord Denning said (at 937-8):

> 'It is often a question which order should be made. It seems to me that when the object of the committal is punishment for a past offence, then, if he is to be imprisoned at all, the appropriate order is a fixed term. When it is a matter of getting a person to do something in the future – and there is a reasonable prospect of him doing it – then it may be quite appropriate to have an indefinite order against him and to commit him until he does do it. But if there is no such prospect – as here – there should not be an indefinite term. If he is to be imprisoned at all, it should be a fixed term for his past disobedience.
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> Take next the directions to the prison governor: ... not less than 3 months ..." That, too, was bad. It leaves it in the discretion of the governor when to release him: with a minimum of three months. That cannot be right. The length of sentence must be determined by the judge, and not by the governor.
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> What then should have been done? The object was to see that the order of the court was obeyed — that the house was sold for the benefit of both parties. To achieve this, it was not necessary to send the man to prison. Whenever there is a reasonable alternative available instead of committal to prison, that alternative must be taken. In this case there was a reasonable alternative available. It was this: to enforce the order for possession by a warrant for possession, to sell the house, and to make the conveyance of the property by means of an instrument to be signed and executed by a third party on the direction of the court: see s47 of the *Supreme Court of Judicature (Consolidation) Act* 1925, which applies to the county court by s74 of the *County Courts Act* 1959.
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> Counsel for the wife submitted that the committal for three months was done to punish the husband — to punish him for his disobedience in the past in not giving up possession. I do not think this was an appropriate case for punishment, certainly not for imprisonment. The husband was obstinate and misguided. But he was sincere. The right way of dealing with the matter was to take steps to enforce the order of the court, but not to imprison him. That would do no good to him or to anyone. It would put him out of work, and make him unable to pay maintenance for the children or do anything.'

Buckley and Scarman L JJ, strongly supported Lord Denning. In particular Scarman LJ was concerned about the manner in which the contempt order issued. He said (at 938):

> 'I would have thought that when a judge is taking the unusual step of committing a man to prison it is advisable that he should see and approve of the terms of the written order so as to ensure that it is the order which he in fact made in court.'

In *Balogh v St Albans Crown Court* (1975) 1 QB 73; (1974) 3 All ER 283 the defendant decided to enliven court proceedings by releasing laughing gas down a ventilation duct on the roof into the court. He stole a cylinder of the gas but before he could carry out his plan he was arrested for the theft of the cylinder and taken into custody. The trial judge committed him to prison for six months for contempt of court. The Court of Appeal was of the opinion that the summary procedure available for contempt should be used only in exceptional cases where the contempt was clearly proved and could not wait to be punished. Here the defendant was already in custody and charged with theft there was no need for immediate imprisonment.

Cautionary comments as to using the contempt power with great care have appeared in English decisions over the years, see e.g. *Seaward v Paterson* (1897) 1 Ch 545 per Lindley LJ at 553 and *Gordon v Gordon* (1946) P.99 per Lord Greene MR at 103. In *Marshall v Marshall* (1966) 110 Sol. Jo. 112 Danckwerts LJ said that too free a use had been made of the remedy of committal for contempt; committal for contempt of court was a serious matter and it was not right that it should be treated as a weapon in the course of domestic warfare.

When the court deals with contempt, the particular matter of contempt must be clearly set forth, particularly in the court's order (*Mcllwraith v Grady* (1967) 3 All ER 625). When a defendant has breached, for example, a non-molestation order, if the defendant is to be imprisoned the term of imprisonment should be clearly fixed (*Vaughan v Vaughan* (1973) 3 All ER 449; (1973) 1 WLR 1159).

There has been at least one reported decision in England where a defaulting spouse has been imprisoned on an *ex parte* application with first being heard in his own defence — see *Hipgrave v Hipgrave* (1962) P.1 and *Husson v Husson* (1962) 3 All ER 1056 but compare *Egan v Egan* (1971) 115 Sol Jo 673. See also *Latrobe University v Robinson* [1973] VicRp 67; (1973) VR 682 at 691. The *Family Law Regulations* do not provide for hearing of contempt applications without proper service on the defendant (regs. 42, 137).

For a note on closing the court in contempt matters see *Re An Infant* (1965) 2 All ER 254 and *Halsbury*, *op.cit.*, par. 95.

In contempt applications the Court has power to call witnesses of its own motion. As Cross J said in *Yianni v Yianni* (1966) 1 All ER 231 at 232, 'I do not doubt that the court has power, in order to find out the truth of the matter, to serve subpoenas.' Compare reg. 111 of the *Family Law Regulations*.

