SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CIVIL SUIT NO. 141 OF 2001

BETWEEN:

PHILLIP MARK VAUGHAN	Applicant
and	
THE COMMISSIONER OF POLICE	First Respondent
THE ATTORNEY GENERAL	Second Respondent
WILLIAM HARRY	Third Respondent
LENROY BREWSTER	Fourth Respondent

Appearances:

Nicole Sylvester, Kay Bacchus-Browne and
Cheryl McSheen for the Applicant

Graham Bollers and Jaundy Martin
for the Third and Fourth Respondents

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2001: June 25 and 28
July 2

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RULING

[1] **WEBSTER, J.** ***(acting)***. On Monday June 28, 2001 I overruled the Applicant's objection to the Court hearing a motion filed by the Third and Fourth Respondents on June 13, 2001 to strike out the Applicant's Motion for Committal for Contempt until the Respondents purge their contempt of court. My reasons for overruling the objection are set out hereunder.

[2] On Friday April 20, 2001 the Applicant was arrested by the police on a charge of breaking the immigration laws of the State. He was detained at the Central Police Station in Kingstown, St. Vincent in circumstances which led to the filing a motion against the First and Second Respondents for redress under the Constitution. On the 25th April at 9 a.m. the Applicant appeared before the Kingstown Magistrates Court and pleaded guilty to the charge against him. The Learned Magistrate adjourned sentencing to 2 p.m. At 1:30 p.m. the Applicant appeared before Justice I. D. Mitchell QC in chambers and obtained an *ex parte* injunction against the First and Second Respondents in the following terms:

> "That this application be heard inter partes on Wed 2nd May, 2001 at 1:30 pm. That Documents be served on the Respondents forthwith and that in the meantime the order is that no official action be taken against the Applicant towards his removal from St. Vincent and the Grenadines or in restraint of his liberty until further ordered or until the hearing of this application." ("the Prohibitory Order")

At 2:00 p.m. the Applicant appeared before the Magistrate and was fined $2,000 which he paid forthwith. Within minutes he was again taken into custody by the police Events unfolded rapidly in the next few hours and by 6:19 p.m. the Applicant was placed on board an aircraft at the E.T. Joshua Airport and taken out of the State.

[3] On the 9th May the Applicant applied by motion for an order committing the Third and Fourth Respondents to prison for their contempt of court in breaching the Prohibitory Order, or for such other orders as the Court may consider appropriate. On the 13th June the Third and Fourth Respondents (referred to hereinafter as "the Respondents") applied by motion to strike out the Contempt Motion on the following grounds:

(a) That the failure to endorse a penal notice on the copy of the order of His Lordship, the Honourable Mr. Justice Ian Donaldson Mitchell QC, made on Wednesday 25th April 2001, was a non-compliance the provisions of Order 66 Rule 7(2) of the Rules of the Supreme Court 1970 and was fatal.

(b) That the failure to personally serve the Third and Fourth Respondents with a copy of the said order was a non-compliance with the provisions of Order 66 Rule 7(2)(a) and was fatal.

(c) That the alleged prohibitory injunction granted by His Lordship, the Honourable Mr. Justice Ian Donaldson Mitchell QC, made on Wednesday 25th April 2001, was unclear and ambiguous in its terms and therefore cannot form the basis of an application for committal of the Third and Fourth Respondents and was fatal.

(d) That the affidavits on which the Applicant intends to rely in support of his application to commit, do not establish beyond reasonable doubt that the Third and Fourth Respondents were aware of the terms of the order and was fatal.

[4] The essence of the Applicant's objection to the Preliminary Motion is that the Respondents breached the Prohibitory Injunction by depriving the Applicant of his liberty and removing him from the State. These acts, and in particular the latter, are continuing contempts, and the Court should not hear the Respondents on an application attacking the contempt proceedings until they purge their contempt by returning the Applicant to the State. Learned Counsel for the Applicant was careful to point out that the Applicant's objection does not go to the Respondents ability to defend themselves on the contempt charges, but they should not be allowed to attack the proceedings until they purge their contempt. When they purge their contempt they will be free to pursue the Preliminary Motion.

