SUPREME COURT OF NEW SOUTH WALES

Re BARNES; Rule Nisi for Contempt of Court

COURT OF APPEAL

HERRON, C.J.

SUGERMAN and ASPREY, JJ.A.

18 March 1968

Courts Practice and Procedure—Contempt of Court—Impeding process server from serving subpoena—Use of indecent language to process server—Failure by process server to tender conduct money—No contempt for failing to obey subpoena because of failure to tender conduct money—Contempt established by impeding process server from serving subpoena—Evidence Act 1898, as amended, s. 13—Supreme Court General Rules 1952, as amended, Ord. XVII, r. 6.

A person injured in a motor-vehicle accident brought an action at common law for damages for injuries he received. The defendants were the owner of the other vehicle involved and the driver of that vehicle. The action was due to be heard on 1 March and on 7 February, an articled clerk employed by the solicitors for the defendants went to the driver's house to serve a subpoena on him. The driver refused to let the clerk serve him with the subpoena and impeded the clerk in all his efforts to serve the subpoena. The clerk omitted to tender conduct money to the driver or to tell him that he was entitled to receive his expenses upon application. The trial of the action took place and the injured person was awarded substantial damages. The trial judge issued a rule *nisi* for contempt of Court directed to the driver, the grounds upon which the rule was issued being that the driver assaulted, ill-treated, and/or impeded the clerk as process server, engaged in his duty of serving the writ of subpoena and that the driver failed to obey the terms of the subpoena by attending to give evidence according to its terms. On the return of the rule *nisi*,

Held: (1) the driver's failure to obey the terms of the subpoena was not a contempt of Court as the subpoena had not been validly served as required by the Evidence Act, s. 13 and the General Rules of the Supreme Court Ord. XVII, r. 6, in that there was no tender or offer of conduct money;

(2) it is essential for the conduct of the Court's business that persons who know something of the matters in issue should be called to give evidence;

(3) it is a contempt of Court to use insolent or indecent expressions, or oaths, or other violent or profane language on being served with any process and it is also a contempt to assault, ill treat, or threaten a process server engaged in his duty;

(4) in impeding the clerk from properly serving him with the subpoena the driver defied the court and was guilty of contempt of court.

RULE NISI FOR CONTEMPT OF COURT

The facts and the nature of the proceedings appear sufficiently from the judgment of Herron, C.J.

R. M. Stonham, for the applicant (the Crown).

N. K. Wran, for the respondent (witness).

The COURT OF APPEAL (HERRON, C.J., SUGERMAN and ASPREY, JJ.A.):

This is a return of a rule *nisi* for contempt of Court directed to one Kevin Joseph Barnes, the rule *nisi* having been issued by McClemens, J., a Judge of this Court, on Monday, 11 March 1968. The grounds upon which the rule was issued are (a) that the respondent assaulted, ill-treated and/or impeded a process server engaged in his duty of serving a writ of subpoena upon the respondent, and (b) that the respondent failed to obey the terms of the subpoena by attending to give evidence according to its terms.

The matter arises out of an action at *nisi prius* for damages for bodily injury to a person and damage to property, which was heard before the learned judge on and after 1 March 1968 and terminating on 8 March 1968. The

action was brought by one Cavaghan against
respondent Barnes as defendants and concerned a collision between motor vehicles which occurred in Parramatta Road, Auburn, on 10 April 1964, in which the damage was done. The respondent Barnes was the driver of the defendant Bird Bros. vehicle on that occasion and he was a material witness as it was his alleged negligence which caused the collision. A statement which he made to an investigator dated 6 August 1967 shows that at the time he ran into the rear of the plaintiff's vehicle he was unable to stop his vehicle because of a defect which occurred without his prior knowledge in the footbrake of the truck, which he was driving for the defendant Bird Bros.

Had his account been received in evidence in the Court and believed by the jury, it may have led conceivably to a different result. The result was that the plaintiff succeeded in the action for substantial damages: the evidence of the respondent Barnes, due to his absence, not being before the Court.