In 1974 a Committee headed by Phillimore LJ presented its *Report on Contempt of Court* (Cmnd. 5794). at paragraph 21 of the Phillimore Report it is said:

> 'The reason and justification for the use of the summary procedure is the urgency with which the conduct may need to be dealt. This being so, we consider that as a matter of principle the contempt jurisdiction should be invoked only where:—
> (a) the offending act does not fall within the definition of any other offence; or
> (b) where urgency or practical necessity require that the matter be dealt with summarily.
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> We recommend that those general principles should govern the use of this remedy. They underline many of the recommendations for changes and reforms that are contained in this Report.'

At paragraph 34 the Report states:

> 'Many acts which are contempts in the face of the court are also ordinary criminal offences, and may be made the subject of criminal proceedings. In such cases a court has an option to proceed against the person responsible for the contempt or report the matter to the appropriate authority for prosecution. In trivial cases the deciding factors will normally be those of convenience and urgency. In more serious cases when the offence (if proved) would be likely to attract severe penalties, the practice should always be that, unless considerations of immediate urgency compel a different course, trial and punishment should be left to the slower process of the ordinary criminal law. As this is essentially a matter of the exercise of a judicial discretion, we make no proposal for legislation but would commend it as a sound and proper practice.'

Several Australian reports deal with the question of contempt. The latest substantial review by the High Court is in *Australian Consolidated Press v Morgan* [1965] HCA 21; (1965) 112 CLR 483 (1965) 39 ALJR 32. In the course of his judgment Barwick CJ said (at ALJR 35):

> 'A contempt in procedure by disobedience of an order of the court or by breach of an undertaking given to it may be accompanied by such contumacy or defiance on the part of the party against whom the contempt proceedings are brought as evidences a criminal as well as a civil contempt. There is no reason in such a case why the same proceedings taken at the instance of the aggrieved suitor may not result in orders or of an undertaking given to it and at the same time punitive of the criminal contempt; but this is not such a case.'

Later he said (also at ALJR p35):

> 'The Court was therefore presented in the proceedings for contempt with at least the major part of the issues which had arisen for trial in the suit. I would not wish to say that it is never appropriate to hear and to determine before the hearing of a suit a motion for an order for committal or sequestration for contempt by breach of an order or of an undertaking where it is necessary in order to determine the matter to decide one or more of the major issues arising in the suit. Circumstances may arise in which this must be done if the plaintiff's rights, or the public interest in the maintenance of

> the court's own prestige, are to be safeguarded. But, in my opinion, those circumstances must be somewhat special. In the ordinary course, the court ought not, in my opinion, to attempt to resolve in the proceedings for contempt the question or questions which is or are to be litigated before it, no doubt at greater length and with greater attention to detail, at the hearing of the suit. The proper course, except in special circumstances, in my opinion, in such a case is for the court to adjourn the contempt proceedings which cannot be determined without resolving a major question in the suit until the hearing of the suit itself.'

Other cases where the High Court has reviewed the contempt power are *Consolidated Press Ltd. v McRae* [1955] HCA 11; (1955) 93 CLR 325; *R v Metal Trades Employers' Association* [1951] HCA 3; (1951) 82 CLR 208 and *R v Fletcher* [1935] HCA 1; (1935) 52 CLR 248. In the latter case Evatt J said (at 258):

> 'Summary proceedings for contempt are criminal in character and the respondents are therefore entitled to invoke the principle that guilt should be proved beyond reasonable doubt.'

In *Latrobe University v Robinson* [1973] VicRp 67; (1973) VR 682 one of the grounds of appeal was that the plaintiffs could have proceeded by way of criminal information under the Victorian *Summary Offences Act* (1966) rather than by way of civil action for trespass which led to interlocutory writs of attachment being issued. Smith ACJ said (at 691):

> 'Finally it may be mentioned that complaint is made that the appellants should have been proceeded against under s9(1)(d) of the *Summary Offences Act* 1966 and so given the benefit of the protections embodied in normal criminal procedures. The University, however, was entitled to choose whether it would lay a criminal information or proceed by civil action. And the fact that a criminal remedy was open in this case was merely one of the considerations to be taken into account by the Court when exercising its discretion as to whether leave should be given to issue a writ of attachment.'

The troubled relationship between the summary powers associated with contempt and the ordinary processes of the criminal law has been the subject of several decisions in the United States. For a detailed and informative analysis see Moskovitz, *Contempt of Injunctions, Civil and Criminal* (1943) 43 Columbia Law Review 780.

