

Neutral Citation No: [2023] NICA 65

Ref: McB12279

*Judgment: approved by the court for handing down
(subject to editorial corrections)**

ICOS No: 22/66503/A02

Delivered: 15/09/2023

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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MATTHEW CAVAN

Appellant/Respondent

v

JOLENE BUNTING

Respondent/Appellant

—————
Mr Lavery KC with Mr McClean (instructed by Brentnall Legal Ltd) for the Appellant
Ms Quinlivan KC with Ms Rice (instructed by Phoenix Law, Solicitors) for the
Respondent

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Before: Keegan LCJ, Treacy LJ and McBride J
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McBRIDE J (*delivering the judgment of the court*)

Application

[1] This is an appeal from an order of Her Honour Deputy County Court Judge Harmer dated 5 June 2023 when she sentenced the appellant to a fine of £750 for civil contempt for disobedience of a court order dated 9 August 2022.

[2] The court delivered its oral ruling on 15 September 2023. This case involved consideration of the powers of the court in civil contempt proceedings and given that there is no written judgment on this matter in this jurisdiction this court considered it was desirable for the judgment to be now given in written format.

Background

[3] On 9 August 2022, pursuant to an ex parte application by the respondent under the Protection from Harassment (Northern Ireland) Order 1997 Deputy County Court Judge Harmer made an order ("the Order"), inter alia, requiring the appellant to immediately remove and refrain from posting a video entitled "WATCH AND

SHARE: Drag Queen Story Time “HONEST” & “SPECIAL” from YouTube and all other social media outlets and platforms that it had been posted and shared on.

[4] The application for protection from harassment arose out of a protest by the appellant against the hosting of an event, organised by Young at Art, as part of the Belfast Pride Festival, on Sunday 31 July 2022 at the MAC Belfast. The event was entitled, “Drag Time Stories with Cherrie Ontop” in which the respondent, (who is an actor and performer and has a drag act where he is known as “Cherrie Ontop”) read stories to primary school children who were accompanied by family members. After this event the appellant posted a video entitled “WATCH AND SHARE: Drag Queen Story Time “HONEST” & “SPECIAL” on Twitter, YouTube and other social media outlets. The video shows her in dialogue with another protestor outside the MAC and in which it is stated that drag queens groom children and have been exposed as paedophiles. There was significant media interest in the story and this video was watched by a large number of members of the public. As a result of the material posted on the internet the Deputy County Court Judge found that the respondent has been subjected to harassment by the appellant and granted the Order.

Chronology regarding Court Proceedings

[5] The Order was served on the appellant at 6:30pm on 9 August 2022. As the video continued to be posted on the appellant’s YouTube and Twitter accounts on 9, 10 and 11 August 2022 the respondent initiated contempt proceedings on 12 August 2022 against the appellant for breach of the court order dated 9 August 2022.

[6] On 5 September 2022, the morning of the contempt hearing, the appellant accepted that she was in contempt of court and removed the online material. The court adjourned the case until 12 September for sentencing. At the sentencing hearing the court imposed a four month conditional discharge.

[7] The respondent appealed this sentence. By agreement of the parties, the Court of Appeal set aside the conditional discharge as this sanction was ultra vires the powers of the court. The Court of Appeal then remitted the case to the Deputy County Court Judge for resentencing. At the remitted hearing on 5 June the Deputy County Court Judge imposed a £750 fine and gave the appellant time to pay.

Grounds of Appeal

[8] The appellant appeals on two grounds. Firstly, the appellant submits that the trial judge erred in law by imposing a punitive sentence of a fine rather than imposing a remedial sentence and submits that the appropriate remedial sentence would have been an order binding the appellant over to keep the peace. The second ground of

appeal is that the trial judge erred in law by failing to take into account material factors and imposed a financial penalty which was disproportionate in all the circumstances.

Consideration

Sanctions the court can impose in civil contempt cases

[9] In respect of imposing sanctions in civil contempt the court has wide powers. In the exercise of its discretion, the court can; make no order; impose a period of immediate imprisonment or suspend a period of imprisonment; impose a fine; seize the contemnor's goods under a writ of sequestration; grant an injunction restraining the repetition of the contempt and/or penalise the contemnor with an order to pay the costs of the committal proceedings.

[10] In determining sentence the court will consider all the circumstances of the cases including the nature of the breach (whether it is minor/technical or serious), any mitigating factors, any aggravating factors and the nature of the contempt involved and the context in which it occurred including whether it occurred within a family context, in the face of the court or otherwise.

[11] There was no dispute between the parties that under section 14 of the Contempt of Court Act 1981 the Deputy County Court Judge had power to impose a fine for civil contempt. The appellant submitted, however, that the object of punishing civil contempt is to ensure compliance with the court order and the judge therefore erred in imposing a fine in circumstances where the appellant had complied with the court order. The appellant submitted the judge ought to have imposed no order or a remedial sentence such as binding over to keep the peace which sanction would have been in keeping with her original intention to impose a remedial sentence as evidenced by her decision to impose a conditional discharge.

