Neutral Citation Number: [2020] EWCA Civ 1675

Case No: B4/2020/1805

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COURT OF PROTECTION
Mr Justice MacDonald
1344811T

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 December 2020

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE COULSON
and
LADY JUSTICE ANDREWS

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DAHLIA GRIFFITH	**Appellant/ Defendant**
v	
P (by her Litigation Friend the Official Solicitor)	**Respondent/ Applicant**

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The Appellant did not appear
Sarah Simcock (instructed by **Mackintosh Law**) for the **Respondent**

Hearing date : 10 December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 11:30am on Thursday, 10 December 2020.

Lord Justice Peter Jackson :

1. This is an appeal from an order committing Dahlia Griffith ('the Appellant') to prison for contempt of court.

2. The background is fully set out in the judgment of MacDonald J ('the Judge'), which is to be found at [2020] EWCOP 46. The Appellant is a relative of P, a woman who is in a specialist hospital with a permanent disorder of consciousness. There were proceedings in the Court of Protection concerning P's best interests. In those proceedings P was represented by the Official Solicitor, who instructed Mackintosh Law as her solicitor. The proceedings came to an end in April 2020.

3. During the course of the proceedings, an issue arose about the disclosure of P's medical records. On 10 July 2019, the court made three third party orders for the disclosure of recent medical records to Macintosh Law and on 12 August 2019 a further order addressed to a fourth organisation. On 26 July 2019, the Appellant applied for disclosure to her of P's "full medical file". That application was unsuccessful. On 13 August 2019, the court made no order on it because of the disclosure orders that had already been made. The Appellant made a further application for the same disclosure on 21 August 2019. This was refused the following day.

4. On 18 October 2019, the Appellant send an email to Barts Health NHS Trust attaching what purported to be a court order made on 10 July 2019 and providing for the disclosure of P's medical records directly to the Appellant. By this stage she was represented by solicitors. Acting in good faith, Barts Health NHS Trust sent P's medical records to the solicitors. They did not read them or show them to their client.

5. The Official Solicitor became aware of what had taken place in November 2019 when, pursuant to further orders, she approached Barts Health NHS Trust for copies of P's medical records, only to be told that they had already been provided at the Appellant's request.

6. On 25 February 2020, the Judge granted permission for an application for committal to be issued by the Official Solicitor under Rule 21.15 of the Court of Protection Rules 2017. That was the last hearing attended by the Appellant.

7. The hearing of the committal summons was listed before the Judge on 1 September 2020. The Appellant, who was represented by a solicitor, Mr Adam Tear of Scott-Moncrieff and Associates, failed to attend the hearing, stating that she was too ill. The hearing was adjourned to 29 September to allow her to provide medical evidence, but she failed to do so and did not attend at court on that occasion either. Mr Tear appeared on her behalf. He informed the court that she was exercising her right of silence. He submitted that the circumstances did not prove beyond reasonable doubt that the Appellant had falsified a court order. She denied doing so and contended that it had been drafted by another, unidentified person, and she simply sent it to Barts Health NHS Trust in good faith. Mr Tear submitted that there were features of the case to suggest that the Appellant believed in all innocence that she was entitled to the disclosure sought by the purported order.

8. The Judge directed himself carefully as to the law and procedure surrounding committal for contempt of court, including the helpful summary of the principles concerning committal in the absence of a respondent that is found in *Sanchez v Oboz* [2015] EWHC 235 (Fam) (Cobb J). He found the allegation against the Appellant to have been proved: paragraph 36 of the judgment. He adjourned sentencing for two days to give her a further opportunity to attend court. She did not do so, and on 2 October 2020, the hearing resumed in her absence. She again claimed illness and Mr Tear applied for an adjournment, which was refused. The Judge directed himself as to the principles of sentencing. He took account of matters that had been advanced in mitigation: the Appellant's likely motivation in the context of fraught proceedings concerning a relative, the low level of harm caused to P by the forgery, the absence of any violence or personal gain, the heavier impact of imprisonment during the pandemic, and the Appellant's good character. Against this, the Judge noted the seriousness of interference with the administration of justice, the deliberate nature of the contempt, the absence of remorse or even any indication that the Appellant appreciated the gravity of her conduct. He was satisfied that the custody threshold was crossed and that the appropriate and proportionate penalty was an immediate term of imprisonment of 12 months.