The case of *In re Debs* (1895) 158 US 564 was concerned with the relationship between the court's powers in equity to secure the uninterrupted running of interstate railways and the criminal law covering the same field. Writing for the Supreme Court Brewer J said (at 593-595):

> 'Again it is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by or are themselves violations of the criminal law.
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> Thus in *Cranford v Tyrrell* 128 NY 341, an injunction to restrain the defendant from keeping a house of ill-fame was sustained, the court saying, on page 344:
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> > "That the perpetrator of the nuisance is amenable to the provisions and penalties of the criminal law is not an answer to an action against him by a private person to recover for injury sustained, and for an injunction against the continued use of his premises in such a manner."
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> And in *Mobile v Louisville & Nashville Railroad*, 84 Alabama, 115, 126, is a similar declaration in these words:
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> > "The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."
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> The law is full of instances in which the same act may give rise to a civil action and a criminal prosecution. An assault with intent to kill may be punished criminally, under an indictment therefor, or will support a civil action for damages and the same is true of all other offences which cause injury to person or property. In such cases the jurisdiction of the civil court is invoked, not to enforce

the criminal law and punish the wrongdoer, but to compensate the injured party for the damages which he or his property has suffered, and it is no defence to the civil action that at the same act by the defendant exposes him also to indictment and punishment in a court of criminal jurisdiction. So here, the acts of the defendants may or may not have been violations of the criminal law. If they were, that matter is for inquiry in other proceedings. The complaint made against them in this is of disobedience to an order of a civil court, made for the protection of property and the security of rights. If any criminal prosecution be brought against them for the criminal offences alleged in the bill of complaint, of derailing and wrecking engines and trains, assaulting and disabling employees of the railroad companies, it will be no defence to such prosecution that they disobeyed the orders of injunction served upon them and have been punished for such disobedience.

Nor is there in this any invasion of the constitutional right of trial by jury. We fully agree with counsel that "it matters not what form the attempt to deny constitutional right may take. It is vain and ineffectual, and must be so declared by the courts", and we reaffirm the declaration made for the court by Mr Justice Bradley in *Boyd v United States*, 116 US 616, 635, that "it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Their motto should be *osta principiis*. But the power of a court to make an order carries with it the equal power to punish for a disobedience of that order and the inquiry as to the question of disobedience has been from time immemorial, the special function of the court. And this is no technical rule. In order that a court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.'

At 596 he summed up as follows:

'In brief, a court, enforcing obedience to its orders by proceedings for contempt, is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to.'

In *Ex Parte Looper* (1910) 134 SW 345 McCord J did not consider that any question of double jeopardy arose when a breach of an injunction covered the same facts as a crime. He said (at 346):

'It is true that if he commits the act which he is enjoined from committing, and such act be violation of the penal laws of the state, he may under this statute be punished for the contempt, and also for the violation of the criminal law. But these are not "the same offence". In the former case he is punished for a violation of the orders of the court; and in the latter for an offense "against the peace and dignity of the state". One who makes as assault in the presence of the court, in such a manner as to constitute a contempt of court, is punishable, not only for the contempt, but also for the assault.'

The case of *Gompers v Bucks Stove and Range Company* (1911) 221 US 418 is frequently quoted as one of the leading judgments on contempt handed down by the US Supreme Court. Writing for the Court Lamar J said (at 441):

'Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two cases. It may partake of the characteristics of both". *Bessette v Conker*, 194 US 329. But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by impeachment may be remedial, as well as punitive, and many such contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.

For example: If a defendant should refuse to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance required by a decree for specific performance, he could be committed until he complied with the order. Unless these were special elements of contumacy, the refusal to pay or to comply with the order is treated as being rather in resistance to

