BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 167 of 2018

BETWEEN:

ANDRE EDWARDS	**CLAIMANT**
AND	
SUPERINTENDENT OF PRISONS	**FIRST DEFENDANT**
THE ATTORNEY GENERAL	**SECOND DEFENDANT**

Before:	The Honourable Mr. Justice Alrick Scott, QC, Judge of the High Court (Acting)
Dates of Hearing:	20 February 2018 5, 13, 20 and 27 March 2018
Date of Decision:	8 May 2018
Appearances:	Mr. Lalu Hanuman for the claimant. Ms. Alison J Burke in association with Mr. Andrew Searles for the Defendants.

DECISION

Background

[1] The claimant's application is for a writ of *habeas corpus ad subjiciendum*. The facts giving rise to the application can be stated with brevity.

[2] The claimant is the father of a child. The mother of the child applied to the magistrate's court for a maintenance order under the Maintenance Act Cap 216 of the Laws of Barbados. On 30th April 2013, the magistrate made a final

order that the claimant pay the sum of $80.00 per week towards the maintenance of the minor child. The maintenance order was later varied, by reducing the amount to be paid to $60.00 per week. The claimant fell into arrears, apparently not very long after the order was made. The claimant was summoned on a number of occasions to appear before the magistrate for the magistrate to enquire into the arrears of maintenance.

[3] On 1st February 2018, the claimant appeared before the then sitting magistrate on an enquiry into the arrears of maintenance. During the course of the hearing, the magistrate was informed that there was an outstanding warrant for the claimant's committal to prison for arrears of maintenance. The magistrate informed the claimant and his attorney-at-law of the warrant to commit and also informed them that the warrant could be withdrawn on the claimant paying the arrears. It appears that no application was made by the claimant to the magistrate to withdraw the warrant to commit. The hearing on 1st February 2018 was not related to the arrears for which the warrant to commit was issued. The magistrate adjourned the hearing before him to 29th March 2018. The warrant to commit was executed and the claimant was arrested and lodged at Her Majesty's Prison at Dodds on 1st February 2018, to be imprisoned for 42 days.

[4] It appears that the clerk to the magistrate's court completed the warrant to commit and passed the completed warrant to commit to the magistrate for his signature. The magistrate signed the warrant to commit, and it was issued and executed. The text of the warrant to commit was in the following terms:

> *"To the Chief Marshal and to each and all Marshals of this Island and to the Superintendent of Dodds Prisons, Andre Edwards, Pasture Rd, Haggatt Hall, St. Michael called the defendant, was on the 30th day of August 2016 before the Magistrate of District "A" Domestic convicted on the complaint of [DAS] for that the defendant at the parish of St. Michael did fail to pay to complainant the sum of $5,610.00 being balance of arrears to 2016-08-02 in pursuance of an affiliation maintenance order made by the magistrate of District "A" Domestic, and it was adjudged that the defendant for his said offence should forfeit and pay the sum of $5,610.00 dollars and the further sum of $2.50 cents for costs on the 10th day of January 2018 and it was further adjudged that if the several sums should not be paid on the 10th January 2018 the defendant should be imprisoned in Dodds Prison for the space of (42) forty-two days unless the said several sums be sooner paid.*
>
> *"And default having been made in payment You the said Marshals are hereby commanded to take the defendant Andre Edwards and convey him to the said Prisons, and there deliver him to the Superintendent thereof, together with this warrant; and you the Superintendent of the said prison to receive the defendant into your custody and keep him for the space of (42) forty-two days unless the said sum of $5,612.50 dollars and the further sum of $5.00 for costs of this warrant be sooner paid."*

[5] The warrant to commit refers to the magistrate having ordered that the arrears be paid by 10th January 2018, and that in default, the claimant be imprisoned for 42 days. A copy of the Order Book for the magistrate's court shows that at the hearing on 30th August 2016, the then sitting magistrate extended the time for the claimant to pay the arrears. There is no minute recorded in the Order Book reflecting the magistrate having ordered that the arrears be paid by 10th January 2018, and that in default, the claimant be imprisoned.