[5] Counsel for the Applicant relied on the case of **Hadkinson v Hadkinson** [1952] 2 All ER 567, a decision of the Court of Appeal of England. The headnote reads:

> "On a petition by a wife for the dissolution of her marriage, a decree nisi was granted, and it was directed the child of the marriage should remain in the custody of his mother, but that he should not be removed out of the jurisdiction without the sanction of the court. On the decree being made absolute the mother re-married, and without the sanction of the court she removed the child to Australia. On a summons by the father an order was made directing the mother to return the child within the jurisdiction. On an appeal by the mother against the order the father objected that, as she was in contempt, she was not entitled to be heard. **HELD**: it was the plain and unqualified obligation of every person against, or in respect of, whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged, and disobedience of such an order would, as a

general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt; where an order related to a child the court would be adamant on its due observance, for such an order was made in the interests of the welfare of the child, and the court would not tolerate any interference with or disregard of its decisions on those matters, and least of all would permit disobedience of an order that a child should not be removed outside its jurisdiction; in the present case the mother was not entitled to prosecute or be heard in support of her appeal until she had taken the first and essential step towards purging her contempt of returning the child within the jurisdiction."

[6] The decision of the Court of Appeal was unanimous but the approach of the Lord Justices was different. Denning L.J.'s approach was that a party who disobeyed an order was not barred from being heard -

> "... but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed"

[7] Romer L.J. (with whom Sommervell L.J. agreed) rested his decision on the general principle that the Court will not entertain an application from a person in contempt until he has purged himself of his contempt, except in the following cases:

(a) an application by the contemnor to purge his contempt;
(b) an appeal with a view to setting aside the order on which the alleged contempt is founded;
(c) a submission that , having regard to the true meaning and intendment of the order that the contemnor is said to have disobeyed, his actions did not constitute a breach of it, or that, having regard to all the circumstances, he ought not to be treated as a person in contempt; and
(d) defending himself against some other application made against him

[8] I am satisfied that the Respondents are entitled to rely on the third exception in the judgment of Romer L.J. and assert that their actions do not constitute breaches of the Prohibitory Order, or that they ought not to be treated as persons in contempt. In doing this they should be allowed to question the Court's ability to proceed on the Committal

Motion, which they have done by filing the Preliminary Motion. If the Court finds in their favour on any of the grounds in paragraphs (a), (b) and (c) of the Preliminary Motion, it cannot proceed to find them in contempt. It would therefore be premature to make an order requiring the Respondents to purge their contempt before hearing full arguments on the Preliminary Motion.

[9] That is sufficient to dispose of the objection, but the learned editors of **Borrie & Lowe on The Law of Contempt** (3rd edition at page 563) suggest that the growing weight of judicial opinion now favours the more flexible approach of Lord Denning as set out in paragraph 6 above. I will therefore examine the Applicant's objection to the Preliminary Motion using the approach suggested by Denning, L.J. The Denning approach focuses on the effect of the breach of the order. If it is a continuing contempt that impedes the course of justice in the case the court has a discretion to refuse to hear the contemnor until the impediment is removed. I am satisfied that the alleged contempt in this case is a continuing contempt that could impede the course of justice in the sense of making it more difficult for the Court to ascertain the truth in the substantive proceedings relating to the Applicant's claim for redress under the Constitution. In considering how to exercise my discretion I have compared the facts of this case with the facts in **Hadkinson v Hadkinson** and come to the following conclusions::

(a) The Respondents were not present in Court when the Prohibitory Order was granted, and the Fourth Respondent was not then a party in the action. The wife in Hadkinson was present when both orders were made and both were directed to her.

(b) There were two orders in Hadkinson, one of which was mandatory directing the wife to return the child to England.

(c) There was no allegation of ambiguity in any of the two orders in Hadkinson while the Respondents in this case are challenging the order on the ground that it is unclear and ambiguous.

(d) The orders in Hadkinson related to the welfare of a child and the Court of Appeal made it clear that this was a very important consideration in making the order to purge.

I therefore find that the circumstances in the Hadkinson case are very different from the facts of this case and this Court is not bound to come to the same conclusion as the Court of Appeal did in Hadkinson. I have also considered that these are quasi-criminal proceedings in which the liberty of the Respondents is at stake. The Respondents are presumed to be innocent, and the alleged contempt must be proved against each Respondent beyond reasonable doubt. The Respondents have not conceded any responsibility for the alleged contempt and have put the Applicant to prove his case against each of them.

[10] I have also considered the cases cited by Learned Counsel for the Respondents in which preliminary objections by alleged contemnors were heard, and the statement by Denning L.J. in Hadkinson's case when he said at page 574: *"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy"*. In all the circumstances I would exercise my discretion by allowing the Respondents to proceed on their preliminary motion. The objection is overruled.

Paul Webster
High Court Judge (*Ag.*)