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IN THE COURT OF APPEAL
CRIMINAL DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 21 February 2019

B e f o r e:

LORD JUSTICE SINGH

MR JUSTICE SOOLE

HIS HONOUR JUDGE WALL QC
(Sitting as a Judge of the CACD)
R E G I N A
v
JOHN MARTIN KIRBY

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Mr J Harrison appeared on behalf of the **Appellant**
Mr D Pawson-Pounds appeared on behalf of the **Crown**

J U D G M E N T
(Approved)

1. LORD JUSTICE SINGH: The appellant appeals against conviction in relation to two indictments with the leave of the Full Court, which was granted on 13 March 2018 when the court also granted the necessary extension of time.

2. On that occasion the court made some further directions which are set out at paragraph 9 of its judgment. Those directions included that, within the specified time, the appellant was to notify this court whether any application had been made to set aside the second order of the High Court, being an order dated 25 March 2014. Secondly, the appellant was to inform the local authority in this case, that is Tower Hamlets London Borough Council, of the appeal before this court. Thirdly, a copy of the court's order was to be served on the local authority and the prosecution. Fourthly, the appellant was to provide this court with a copy of the first order of 2013 made by the High Court under its inherent jurisdiction. We have been able to have sight of that, it would appear through the Criminal Appeal Office. Fifthly, a transcript of the judgment of 13 March was to be made available to the parties and indeed to any court subsequently dealing with the appeal, which it has been.

3. The facts of the case can be briefly summarised as follows. On 25 March 2014 the High Court issued a non-molestation order on the application of Tower Hamlets. The order placed requirements on the appellant, including a requirement which prevented him from attending his elderly mother's address (which was set out). On 25 April 2014 police attended that address and served the order upon the appellant.

4. The matter which was the subject of the first indictment concerned this. On 9 May 2014, following information received about a disturbance at the property, police officers attended and found the applicant present in breach of the order. He was remanded in custody. On 3 November 2014, in the Crown Court at Snaresbrook, the appellant pleaded guilty to breach of that non-molestation order contrary to section 42A of the Family Law Act 1996. He was sentenced by Her Honour Judge Sarah Paneth on 1 December 2014 to 12 weeks' imprisonment.

5. The matter which was the subject of the second indictment related to the following. On 23 April 2015 police officers attended the property following the activation of an emergency alarm. The appellant was present and was arrested for being in breach of the order. He pleaded guilty on 12 October 2015 at Snaresbrook Crown Court. On this occasion, he was sentenced by Her Honour Judge Louise Kamill to 5 months' imprisonment.

6. Subsequent events have a bearing on this appeal. Between 7 and 8 March 2016 the appellant appeared again at Snaresbrook Crown Court, following allegations that he had again breached the non-molestation order by attending his mother's address. During those proceedings it was conceded on behalf of the Crown that the original non-molestation order was invalid, by which we understand was meant that it should

not have been made. This was because the order had been made on an ex-parte application by Tower Hamlets who were not "associated persons" as required by the Family Law Act 1996. Consequently, as a matter of law, they were not permitted to apply for such orders in a case where there were no other proceedings before the court.

7. In those circumstances, on this occasion, the Crown offered no evidence and the appellant, who had been held in custody since his arrest, was released.

8. In this appeal Mr Harrison has advanced five grounds in writing. The first is that the non-molestation order was erroneously granted by the High Court on 25 March 2014 because it was not applied for by an associated person. Secondly, the application for the order should therefore have been refused. Thirdly, the application should have been further refused on the basis that there was already a properly granted prohibitive order in place which had been granted in 2013. Fourthly, the fact that statutory framework was not complied with should make the order invalid *ab initio*, submits Mr Harrison, and therefore not something that can form the basis of separate criminal proceedings. Fifthly, in a sense as an umbrella submission, sweeping up the earlier grounds, Mr Harrison submits that the Crown Court should not be used to enforce improper and unlawful orders.

9. Before this court, at this oral hearing, Mr Harrison has also emphasised that such cases concern the liberty of the subject and may well concern members of society who are vulnerable and will often not appreciate what the legal requirements of various court orders are. They may therefore not be in a position, realistically submits Mr Harrison, to question the propriety of making a court order, in particular if it has been made on an ex-parte basis.

10. That all said, Mr Harrison fairly acknowledged at this hearing that the normal course which the legal system expects people to take is for them to apply to have an order of a court set aside on the ground, for example, that the court had no power to make it; or that a condition precedent which must be met before a court has a power to make a particular order was not satisfied.