[6] Further, there is no evidence that any magistrate made an order for the claimant's committal, immediate or suspended, on any of the occasions the claimant appeared before the court. The clerk procured the magistrate's

signature to the warrant to commit on the clerk being satisfied that the claimant was in arrears of maintenance. It appears that this is the usual practice where a father is in arrears of maintenance. The magistrate's affidavit filed on 16th February 2018, reveals that the warrant to commit was issued in accordance with established practice without the magistrate exercising any judicial judgment or discretion. He explained the claimant's committal thus: "*That such incarceration arose primarily as a consequence of the Clerk of the Magistrate's Court of District "A" applying for an Application for Enforcement of Arrears of Maintenance (which is the procedure in all the Magistrates' Courts across the Island as the Clerks are the keeper of the records as it relates to maintenance payments) in respect of Maintenance Order[s] issued by the Court and dated 2013-04-03 and 2016-06-14 respectively. Having not complied with the Order thereunto procedurally a Warrant of Arrest was issued in respect to the outstanding 2016 non-payment of arrears.*" There is no doubt that the magistrate came and found in place the practice whereby a warrant to commit a person for non-payment of child maintenance is issued in a mechanical way.

[7] The claimant had no notice that he was in jeopardy of a warrant to commit being issued for his default in paying arrears of child maintenance or that he faced imprisonment.

[8] Counsel for the claimant challenged the process by which the warrant to commit was issued. He states, *inter alia*, that there must be a hearing or enquiry into the reasons for the claimant's default, and that the magistrate

must be satisfied that the default was deliberate before an order to commit to prison could lawfully be made and a warrant to commit issued. He says that this was not done. He argued that the power of the magistrate to commit for arrears of maintenance, if it exists, could only be exercised where the father is able to pay, but has refused to do so. He states that the claimant was unable to pay the maintenance as ordered, and that an order for committal to prison could not properly be made against the claimant. He contended that the imprisonment was unlawful and that the writ of *habeas corpus* should be issued for the claimant's release.

[9] The application first came before me on 20th February 2018. The facts were then sketchy. I adjourned the hearing to facilitate the filing of affidavits. On the adjourned date there were still gaps in the facts as to how the warrant to commit was issued. There was a real risk that the claimant could spend the full term of imprisonment before all the facts were before me to enable me to make a decision. Accordingly, I made an order that the claimant be released from Dodds Prison pending the hearing and conclusion of the application. The matter was adjourned on three further occasions. The additional information was not forthcoming. I indicated I would give my decision based on the evidence before me, and I now do so.

[10] Two issues were raised: first, whether a writ of *habeas corpus* was the appropriate process for the release of the claimant, and secondly, whether the process by which the warrant to commit was issued is lawful or not. Embedded in the second issue is whether the magistrate must make an

enquiry into the reason for the claimant's default and must be satisfied that the default was due to the claimant's wilful refusal or his culpable neglect before making an order to commit to prison.

[11] But for the significance this decision may have for the process by which a warrant to commit a person is issued for non-payment of arrears of maintenance in the magistrate's court, I would no doubt have given an oral decision at the end of the hearing and disposed of the matter then. I appreciate that if my order is likely to affect what appears to be the standard procedure whereby a warrant to commit to prison for arrears of child maintenance is issued in the magistrate's court, that I should reduce to writing my reasons for holding the claimant's committal to prison to be unlawful. It is a point I think that was not lost on the parties before me.

Appropriateness of Writ of Habeas Corpus

[12] The writ of *habeas corpus ad subjiciendum*, commonly called "*habeas corpus*" is one of the prerogative writs of ancient common law origin. Its process is to secure the release of a person unlawfully detained. Part 57 of the Supreme Court (Civil Procedure) Rules 2008 provides the procedure for making an application for a writ of *habeas corpus.* It is an attractive and effective remedy, as it is non-discretionary in nature. It is issued *ex debito justitiae*, that is, as of right once the detention is shown to be unlawful (see Judith Farbey and R.J. Sharpe with Simon Atrill, *The Law of Habeas Corpus,* 3rd edition, page 52). Alleyne J, in *Gittens v Superintendent of Prisons et al* BB 2013 HC 41 (hereinafter referred to as *Gittens v Superintendent*), neatly

summarized the emergence and importance of the writ of *habeas corpus* thus (at paragraph 1):