In order to make the matter clear, we do not propose to treat the second ground in the rule *nisi*, viz. the respondent's absence from the Court as a matter of contempt. Section 13 of the Evidence Act is in point and it provides: "(1) Where any person duly bound by recognizance or served with a subpoena to attend in any Court as a witness at the trial of any case, civil or criminal, fails to appear when called in open Court either at such trial or upon the day appointed for such trial, the Court may—(a) upon proof of such recognizance or his having been duly served with the subpoena, call upon him to show cause why execution upon such recognizance or an attachment for disobedience to such subpoena should not be issued against him . . . ."

On this aspect the matter is concluded in favour of the respondent, we think, by terms of Ord. XVI, r. 6 of the General Rules of the Supreme Court. Rule 6 provides that service of a writ of subpoena shall be effected by handing a copy thereof to the person named therein, at the same time showing him the original writ, provided that: "(a) A person upon whom such copy is served need not attend in obedience thereto unless his reasonable expenses are tendered him at the time of service or within a reasonable time before the day fixed for the trial or hearing; and (b) If the person to be served refuses to accept the subpoena it shall be sufficient to place it down in his presence after informing him of the nature thereof and that his reasonable expenses of attendance will be paid on application."

In the present instance the action taken by the respondent Barnes towards the process server, a young man named Collins, prevented proper service of the subpoena being effected, in particular no conduct money was tendered to him, nor was he informed that he was entitled to receive his expenses upon application. Although that omission by the process server may be explained by the respondent's conduct towards him at the time, to which I will refer in a moment, none the less the subpoena was not validly served in accordance with the law for the reason that there was no tender or offer of the conduct money. Indeed, it is worth observing that on all subpoenas *ad testificandum* issued by this Court there is a note at the foot thereof to this effect: "Rules of Court provide that except at the instance of the Crown in the criminal jurisdiction a person upon whom a subpoena is served need not attend in obedience thereto unless his reasonable expenses were tendered him at the time of service of the subpoena or within a reasonable time before the day fixed for the trial . . ." So that the Court is not in those circumstances disposed to hold the respondent responsible for contempt of court by reason of the fact that he was not in attendance at the trial of this action for damages when it was called on. Nor are we able to hold him responsible for the possible miscarriage of justice that occurred in the jury's verdict favouring the plaintiff, in the absence of his evidence. Lastly, we cannot hold him responsible for the added costs, trouble and expense that the parties and the sheriff were put to in attempting to bring the respondent to the Court in order to give evidence on that occasion. But, having said all this there remains another serious aspect of this case.

The solicitors for the defendants in this matter were Messrs. J. W. Maund & Kelynack, a reputable firm of solicitors in the City of Sydney and employed by the solicitors was an articled clerk named Peter Andrew Collins. He, under instructions from the solicitor in the firm of Messrs. J. W. Maund &

Kelynack who had the conduct of this matter, went to see the respondent Barnes on 7 February 1968. At this time the trial of the action had been fixed by the Prothonotary to take place on 1 March 1968 and Mr. Collins, a young gentleman of 19 years of age, attended at Mr. Barnes' residence at 17 Lever Street, Mascot. He arrived there at about 9 o'clock in the evening and was ushered by Mrs. Barnes into the kitchen where the respondent was then eating his dinner or had just eaten it. Some degree of conflict is seen in the account given on oath by the witness Collins and the affidavit of the respondent of 18 March 1968, which has been filed in these proceedings and which we have read and closely considered. Where there is such a conflict we prefer to believe the evidence of Collins. The respondent was unsure about the statements which he made in his affidavit and vague and unsure as to the matters which took place in his house on 7 February. He claims that he was not sure of his recollection of the things attributed to him because he had consumed a considerable quantity of liquor earlier that day. However, he does remember some of the things that were attributed to him and he states that he remembers being rude to the process server and that he did touch him on the shoulder and that he refused to take the subpoena, and indeed he has, in his affidavit, apologized for his actions in that respect.