11. We have been assisted in this case by helpful grounds of opposition, set out in the respondent's notice by Mr Pawson-Pounds. He has attended the hearing today in order to assist the court but in the event that the court felt it unnecessary to call upon him. In essence, he submits, in his written grounds of opposition, first, that an appeal against conviction arising from a guilty plea can only be considered in exceptional circumstances. He submits that the appellant was well aware of the substance of the cases against him and it cannot be realistically argued that he was misled in any way. There is no indication of the instructions given or the advice received by the appellant on either occasion.

12. Secondly, and perhaps fundamentally, the Crown submit that the correct avenue for relief in cases such as this is for the appellant to challenge the validity of the non-molestation order in an appropriate manner, if an appeal is available or by applying to the original court to have it set aside. It is not a defence to criminal proceedings, submits Mr Pawson-Pounds.

13. In approaching this appeal, we remind ourselves that there is a long-standing principle of our law that there is an obligation to obey an apparently valid order of a court unless and until that order is set aside. This is a crucial feature of a civilized society which has respect for the rule of law. The authorities amply demonstrate that that is the long-standing principle of our legal system.

14. In 1846 in Chuck v Cremer [1846] Cooper temp Cottingham 2005 at 338, Lord Cottingham LC said:

> "A party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null and void — whether it was regular or irregular. That they should come to the court and not take it upon themselves to determine such a question: that the course of a party knowing of an order, which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed."

15. That passage was cited by Romer LJ in Hadkinson v Hadkinson [1952] P 285 at page 288:

> "It is the plain and unqualified obligation of every person against, or in respect of whom an order is made, by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."

16. Those passages were cited with approval by the Judicial Committee of the Privy Council in Isaacs v Robertson [1985] AC 97, at page 101, in the judgment of the Board which was given by Lord Diplock. There, Lord Diplock considered an argument based on the operation of Order 34 Rule 11(1)A of the Rules of the West Indies Associated States Supreme Court (Revised 1970) that the order made by the High Court of St Vincent granting an interlocutory injunction was "a nullity" so that disobedience to it could not constitute a contempt of court.

17. That submission had been accepted at first instance but rejected by the Court of Appeal. On further appeal to the Privy Council it was held that the Court of Appeal was correct. The passages we have cited from Chuck v Cremer and Hadkinson v Hadkinson were, in the view of the Privy Council, "all that needs to be said upon this topic".

18. It should also be noted that at page 103 Lord Diplock said:

> "The contrasting legal concepts of voidness and voidability form part of the English law of contracts. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set

> aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies."

19. Issacs v Robertson was cited with approval by the House of Lords in M v Home Office [1994] 1 AC 377, at page 423, where Lord Woolf said, in considering an argument that an order made by the High Court of England and Wales had been made without jurisdiction:

> " ... the order was made by the High Court and therefore has to be treated as a perfectly valid order and one which has to be obeyed until it is set aside. (See the speeches of Lord Diplock in In re A Company [1981] A.C. 374 at p.384 and Isaacs v. Robertson [1985] A.C. 97 at p. 102.)"

We would observe that in the case of in Re: A Company it was held by the House of Lords that for this reason it is not possible to apply for judicial review of a decision made by the High Court.

20. The mainstay of the submissions made in writing by Mr Harrison is to be found in the decision of the Court of Appeal (Criminal Division) in R v Beck [2003] EWCA Crim 2198; [2003] All ER (D) 471, at paragraphs 25 to 29, in the judgment of Mance LJ. That case concerned, we would observe, an order made by the Crown Court which was described by Mance LJ as being "a court of limited statutory jurisdiction". That, of course, is not the status of the High Court which, as we have observed, is a court of unlimited jurisdiction - see the speech of Lord Diplock in Re: A Company at page 384.

21. It should also be observed that in the judgment given by Mance LJ in Beck, at paragraph 27 he said, referring to an argument outlined at paragraph 26 as to whether the fresh restraining order made on 6 October 2000 could be said to be valid so long as it had not been set aside:

> "As to point (a), it seems to us that, if the making of a restraining order was outside the power of the Kingston Crown Court on 6th October 2000, then the decision to make one 'amounts to nothing', even though the order is only now being formally set aside: see Halsbury's Laws of England (4th Ed. Reissue) Vol. 10, para. 314. The Crown Court is a court of limited statutory jurisdiction, rather than a court of unlimited jurisdiction to which, in at least some contexts, the principles in Isaacs v. Robertson [1985] 1 AC 97 might apply. Further, we are concerned with a criminal context, in which article 7 of the European Convention on Human Rights would, if anything, increase the problems which would be involved in upholding a conviction for an offence of acting contrary to an order which the court, a public authority, had no jurisdiction to make and which this court is now setting aside. We say no more on point (a), in view of the very limited submissions addressed to us on it."