> the opposite party then in contempt of the court. The order for imprisonment in this class of cases, therefore, is not to vindicate the authority of the law, but is remedial and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, as aptly said in *In re Nevitt*, 117 Fed Rep 451, "he carries the keys of his prison in his own pocket". He can end the sentence and discharge himself at any moment by doing what he had previously refused to do. On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offence. Such imprisonment operates, not as a remedy coercive in nature but solely as punishment for the completed act of disobedience.
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> It is true that either form of imprisonment has also an accidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character, or *vice versa*.
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> The fact that the purpose of the punishment could be examined with a view to determining whether it was civil or criminal, is recognized in *Doyle v London Guarantee Co* 204 US 599, 605, 607, where it was said that "while it is true that the fine imposed is not made payable to the opposite party, compliance with the order relieves from payment, and in that event there is no final judgment of either fine or imprisonment ... The proceeding is against a party, the compliance with the order avoids the punishment and there is nothing in the nature of a criminal suit or judgment imposed for public purposes upon a defendant in a criminal proceeding". *Bessette v Conkey*, 194 US 328; *In re Nevitt*, 117 Fed Rep 448; *Howard v Howard*, 36 Georgia, 359; *Phillips v Welch*, 11 Nevada, 187.
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> The distinction between refusing to do an act commanded remedied by imprisonment until the party performs the required act; and doing an act forbidden, punished by imprisonment for a definite tempts sound principle, and generally, if not universally, affords a test by which to determine the character of the punishment. In this case the alleged contempt did not consist in the defendant's refusing to do any affirmative act required, but rather in doing that which had been prohibited. The only possible remedial relief for such disobedience would have been to impose a fine for the use of complainant measured in some degree by the pecuniary injury caused by the act of disobedience. But when the court found that the defendants had done what the injunction prohibited, and thereupon sentenced them to jail for fixed terms of six, nine and twelve months no relief whatever was granted to the complainant, and the Bucks Stove & Range Company took nothing by that decree.
>
> If then, as the Court of Appeals correctly held the sentence was wholly punitive, it could have been properly imposed only in a proceeding instituted and tried as for criminal contempt. The question as to the character of such proceedings has generally been raised, in the appellate court, to determine whether the case could be reviewed by writ of error or on appeal. *Bessett v Conkey* 194 US 324. But it may involve much more than mere matters of practice. For, notwithstanding the many elements of similarity in procedure and in punishment there are some differences between the two classes of proceedings which involve substantial rights and constitutional privileges. Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent he must be proved to be guilty beyond a reasonable doubt and cannot be compelled to testify against himself.'

Apparently in some cases because of a US Statute (the *Clayton Act*, 15 October 1914) a person accused of criminal contempt which is also a crime may insist upon a trial by jury (see *Michaelson v Canoe Creek Coal Co* (1924) 266 US 42). In *Simmons v Simmons* (1938) 278 NW 537 it was held by the Supreme Court of South Dakota that upon the hearing of an order to show cause why a defendant should not be adjudged in contempt for failure to observe a divorce decree, the refusal of the trial court to permit the defendant to give oral testimony and to cross-examine the plaintiff constituted a reversible error.

The distinction which must be drawn between the refusal to obey a court order and the doing of something which the order has prohibited is emphasised by the following passage from the judgment of Clark J in *Shillitani v United States* (1965) 384 US 364 at 368:

> 'We believe that the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings. See *Penfield Co v Securities & Exchange Comm'n*, 330 US 585, 590

> (1947). As the distinction was phrased in *Gompers v Bucks Stove & Range Co* 221 US 418, 449 (1911), the Act of disobedience consisted solely "in refusing to do what had been ordered", i.e., to answer the questions, not "in doing what had been prohibited". And the judgments imposed conditional imprisonment for the obvious purpose of compelling the witnesses to obey the orders to testify. When the petitioners carry "the keys of their prison in their own pockets", *In re Nevitt*, 117 P 448, 461 (CA 8th Cir. 1902), the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees". *Green v United States* 356 US 165, 197 (1958) (Black J dissenting). In short, if the petitioners had chosen to obey the order they would not have faced jail.'

See also *United States v Wilson* (1975) 43 LW 4584.

When the various reported authorities from the common law countries together with the Phillimore Report (*Report of Contempt of Court* (Cmnd 5794)) are examined the following principles emerge in relation to civil contempt:—

(a) a person can be found guilty of contempt of court only if he knows the order he is required to obey and is in breach of that order;
(b) the precise breach of the order must be proved beyond reasonable doubt;
(c) the court may then punish (*inter alia*) by imprisonment:
  (i) until the order is complied with; or
  (ii) to uphold the authority of its orders;
(d) as to (c)(i) imprisonment should only be imposed if there is no alternative method available to achieve the remedy the breached order seeks to effect;
(e) as to (c)(i) the sentence may be indefinite as the defendant has 'the keys of his release in his own pocket' but imprisonment should not continue when compliance is no longer possible.
(f) where the defendant breaches an order and his breach is apparently a criminal offence, the court has to exercise a discretion whether to hear the contempt charge or adjourn it and await the outcome of the criminal proceedings (if any);
(g) in the exercise of that discretion the court will need to consider *inter alia* the gravity of the offence and the urgent need (if any) to protect the applicant or prevent repetition of the offence;
(h) in the hearing of contempt proceedings the defendant should have the same rights and privileges as a person charged summarily with a criminal offence;
(i) contempt procedures should be used sparingly and imprisonment invoked only as a last resort.