Mr. Wran, who appeared for the respondent, has also "pleaded guilty", if one might use that expression, to this aspect of the contempt and has himself from the bar table apologized in full measure for his client's actions on that night. However, accepting as we do Mr. Collins' evidence on this subject, it is worthy of record that Collins said that at first the respondent Barnes took the subpoena and read it and then poked it back at him. He said he would not take the subpoena and as far as he was concerned the matter was finished, and thereafter he would not let Collins give the subpoena to him or even put it down anywhere. It seems that whenever Collins made a motion with the subpoena towards the respondent or to place it on the table the respondent prevented this by moving towards the table so that Collins could not serve it or put it down anywhere. He also told Collins that the matter was completely finished, that he had had an investigator in the house taking a statement from him and he was not interested in Court and that he was not going to come to Court. He told Collins to "get to hell out of the house", that he would not accept service. He put his hands, or one hand on Collins' shoulder to motion him as it were to leave the house by the hallway and, although the force used was small, the intent was clear for the evidence is sufficient to indicate an action of aggression by "aiming" Collins as it might be said at the doorway. There was a defiance of Collins, a refusal to take the subpoena, and it ended up by the respondent telling Collins that he could stick the subpoena up a certain portion of his anatomy. He also said, according to Collins, evidence which this Court believes, that he had already "flushed another one down the toilet". Whether in fact he had ever done such a thing will never be known; the Court has no means of discovering such a thing, and the respondent Barnes has denied it. None the less we believe it was said in order to show Collins the supreme contempt in which the respondent held him as the process server and the subpoena itself.

Collins is a decent young man of gentlemanly bearing, whom we have seen in the witness-box, whereas the respondent is a man who on this occasion, possibly because of the amount of drink that he had taken, was of an aggressive nature and showed quite clearly that he was not prepared to allow the subpoena duly to be served upon him, although we are convinced that he knew of its contents.

Mr. Wran has properly drawn our attention to the fact that his client on former occasions had served as a juror, had attended as a witness at a Court of Petty Sessions when subpoenaed to do so, and had made a statement to the investigator about this accident, and on this occasion, according to Mr. Wran, he acted in a way completely out of character with his ordinary demeanour and attitude towards the Court's processes. On this occasion it cannot be disputed, we think, and it is the plain fact that he rebuffed this young clerk, the process server, with offensive language and manner. Why was this? The answer we believe is not far to seek. The subpoena stated in it that the respondent was required to attend at the Supreme Court for the

hearing of the damages action on 1 March and it is known that the respondent had arranged his holidays at a time which conflicted with that date. As early as November 1967, he had hired a cottage at Forster and had intended to leave for his holidays on 18 February and it is this Court's opinion that he would not allow the Court or its processes to interfere with his private arrangements or interfere with his leisure. Hence on the night we are speaking of he adopted an aggressive and wholly unreasonable attitude towards both young Collins and the process with which he was attempting to serve.

We are concerned about this matter and we note, and are glad to record this, that Mr. Wran in his most reasonable approach to this case, has freely admitted that his client is in contempt and is conscious that he cannot defy the law. The respondent is aged 43 and is a truck driver and has been shown to be a good worker and a good family man and it is distressing that this Court should be faced with the necessity of punishing him for his contempt of court by reason of his contempt of its processes.

The principles of law upon which such cases are governed are not in doubt. They are stated succinctly in *Oswald on Contempt* in the 3rd ed., at p. 84, where the learned author says: "The respect due to the Court itself is owing also to its process. It has often been held to be a contempt to use insolent or indecent expressions, or oaths, or other violent or profane language on being served with any process." And, at p. 85 it is stated: "It is also a contempt to assault, illtreat, or threaten a process-server engaged in his duty." We are satisfied that Collins on this occasion felt a degree of apprehension by reason of the actions of the respondent. A reasonable inference arises as to this by the attitude of the respondent exhibited towards him that night.