In the result, at paragraph 29, the court found that it had to quash the appellant's

conviction because there was a defect in the indictment. It did not record the date of the correct restraining order.

22. Be that as it may, we would observe that the rule that an order of the court must be obeyed unless and until set aside has been applied to courts of limited jurisdiction. For example, in Johnson v Walton [1990] 1 FLR 350, a case which does not appear to have been cited to this court in Beck. Johnson concerned an application in the County Court to commit for contempt of court for breach of a non-molestation undertaking given to the court. The Court of Appeal (Civil Division) held that the County Court had been wrong to say that there could not be a contempt of court if there is no jurisdiction to accept the undertaking in the first place. Lord Donaldson of Lymington MR said at page 352:

> "It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place."

23. The same principle was applied in the case of a District Judge making an anti-social behaviour order under the Crime and Disorder Act 1998 in DPP v T [2006] EWHC 728 (Admin); [2007] 1 WLR 209, at paragraphs 27 to 34 in the judgment delivered by Richards LJ. In that case the Divisional Court distinguished the decision of the House of Lords in Boddington v British Transport Police [1999] 2 AC 143, on the ground that that case concerned the validity of bylaws and not court orders. In Boddington it had been held by the House of Lords that the validity of a bylaw can be questioned by way of defence in criminal proceedings. However, in T the Divisional Court said at paragraph 27:

> "Very different considerations apply in the present context. First, the normal rule in relation to an order of the court is that it must be treated as valid and be obeyed unless and until it is set aside. Even if the order should not have been made in the first place, a person may be liable for any breach of it committed before it is set aside."

T was recently cited with approval by the Civil Division of the Court of Appeal in R (on the application of) TN (Vietnam) v Secretary of State for the Home Department [2018] EWCA Civ 2838, paragraph 78.

24. Before this court, and principally in reliance on the decision of this court in Beck, Mr Harrison seeks to distinguish the case of Isaacs on the basis that, in the present context, albeit that the High Court is a court of unlimited jurisdiction, it was exercising a jurisdiction conferred on it by statute only, namely the Family Law Act 1996. He submits that it only had power to make the non-molestation order concerned if certain conditions were satisfied. One of those conditions, as is now conceded by the Crown, was not satisfied. We reject that submission. The crucial point which has been emphasised in all of the cases to which we have referred is the status of the High Court as a court of unlimited jurisdiction.

25. In those circumstances, the appropriate remedy was not a challenge to the conviction of a defendant but to the order imposed by the High Court. We would observe, with respect, that if it was to be done so as to provide a defence, it ought to have been done before an offence is committed. Making an application to set aside, even if that had been done, some 4 or 5 years after the event, does not appear to us to lay any foundation after the event to providing a defence to criminal proceedings. In any event, as Mr Harrison fairly accepts before this court, there is no material before the court to show that Mr Kirby has in fact done anything, even since the order of this court of March 2018, even now to apply to set aside the non-molestation order. We have reached the conclusion that the case of Beck is clearly distinguishable and does not provide any assistance to the appellant in his submissions.

26. However, it would not be right to leave this case without putting down a marker even in relation to courts or Tribunals, which unlike the High Court do not have unlimited jurisdiction but have what was described in Beck as a "limited statutory jurisdiction", for example, the Crown Court, the County Court and Tribunals. This court may on a future occasion have to reconsider whether what was said in Beck is correct. We note that it was the subject of only "very limited submissions" in that case and that it would appear to be inconsistent with other authorities including not only T, a decision of the Divisional Court but also decisions of the Civil Division of the Court of Appeal. We need not dwell on this point further because, for reasons we have explained, it does not in fact arise on the facts of this case.

27. But the jurisdiction of the Court of Appeal (Criminal Division) to reach a view which is different from an earlier decision of the same division is well established and is outlined in Beldam & Holdham Court of Appeal (Criminal Division), A Practitioner's Guide, 2nd edition at paragraphs 2-010 to 2-013 (see in particular the decision of this court in R v Magro, Varma & Ors [2010] 2 Cr App R 25, in particular paragraphs 30 - 31 in a judgment of the court delivered by Lord Judge CJ.

28. For the reasons which we have given, we have reached the clear conclusion that this appeal must be dismissed.