B. The provisions of the *Family Law Act* and contempt

At the time of the hearing at first instance s108 of the *Family Law Act* read as follows:

> (1) 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.
> (2) The regulations may provide for practice and procedure as to charging with contempt and the hearing of the charge.
> (3) Where a person in contempt is not a corporation, the court may punish the contempt by committal to prison or fine or both.
> (4) Where a corporation is in contempt, the court may punish the contempt by sequestration or fine or both.
> (5) The court may make an order for:
> (a) punishment on terms;
> (b) suspension of punishment; or
> (c) the giving of security for good behaviour.
> (6) Where a person is committed to prison for a term for contempt, the court may order his discharge before the expiry of that term.

By Act No. 63 of 1976, s108(1) has been shortly amended as from 1 July 1976 but the amendment plays no part in our consideration in this appeal.

Section 108 does not appear to alter the common law principles relating to contempt except to indicate that the breach must be wilful (compare *Knight v Clifton* (1971) 2 All ER 378).

Section 35 provides that the Family Court of Australia has the same power to punish contempt as has the High Court. Section 24 of the *Judiciary Act* 1903 provides that the High Court shall have the same power to punish contempts as was possessed at the commencement of the Act by the

Supreme Court of Judicature in England. In the present case, as jurisdiction is being exercised under the Act and not under some other law (see s31), s108 governs the situation.

Section 108 does not provide the only sanction to ensure compliance with the court's orders. If a person knowingly and without reasonable cause contravenes or fails to comply with custody and access orders or prevents or hinders the execution of a warrant directed to enforce custody or access, such person may be fined or otherwise dealt with as provided in s70(6). Double jeopardy is to be avoided, for whereas s70(6) does not prevent prosecution for an offence against any other law nothing in s70 shall render any person liable to be punished twice in respect of the same offence (s70(7)). The court's power to punish for contempt is not prejudiced (s70(8)).

Section 114 gives the court wide powers to grant injunctions and make similar orders. If such orders are knowingly breached without reasonable cause, sanctions similar to s70(6) are available (s114(4)). Double jeopardy is to be avoided (s114(6)). Again the court's power to punish for contempt is not prejudiced (s114(5)).

Section 107 clearly prohibits imprisonment for maintenance and other failures to pay money orders. The code for enforcement of such orders must now be found in the Regulations, although in a case of wilful disobedience s108 probably still has application.

Other sections of the Act are designed to remove bitterness (e.g. s14), ensure whatever dignity and improvement of relationships may still be available (s43), and reduce formality and ensure court proceedings are not protracted (s97). All enforcement provisions in the Act and Regulations are discretionary.

When the Act and Regulations are totally viewed, when the atmosphere and procedures of the Family Court are studied and the basic concept of the Court as 'the helping court' is adhered to, the use of the contempt power should be seen as an exercise of last resort. If counselling fails or is inappropriate, the powers under section 70 and 114 remain. Only if these have failed or are inappropriate should the contempt provisions be invoked. Legal practitioners, who have their own duties under the Act, should be loathe to advise the invoking of the contempt power until all other avenues of compliance or agreement have been reasonably considered and explored.

Nevertheless cases will remain where invocation of the contempt power is the only appropriate course. Where such a course is necessary the relevant procedures must be strictly complied with. To this we shall return.

C. Contempt and the Criminal Law

There will be many cases where the same set of facts wholly or partly constitute —
(a) a criminal offence; and
(b) a breach of an order of a court acting under the *Family Law Act*.

Allegedly the case under appeal is one such. We fully agree with what was said in the Phillimore Report. That Committee did not suggest any alteration in the law, apparently viewing its statement in paragraph 34 as a correct statement of the common law. We accept that it is. We repeat the salient points —

> 'In trivial cases, the deciding factors will normally be those of convenience and urgency. In more serious cases when the offence (if proved) would be likely to attract severe penalties, the practice should always be that, unless considerations of immediate urgency compel a different course, trial and punishment should be left to the slower process of the ordinary criminal law. As this is essentially a matter for the exercise of a judicial discretion, we make no proposal for legislation, but would commend it as a sound and proper practice.'

When in a contempt application brought under the Act it is apparent to the court that a criminal offence is also involved the court is clearly called upon to exercise a discretion. The elements of such discretion are clearly set forth in the above statement from the Phillimore Report. To some extent the exercise of the court's discretion can be assisted by the applicant's own choice of remedy. If the applicant undertakes to the Court, that although there is *prima facie* evidence of a criminal offence, he or she does not propose to invoke the criminal law, the Family Court will be in a much better position to deal with the application. In the course of its so dealing the Court

may have regard to the whole of the Act including its counselling provisions. It is for this reason that minor assaults and molestations can best be dealt with in the Family Court. In the past there was frequent recourse to the Magistrates' Courts with summary charges of "apprehended violence", "assault female" and "peace complaints". Where such altercations arise between spouses, or involve spouses and children, there is a great deal to be said for invoking the jurisdiction of the Family Court which is a specialised tribunal with counselling components, rather than the summary jurisdiction of the Magistrates' Courts. If the applicant does not give an undertaking not to invoke the criminal law, the court may decline to proceed with the contempt application.