There is no need to canvass a number of authorities on this subject. It is sufficient if I refer to two of them. The first is *Price* v. *Hutchison* (1870), L.R. 9 Eq. 534, a decision of Malins, V.C. In that case the learned Vice Chancellor said this of the respondents: "They have been guilty of the most improper conduct towards Mr. Vanderpump. When they considered themselves in danger they turned round, and thought they would get an advantage by making a charge against him. The whole thing is, in my opinion, most disgraceful to them. It is not a slight thing that the process of this Court should be treated with contempt, or that a person who is engaged in serving the process of this Court should be molested in the discharge of that duty, or that anything should take place which could throw any doubt whatever as to his personal safety in the conduct of the business of this Court. The case has been brought before me upon a motion for contempt. This Court usually takes so lenient a view of the liberty of the subject, and is so much inclined to put a merciful construction upon the acts of parties, that it usually is satisfied, in the first instance, by the payment of costs; but in this case, I think I should fall very far short of the discharge of my duty if, upon conduct so contemptuous as this—so flagrant a disrespect to this Court, so broad and palpable an infringement of the liberty of the subject—I did not mark my dissatisfaction by doing much more than making these gentlemen pay the costs." The Court ordered the respondents to be committed and it is noted that in one case one of them was in custody for a period between 27 December and 12 January as a result of the Court's order. The second case to which reference may be made is *Ullathorne, Hartridge & Co. Ltd.* v. *Green, Re Hartridge* (1901), 27 V.L.R. 22. The headnote of that case says: "It is a contempt of court to assault a person either when he is trying to effect or has effected service of the process of the Court." There is a statement of the general principles relating to contempt in *Re Buchanan* (1964), 82 W.N. (Pt. 2) (N.S.W.) 83, a decision of the Full Court of the Supreme Court of New South Wales.

The service of a subpoena has important consequences. By its very terms, being signed by the Chief Justice, a subpoena is a command to the person served that he shall by no means omit to obey its terms. The subpoena commands him that, laying aside all other matters and business and notwithstanding any excuse he personally be and appear before the Supreme Court at the Court House specified on the day specified. A subpoena is one of the most important processes of the Supreme Court. It is essential for the conduct of the Court's business that persons who know something of the

matters in issue should be called to give evidence. This is the rule of law and no man is above the law. We are all subject to the rule of law.

This subpoena required the attendance of the respondent, as I have said, on a date which conflicted with his holidays and he was defiant. No doubt he had had some drink, but we are convinced he was not drunk. He put himself above the law and in the opinion of this Court the gravamen of what he did was to impede the process server from making a proper service of the subpoena. Indeed, it was because of the action of the respondent that the process server omitted to tender him the $2 conduct money which he had in his pocket for that purpose, or to offer to pay him his reasonable expenses and thus service was frustrated.

It is no slight thing to treat with contempt the process of this Court and it is even more serious to molest the server of the process. Whilst we are impressed with the apology that has been tendered to the Court, the general principle that I have stated must apply, that is, that the rule of law in a democracy must be upheld. We intend by our order to uphold the primary judges of this Court who have to deal from day to day with these cases and to hear witnesses give evidence before juries in order to elicit the truth. Punishment in these cases involves, we believe, an element of deterrent and we wish by our order to demonstrate that no man is above the law and that every right-thinking person in the community must realize that the direction of the Supreme Court in a subpoena is paramount and such documents and the service of them must be respected and not defied. In this case there was a refusal properly to be served; there was a defiance and an arrogant refusal and we believe the clerk was impeded in his lawful duty in serving this process and we find the contempt to be made out. Had it not been for Mr. Warn's eloquent appeal and his sincere apology tendered to the Court we would have imposed a heavier penalty than the one we propose although that, let it be said, is no trifling matter of punishment either.

The order of this Court is that the respondent is found guilty and is convicted of the contempt of Court according to the terms of the rule *nisi* and that the rule be made absolute. We order that the respondent be fined the sum of $100 to be paid to the sheriff of the Supreme Court of New South Wales and we also order that the respondent be imprisoned at the State Penitentiary at Malabar for the space of 48 hours. If at the end of 24 hours of that term, which is to date from 2 p.m. on this the 18th March 1968, he pays the fine of $100 to the sheriff he may then be released.

Having regard to the terms of the order and the fact that we have taken into consideration Mr. Wran's appeal for clemency, and because, and only because, the respondent is a married man, a working man who has five children and a wife to support, we do not propose to make any further order in respect of the costs of this application. We direct the sheriff to take the respondent into custody and carry out the terms of our order.

Order accordingly.

Solicitors for the applicant (the Crown): *R. J. McKay*, State Crown Solicitor.

Solicitors for the respondent (witness): *J. R. McClelland & Co.*

M. ADAM
BARRISTER-AT-LAW