> "*The writ of habeas corpus ad subjiciendum is an ancient concept yet of immeasurable worth. It allows for the release of persons from unlawful detention, thus protecting that most cherished of human values, personal liberty. Understandably, its scope of application is wide, though not unlimited. Lawton L.J. expressed the position, graphically, in Linnet v. Coles [1987] Q.B. 555, at 561, where he stated that the writ is a 'most cherished sacred cow ... but the law has never allowed it to graze in all legal pastures.*'

[13] Even though its scope is wide, it is not unlimited, as observed by Alleyne J. And its scope was initially challenged in this case, as it was challenged in two other cases in this jurisdiction. In the case of *Rhajan Alleyne-King v The Attorney General et al*, BB 2009 HC 508, Reifer J agreed with pronouncements earlier made that the writ of *habeas corpus* is not appropriate in circumstances where children are placed in the care of local authorities. The appropriateness of the writ of *habeas corpus* also arose in *Gittens v Superintendent*. In that case, Alleyne J had to consider the appropriateness of the writ of *habeas corpus* to the criminal law. At paragraph 29 of his decision, he wrote:

> "*These passages demonstrate that while there is a role for habeas corpus in criminal law, a court will decline jurisdiction where an appellate process is available and appropriate to the circumstances. With copious reference to authorities, Farbey and Sharpe summarise the legal position accurately in The Law of Habeas Corpus. At page 165, they identify the types of cases in which habeas corpus may be available in relation to criminal sentences. They state:*
>
> > ""*While the English Courts are hesitant to allow convicted prisoners to apply for habeas corpus, there can be little doubt that it is available where the applicant alleges that he or she is being detained longer than is legally warranted by a sentence. It may be contended, for example, that a series of sentences*

was intended to run concurrently rather than consecutively; that the prison authorities have incorrectly interpreted the legal effect of the sentence; that the prisoner has improperly been denied statutory remission, is entitled to mandatory release on parole, or simply that the sentence has expired.""

[14] Counsel for the defendants objected to the application for *habeas corpus* on the basis that the claimant should challenge the warrant to commit by way of appeal. She contended that *habeas corpus* should not be used as a means of appeal and that the writ of *habeas corpus* does not issue in the context of this case.

[15] Courts have declined *habeas corpus* where there is a right of appeal from criminal convictions, and *habeas corpus* is being used as a means of appeal (see Judith Farbey and R.J. Sharpe with Simon Atrill, *The Law of Habeas Corpus*, 3rd edition, pg. 54). Lord Goddard CJ, in *Ex parte Corke* [1954] 2 All ER 440, [1954] 1 W.L.R. 899, observed thus:

> *"It is as well that persons serving sentences passed upon them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal. If they complain that they are wrongly convicted, they should appeal to quarter sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of habeas corpus. The affidavit here shows that the applicant is in prison serving a sentence passed by the Bow Street Magistrates' Court under the Vagrancy Act, 1824. It has always been the law as it was laid down by Wilmot C.J., in giving his opinion on the writ of habeas corpus, that the writ is a writ of right and not a writ of course. That means that, before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can see that the applicant may be unlawfully detained.*
>
> *"In the present case, it is clear that, unless the conviction was set aside on appeal (and the time for appeal has long gone by), the*

applicant is lawfully in custody, serving a lawful sentence; and his application for a writ of habeas corpus is, therefore, refused."

[16] The meaning of conviction has been discussed in several cases. It is not necessary for me to review the cases on the legal meaning given to the word. The claimant has not been found guilty of any offence liable to punishment. The magistrate did not pass a sentence on the claimant (see the definition of sentence given in section 2 of the Magistrate's Courts Act Cap 116A). In short, this is not a case of a convicted person seeking to circumvent an appeal. Further, I have difficulty grasping what is the order of the magistrate to be appealed, given the mechanical manner in which the warrant to commit was issued. Indeed, the magistrate, in his affidavit filed on 16th February 2018, deposed that *"[n]o order was made by the Court that the Claimant be sent to Dodds for wilful non-payment of Maintenance Payment for 2016."*