However, where a more serious offence is alleged (e.g. attempted murder, malicious wounding, maliciously inflicting grievous bodily harm) the respondent's actions may take on a quality that involves wider implications than the conflict between say the husband and wife. The actions of the respondent may show such disregard for life and safety as to invoke public concern and require the application of criminal law and procedure: in such a case it would be proper to locate the subject-matter outside the narrower considerations involved in the Act (compare *R v Bateman* (1925) Cr App Rep 8 quoted with approval by the NSW Court of Criminal Appeal in *Clout v Hutchinson* (1950) 67 WN (NSW) 203.)

Segments of the old law concerning misprision of felony and compounding a felony may still remain (see *Sykes v Director of Public Prosecutions* (1962) AC 528) and s44 of the Commonwealth *Crimes Act* (1914) and this notwithstanding that the law does not object to the compromising of a claim for private injury resulting from an act which amounts to an indictable offence provided that it is not a matter of public concern (*Kerridge v Simmonds* [1906] HCA 66; (1906) 4 CLR 253).

All this emphasises the soundness of the statement in the Phillimore Report. Where the alleged facts constituting the contempt also constitute a crime the court has a careful considered discretion to exercise. In some cases protection of the applicant will demand urgent action. In others the applicant's protection can be left to the processes of the criminal law. Where only the affront to the court's authority is involved and the same facts constitute a crime, the criminal processes should first be allowed to take their course. When they are concluded the court may then turn to the question whether the disobedience of its order merits further punishment in the public interest.

Even then further problems may arise. If the respondent has been found guilty of a criminal offence the Family Court may need to consider whether further punishment is desirable particularly bearing in mind sections 70(7) and 114(6). If the respondent has been acquitted difficult problems of issue estoppel may arise (see e.g. *Mraz v The Queen* (No. 2) [1956] HCA 54; (1956) 96 CLR 62 and *R v Hogan* (1974) 2 WLR 357; (1974) 2 All ER 142).

Where a court decides to deal with a set of facts on a contempt charge which in themselves appear to constitute a criminal offence, the respondent may be in a position that he cannot successfully defend himself without being caught in the snare of self-incrimination.

Considerable difficulty has arisen in this area in the United States – see particularly *United States v Wilson* (1975) 43 LW 4584 and Wyld, *Summary Contempt may properly be applied to refusal to testify after Grant of Immunity* (1975) 13 American Criminal Law Review 271.

The Family Court has no power to grant immunity from criminal prosecution. But in the appropriate case the Court may decline to proceed with a contempt hearing unless the applicant undertakes that he or she will not prosecute the criminal offence for which the respondent may be convicted on the same facts. Such an undertaking may lack effect if the carriage of the prosecution rests in other hands, particularly where the alleged criminal offence is a serious one.

At common law no one is bound to answer any question or produce any document the tendency of which would, in the opinion of the court, be to expose the witness to any charges, penalty or forfeiture which the court regards as reasonably likely to be preferred or sued for (*Blunt v Park Lane Ltd* (1942) 2 KB 253). In *Ex parte P: Re Hamilton* (1957) 74 (NSW) 397, Maguire J said at 399-400:

> 'An examination of these authorities and others discloses that the following matters have been established by the various cases: (1) a witness desirous of claiming the privilege of silence must first be sworn; (2) the witness must claim the privilege in answer to a specific question put to him; (3) the witness must decline to answer the question, stating the ground in question, namely, that to