Distinction between Civil and criminal contempt

[12] The traditional distinction in domestic law between civil and criminal contempt is set out in Arlidge, Eady & Smith On Contempt (5th Ed) para 3.1 "...a criminal contempt is an act which so threatens the administration of justice that it requires punishment from the public point of view; whereas by contrast, a civil contempt involves disobedience of a court order or undertaking by a person involved in litigation. In these cases the purpose of the imposition of the contempt sanction has been seen as primarily coercive or "remedial"."

[13] Whilst the primary concern of the court in civil contempt cases is to ensure compliance with the court order which has been flouted, that does not diminish the role of the court in punishing the person guilty of such contempt when punishment is called for. In *JSC BTA Bank v Solodchenko* [2012] 1 WLR 350 the court recognised that

a sentence for civil contempt performs a number of functions. “First it upholds the authority of the court by punishing the contemnor and deterring others. Such punishment has nothing to do with the dignity of the court and everything to do with the public interest that court orders should be obeyed. Secondly, in some instances it provides an incentive for belated compliance, because the contemnor may seek a reduction or discharge of sentence if he subsequently purges his contempt by complying with the court order in question”.

[14] It has been recognised in the existing jurisprudence that a contemnor may be fined for breach of a court order, at least where it is committed in contumacious circumstances – see *Phonographic Performance Ltd v Amusement Caterers Ltd* [1964] Ch 95, *Re Grantham Wholesale Fruit Vegetable and Potato Merchants Ltd* [1972] 1 WLR 559 and *Deputy Chief Legal Ombudsman v Young* [2021] 1 WLR 3227.

Ground 1 of appeal – Did the learned trial Judge err in principle by imposing a fine?

[15] The appellant received notice of the Order on 9 August 2022 and notwithstanding the requirement to remove the video immediately the appellant failed to do so and permitted it to remain on a number of social media platforms. After the contempt proceedings were initiated, she did not purge her contempt by removing the offending material until the first day of the contempt hearing on 5 September 2022. Breach of the court order was committed in a very public manner as there was intense media coverage of this story and the video was viewed by many members of the public. In these circumstances we consider the appellant has been guilty of deliberate and flagrant breach of the court order. Given the contumacious nature of the breach and its public nature, we consider a sanction is required which sends out the message that court orders are to be obeyed and which deters others from acting in this way.

[16] Accordingly, we are satisfied the learned trial judge was entitled to impose a punitive sentence and therefore did not err in principle by imposing a fine. Insofar as she showed any intention by originally imposing a conditional discharge, we consider that intention was not to impose a remedial sanction but rather an intention to impose a non-custodial sentence.

[17] Although counsel for the appellant urged the court that binding the appellant over to keep the peace was the appropriate order to make, we do not agree. Such an order is only appropriate in the context of criminal and not civil contempt. Whilst such an order may be appropriate where there has been a disturbance in court, we agree with Arlidge Eady and Smith, *On Contempt* (5th Ed) at para 14-127 when the authors state that it is “difficult to imagine any other situation where such an order would be appropriate”. Accordingly, we reject counsel’s submission that the Deputy County Court Judge ought to have imposed such a sanction.

[18] During the course of argument counsel for the appellant referred the court to a large number of authorities where the court did not impose a punitive sanction. We did not find these cases of much assistance given the very wide variety of

circumstances in which civil contempt can occur. Accordingly, these cases cannot be seen as laying down any guidelines given the fact sensitive nature of civil contempt cases. In particular, we note that cases emanating from the Family Division are of very limited assistance in a case such as this one because the primary purpose of imposing a sanction for civil contempt in family cases is coercive and therefore punitive sanctions such as committal orders or fines are remedies of last resort used only when all other efforts to resolve the situation have been unsuccessful.

Ground 2 - Did the Learned Trial Judge fail to take into account material factor and impose a fine which was disproportionate?

[19] The appellant submitted that that the fine imposed by the learned trial judge was disproportionate as she failed to take into account a number of factors including the fact the appellant accepted the breach at the date of the hearing, the appellant purged her contempt; there were no further breaches of the Order and the appellant had no record.

[20] We are satisfied that all these mitigating factors were brought to the attention of the learned Trial judge and were considered by her. Accordingly we do not find that she failed to take into account any relevant factor when determining the appropriate level of fine.

[21] We are also satisfied that she was aware of the financial circumstances of the appellant and allowed 26 weeks to pay the fine of £750.

[22] In all the circumstances we are satisfied that the sentence imposed was neither wrong in principle nor in fact and, accordingly, we dismiss the appeal.