[17] The authorities suggest that the context of this action may give rise to the issue of a writ of *habeas corpus*. The authors of *Halsbury's Laws of England, Rights and Freedoms* (Volume 88A (2018), write, at paragraph 152, footnote 1, that: "*Commitment for non-payment of arrears of maintenance may also be tested by application for habeas corpus.*"

[18] In *R v Governor of Bedford prison ex p. Ames* [1953] 1 All ER 1002, [1953] 1 W.L.R. 607 ("*Ex p. Ames*"), the husband had appeared before the justices of a court of summary jurisdiction, and was examined as to his means with respect to arrears of maintenance. An order to commit the applicant was made but the order was suspended on terms. The applicant failed to comply

with the terms upon which the warrant to commit had been suspended. The applicant was arrested and detained. The husband challenged his detention on the ground that the warrant to commit was irregular. Lord Goddard CJ held that no further enquiry was required before the suspension was lifted, as the enquiry was done earlier. However, the court issued the writ of *habeas corpus* since the warrant was issued for the wrong amount. *Ex p. Ames* is authority that a warrant to commit to prison for non-payment of arrears of maintenance can appropriately be challenged by way of *habeas corpus*.

[19] Further, courts do not refuse the writ of *habeas corpus* because there exists an alternative remedy. The authors of *The Law of Habeas Corpus,* referred to earlier, write, at pages 53 to 54 as follows:

> "*Since habeas corpus is not a discretionary remedy the existence of an alternate remedy does not afford grounds for refusing relief on habeas corpus. Whether the other, perhaps more direct, remedy could still be used, or whether the applicant has foregone the right to use it, its existence should not preclude or affect the right to apply for habeas corpus. As the Supreme Court of Canada stated when distinguishing two of its prior decisions that appeared to stand for the proposition that habeas corpus could be refused on discretionary grounds in favour of an alternative remedy:*
>
> > "*as a matter of general principle, habeas corpus jurisdiction should not be declined merely because of the existence of an alternative remedy. Whether the other remedy is still available or whether the applicant has forgone the right to use it, its existence should not preclude or affect the right to apply for habeas corpus to the Superior Court.....*"

[20] Similarly, Alleyne J, in *Gittens v. Superintendent,* adopted the statement of Lebel and Fish, JJ in *May v. Ferndale Instillation* [2005] 3 S C R 809, 2005 SCC 82, observing that the court's *habeas corpus* jurisdiction is usually not

declined merely because there is an alternative remedy. Alleyne J wrote (at paragraph [27]):

> *"At paragraphs 33 to 43 of May, the court discussed the emergence of a limited judicial discretion to decline the exercise of its habeas corpus jurisdiction. At paragraphs 35 to 37, the court considered the limitations in criminal law. Lebel and Fish JJ, delivering the opinion of the court, stated:*
>
> > *"35. .....Courts have sometimes refused to grant relief in the form of habeas corpus because an appeal or another statutory route to a court was thought to be more appropriate. The obvious policy reason behind this exception is the need to restrict the growth of collateral methods of attacking convictions or other deprivations of liberty ... So far, these situations have primarily arisen in two different contexts.*
> >
> > *"36. Strictly speaking, in the criminal context, habeas corpus cannot be used to challenge the legality of a conviction. The remedy of habeas corpus is not a substitute for the exercise by prisoners of their right of appeal ...*
> >
> > *"37. Our Court reaffirmed this in R. v. Gamble, 1988 CanLII 15 (SCC), [1988] 2 S.C.R. 595.....*
>
> *"The court concluded at paragraph 44:*
>
> > *"44. ..... As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. Habeas corpus jurisdiction should not be declined merely because another alternative remedy exists and would appear as or more convenient in the eyes of the court. The option belongs to the applicant. Only in limited circumstances will it be appropriate for a provincial superior court to decline to exercise its habeas corpus jurisdiction. For instance, in criminal law, where a statute confers jurisdiction on a court of appeal to correct the errors of a lower court and release the applicant if need be, habeas corpus will not be available (i.e. Gamble)."*

[21] I am satisfied that the warrant to commit the claimant to prison for non-payment of arrears of maintenance can appropriately be challenged by

habeas corpus. Further, based on the foregoing, there is no basis on which I can properly decline to exercise the Court's *habeas corpus* jurisdiction.