> answer might incriminate him; (4) there is no strict rule as to the form of words which must be used by a witness to express his opinion as to whether or not the answer would incriminate him; (5) the judge (or magistrate) is then to decide whether or not the witness is entitled to the privilege; (6) the bare oath of the witness that he is endangered by being compelled to answer is not to be considered as necessarily conclusive of the matter; (7) the court must see from the circumstances of the case and the nature of the evidence that the witness is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; (8) the danger must be real and appreciable and not of an imaginary and unsubstantial character; a remote and naked possibility, out of the ordinary course of the law and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice; (9) the privilege of silence is not destroyed and a witness will not be compelled to answer a question directed to proving his commission of a criminal act merely on the ground that, in the particular circumstances of the case and on a balance of probabilities, it is unlikely that he will be prosecuted. As a general rule it is true to say that any admission of a criminal offence, of which the witness has not hitherto been convicted, must "tend to criminate him" within the meaning of the rule (per Du Parcq LJ delivering the judgment of the Court of Appeal in the *Triplex Safety Glass Ltd* (1939) 2 All ER 613 at p620; (10) a question which at first sight might appear a very innocent one might, by affording a link in the chain of evidence, become a means of bringing home an offence to the witness; (11) if the fact of the witness being in danger is once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question (per Cockburn CJ in *Boyes'* Case (1861) 1 B & S, at p330; 121 ER at p738; (12) the privilege does not continue to operate where there is a statutory limitation of time for launching a prosecution and this period of time has expired. (*Roberts v Allatt* (1828) Moo and M 192; 173 ER 1129; *Attorney-General v Cunard Steamship Co* (1887) 4 TLR 177); (13) the function of the judge (or magistrate) is to decide whether the proposed question has really a tendency to incriminate the witness or may fairly be considered, under the circumstances of the case, as having that tendency; (14) the claim to privilege is not to be disallowed merely because the judge (or magistrate) might think that those persons who might, in normal circumstances, be expected to prosecute were likely to be soft-hearted or that a jury would be indulgent. (*Triplex Safety Glass Co Ltd Case* (1939) 2 All ER, at p618).'

If in contempt proceedings the respondent declines to give evidence or refuses to answer questions on the ground of possible incrimination, it is difficult to see how he can be fairly tried if the matters upon which he claims protection are the very matters the court has to decide. This is another factor to be taken into account when the judge before whom a contempt application is brought is called upon to exercise his discretion whether to hear the application when criminal charges arising out of the same matter remain unheard.

On the other hand if the applicant chooses to proceed under section 70(6) or 114(4) and the respondent chooses to give evidence on his own behalf, he may not plead self-incrimination to avoid questions in respect of the matter with which he is charged (*Maxwell v Director of Public Prosecutions* (1935) AC 309; *Brown v The King* [1913] HCA 70; (1913) 17 CLR 570; *R v Paul* (1920) 2 KB 183).

Generally the principles appear to be much the same as when a lesser charge is brought on for hearing whilst a graver charge arising out of the same facts remains unheard — in such cases the court almost invariably exercises a discretion in favour of adjourning the lesser charge until the graver charge is disposed of.

D. The procedures available when an order is made under Part VII or under section 114

Where an order for custody is in existence and a person interferes with the custodian's care and control contrary to the order or interferes with the custodian's rights under the order, or where a person fails to deliver up a child consequent upon a custody order, or where a person without just cause or excuse, hinders, prevents or interferes with the operation of an access order, or where a person prevents or hinders the execution of a warrant issued to give effect to a custody or access order, alternative remedies may be available. An applicant may seek an order under s70(6), he may institute contempt proceedings or he may turn to any applicable provisions of the criminal law.

No procedure is specifically laid down by the regulations where the applicant chooses to adopt the first course but it is clear that regulations 30, 31 32 and 36 would apply. although not precisely indicated, it seems obvious having regard to the general structure of the regulations that the application being in accordance with Form 6 should generally be accompanied by an affidavit setting out the facts relied upon to show that the respondent has knowingly and without reasonable cause contravened or failed to comply with a provision of s70. There may be urgent

cases where oral evidence in lieu of an affidavit will, in the discretion of the court, be accepted. Service should be in accordance with regulations 37 and 44. Unless the Court otherwise orders the time specified in r38(1)(b) should apply. A successful application under s70(6) can have penal consequences. Therefore we consider that unless a Court specifically directs otherwise, service should be personal. The standard of proof to be applied in the proceedings should be the criminal standard, i.e. beyond reasonable doubt.

Section 114 empowers the court to grant injunctions and make orders in a great variety of circumstances either arising out of the marital relationship or ancillary to other proceedings under the act. If such injunction or order is breached, an applicant may seek an order under s114(4), he may institute contempt proceedings, or he may turn to any applicable proceedings of the criminal law.

What we have said in relation to the procedure for applications under s70(6) applies equally to s114(4). Both s70(6) and 114(4) provide the Court with a number of options which it may invoke to seek compliance with orders or injunctions. As indicated earlier an appropriate application under these sections is in most cases to be preferred to the institution of contempt proceedings.

B. Procedure to be followed when contempt is alleged because of disobedience of an order
(The Court then set out Reg. 137)
Where a court order has been disobeyed and attachment of the offender is sought the procedures set forth in rr137(4) and (5) should be strictly complied with. Although in some cases the Court may be prepared to use its dispensing powers under rr4, 14 and 15 such cases must be extraordinary and rare.

If the respondent appears after service upon him of an application for attachment filed under r137(4) and personally served under r137(5), the hearing should proceed as set forth in r137(2). It seems to us that r137(2)(c) clearly invokes the principles of a hearing analogous to a summary criminal trial previously referred to.