9. The Appellant was entitled to appeal from the committal order as of right. In fact, she did so out of time. Acting in person, she issued an Appellant's Notice on 30 October 2020, stating that she had wrongly believed that she had 28 days within which to appeal. As an indulgence, time for appealing will be extended and the appeal will be considered as if it had been issued in time. The grounds of appeal are:

> "(1) The judgement was made in default pursuant to CPR 12.1b.
>
> (2) The judgement was out of time and therefore should have been stayed.
>
> (3) The judgement was not in keeping with the overriding objectives of the Court of Protection.
>
> (4) Where the judgement was made against a defendant with no previous criminal background, where the allegations made against the defendant are still unproved and where there would be no further opportunity, let alone will, for the defendant to carry out that which was alleged and subsequently unproven by the applicant, who of themselves exhibited questionable conduct within the proceedings, this judgement was unduly harsh concerning committal in the absence of a respondent and therefore exhibits Wednesbury unreasonableness."

10. The Appellant also applied for a stay of the order. I refused this on 2 November 2020 on the basis that there was no arguable reason to support a contention that an immediate custodial sentence was wrong in principle. In fact, the Appellant has not yet been found and taken into custody.

11. In the weeks since the appeal was listed, the Civil Appeals Office has been in communication with the Appellant by email to make her aware of her entitlement to legal aid and of Mr Tear's willingness to act on her behalf if instructed. That offer has not been taken up. Instead, the Appellant has persistently attempted to persuade the court to list a remote hearing on the basis that she is not able to attend in person.

When required to produce medical evidence, she sent an incomplete certificate stating that she was unfit for work for 14 days by reason of back pain. That evidence fell far short of establishing that she was unable to travel to court and her application to attend remotely was refused.

12. The Appellant has not attended today's hearing. She has sent a witness statement accompanied by substantial exhibits and a short position statement this morning. She complains about the effect of the contempt application upon the proceedings concerning P. She criticises the actions of the court and her former solicitors and of the Official Solicitor. In the latter case, she refers to "the abuse of court process, using the committal application to impugn and annihilate a personal welfare application." She raises a series of procedural points, including about the identity of the judge and the refusal to adjourn on 29 September. She reiterates that it is unproven that she generated the order, and she asserts that it could have been generated by some other party, namely Macintosh Law or her own solicitors or a hospital or a local authority or a clinical commissioning group. To take for granted that she would be the only person who would have falsified an order would be to pick on the weakest party. The records that were obtained were subsequently the subject of an order anyway, so there can have been no interference with the course of justice. The sentence is disproportionate. She is not in contempt, but the committal application has been made with a contemptuous sentiment. The matter should be referred to the Attorney General for consideration of contempt proceedings being brought against the other parties to the proceedings.

13. The position of the Official Solicitor is entirely neutral. She did not bring the committal application in any partisan manner but as an officer of the court. She does not accept any of the arguments made by the Appellant, but she does not seek any adverse order in relation to the proceedings or the appeal. Indeed, she has supported the time for appealing being extended and has specifically sought no order for costs on the appeal.

14. The first matter to consider is the Appellant's absence at this appeal hearing. I am satisfied that she has had every opportunity to be represented and that, having chosen to represent herself, there is no good reason why she could not have attended. Her absence is unfortunately of a piece with her overall attitude to the court process. There is no good reason why her appeal should not be determined today.

15. As to that, I conclude that the Judge dealt with these committal proceedings in a way that is beyond criticism. His approach is a model of the careful and balanced assessment that is necessary in a case of this kind. His finding that the Appellant is in contempt was supported by compelling reasoning, indeed the conclusion was inevitable. His approach to the sentencing exercise cannot be faulted. A sentence of this length is a long one, but it is unfortunately necessary in circumstances where the appellant has shown no acceptance, remorse or apology for the deliberate forgery of a court order.

16. I would therefore dismiss this appeal. In doing so, I draw attention – and the Appellant's attention in particular – to the opportunity that is given to all contemnors to seek to purge their contempt by making an application to the trial court. In circumstances of this kind, the sentence of a contemnor who accepts their contempt and makes a genuine apology for their behaviour will always be carefully reviewed.

Lord Justice Coulson

17. I agree that, for the reasons given by Lord Justice Peter Jackson, this appeal must be dismissed.

18. I would wish to add my own tribute to the judge. Although the recent changes to CPR Part 81 will do much to make the contempt procedure less cumbersome and complex, there will still be many contempt cases in which a judge will have to roll up his or her sleeves and address in detail not only the facts and the law, but all the many balancing factors necessary to achieve a just outcome.

19. I am in no doubt that here the judge did all that and more, and he reached the right conclusion for the right reasons.

Lady Justice Andrews

20. I agree that the appeal should be dismissed for the reasons given by Lord Justice Peter Jackson. I would also echo the sentiments expressed by my Lords as to the exemplary approach taken by Macdonald J to the difficulties presented in this case.