As to the question whether such hearing should take place in an open or closed court we draw attention to the judgment of Asche J in *Davis and Davis* (1976) FLR 90-050.

We return to the facts in this case. In this case there were special reasons to be cautious about cross-examination, because of the criminal proceedings pending against the husband in respect of the 5 May incident. Although this was not referred to expressly until after His Honour had found that the husband had committed breaches of the order of 27 April in three respects (p126), it had been referred to on an earlier occasion (see pp73, 75). There was material before the Court from which it could be inferred that the husband might have been charged with an offence. In our view the Court ought to have made enquiries in order to exercise its discretion whether to continue the hearing or to defer the matter until the criminal charge had been disposed of. The parties also had a duty to inform the Court of the charges. In reaching this view we rely primarily on the views expressed in the Phillimore Report. These are particularly appropriate for a Family Court whose main concern is in enforcement and protection; punishment is incidental to this main purpose. If alternative procedures have been set in motion to deal with the acts constituting the alleged contempt, the court should not proceed with the latter unless it is necessary to take immediate protective or preventive action, or action to secure compliance with its order.

A further complicating factor in this present case was that cross-examination of the husband in the present case might have prejudiced his later trial. This was an additional reason for postponement of the contempt proceedings, quite apart from the fact that the absence of cross-examination meant that the evidence was not properly tested.

It seems to us that His Honour did not, nor was he called upon, properly to exercise his discretion when faced with a set of facts upon which a criminal charge of an indictable nature had already been laid; it is also our view that by not allowing the defendant to be tested on his affidavit the hearing of the contempt proceedings miscarried.

The failure to consider these questions and to exercise his discretion was in our view an error fundamental to the proceedings. For these reasons the appeal must succeed.

However, because of the importance of the issues raised in the appeal it is appropriate to comment briefly on His Honour's approach to the question of penalty. At that stage Mr Beder informed the Court that the husband still had to run the gauntlet of a charge for at least one indictable offence and the consequent penalty in the event of conviction (pp127, 128).

The husband affirmed in the witness box that he was prepared to abide by any orders that the Court may make in respect of custody or access or any order relating to his matrimonial situation.

His Honour took, as we do, a most serious view of the husband's conduct and thought that *prima facie* he should impose a prison sentence. First he looked at matters which might be thought to go against such a sentence.

He considered the philosophy of the Court and Act and took the view that punitive powers should be exercised sparingly and only in exceptional circumstances. With this view we are in full agreement.

His Honour next considered whether or not the imposition of a term of imprisonment could be considered as punishment twice over for the same set of circumstances in view of the pending criminal proceedings. He took the view that if there had been a punishment imposed already in the criminal courts it would be inappropriate to punish again. (This is consistent with the requirements of s114(6)). But he was of the view that he should not delay the imposition of a penalty because the criminal trial might not take place for some 12 months and could, if appropriate take account of the Family Court's penalty.

His Honour considered other factors relevant to the decision whether to impose a term of imprisonment in most cases where the person is before the court on the first occasion. However he then went on to mention that the husband was committed for trial on two charges arising out of incidents between him and the wife and her relations on 31 March and 2 April. He went on to say:

> 'Mr Sahari has had some experience in the Court and is presumably on bail. It would appear that when this event occurred on 5 May, certainly he would have been charged with one or more previous offences.'

In our view it was not appropriate for His Honour to rely on outstanding charges as a basis for imposing a prison sentence.

The final matter referred to by His Honour was the need to prevent further incidents:

> 'I really believe that if I were to impose no penalty or if I were to suspend the penalty, there is a real likelihood of repetition of this conduct in the immediate future and, if conduct of this type occurred again, it may result in quite tragic circumstances. I believe I have a positive duty in this case to impose a penalty which might attempt to bring before Mr Sahari's mind that conduct of this nature is so outside the ordinary run permissible in our society, that this Court has determined that a term of imprisonment is called for.'

His Honour committed the husband for 28 days. While we consider that with one exception His Honour's approach to sentence was in accordance with the spirit of the Act, we have already reached the view that the proceedings should not have reached that stage, and that the appeal must be upheld.

The result is unfortunate because it is obvious that His Honour acted as he did in an endeavour to avoid injustice to the husband. But His Honour had neither the opportunities, the time, nor the resources that have been available to us in giving detailed consideration to the difficult principles involved.

We allow the appeal, vacate the order for imprisonment and the order for costs. We direct that the application to deal with the husband stand over generally; either party may restore it to the list on 24 hours' notice. We make no order as to costs of this appeal.