Lawfulness of Detention

[22] It was accepted that before the warrant to commit was issued, there was no oral hearing at which the claimant was present, and at which the magistrate made an order for the claimant's committal to prison. Instead, as stated before, the clerk, being satisfied that the arrears of maintenance were not being paid as ordered, completed the warrant to commit and secured the magistrate's signature to the warrant to commit. And it was issued for execution.

[23] Counsel for the claimant argued that the magistrate lacked jurisdiction to commit the claimant for non-payment of maintenance. It is a surprising argument. Section 110 of the Magistrate's Courts Act Cap. 116A gives the magistrate the jurisdiction to commit a person for non-payment of maintenance as ordered. Section 110 provides as follows:

> "*(1) Subject to the following provisions of this Part, where default is made in paying a sum adjudged to be paid by a conviction or order of a magistrate, the magistrate may issue a warrant of distress for the purpose of levying the sum or issue a warrant committing the defaulter to prison*".

[24] If there was doubt as to the applicability of section 110 of the Magistrate's Courts Act to a maintenance order, such doubt is removed by section 120(1) of the same enactment, which provides:

> *"A magistrate shall not exercise his power under section 110 to issue a warrant to commit to prison a person who makes default in paying an amount adjudged to be paid by an order made by the magistrate except where the default is under*
>
> > *"(a) a magistrate's court maintenance order;*
> >
> > *"(b)....."*

[25] Further, section 122 of the Magistrate's Courts Act pertains to the magistrate's exercise of magisterial power to commit for arrears of maintenance. It provides: "*Where a person is committed to custody under this Part for failure to pay an amount due under a maintenance order or order enforceable as a maintenance order, then, unless the magistrate otherwise directs, no arrears shall accrue under the order while he is in custody.*"

[26] The contention that a magistrate lacks the power or jurisdiction to commit a father for non-payment of child maintenance is unsustainable in light of the above provisions of the Magistrate's Courts Act.

Irregularity of Committal to Prison

[27] The claimant's next, if not major argument is that the procedure adopted is irregular and unlawful. The issue requires an examination of the relevant provisions of the Maintenance Act as amended by the Maintenance (Amendment) Act 2014-13, the Magistrate's Courts Act and the Maintenance Rules 1984.

[28] The Maintenance Act, as amended, provides a summary process whereby a parent, that is, a mother or father, or a person who has been granted custody

of a child could secure payment of maintenance from the other parent for the child born out of wedlock, where the other parent has neglected to provide reasonable or any maintenance for the child. The Maintenance Rules provide a prescribed form for making the application for maintenance. The Maintenance Act gives the magistrate the power to make a maintenance order against a defendant for the purpose of making financial provision for the child. The magistrate is given power to make a wide range of orders with respect maintenance, including orders for a lump sum, weekly, monthly, yearly or any other periodic sum, amongst other orders.

[29] Section 12 of the Maintenance Act provides that on making a maintenance order, the court may order that payments be made to the clerk of the court or to the clerk of a magistrate's court in another district. The magistrate has a corresponding power under section 98 of the Magistrate's Courts Act to order payment of maintenance to be made to the clerk of the court or to the clerk of a magistrate's court in another district. The clerk of the court then makes payment to the parent for the child. By virtue of section 12 of the Maintenance Act and section 98(2) of the Magistrate's Courts Act, the usual order will be for the moneys to be paid to the clerk of the magistrate's court, unless the applicant for a maintenance order makes representations to the contrary and the magistrate is satisfied that it is undesirable for the payments to be made to the clerk. Section 102 of the Magistrate's Courts Act also permits the magistrate to order that periodic payments of maintenance be paid to the person having custody and control of the child. Where, however, the payment is to be made to the clerk of the court, the Maintenance Act

imposes a duty on the clerk to receive the payments and also to take proceedings to enforce a maintenance order. It is the clerk and not the parent who applies to enforce the order where payments are to be made to the clerk. This decision is concerned solely with the case where the clerk is seeking to enforce arrears of maintenance.

[30] The process whereby the clerk of the court takes proceedings to enforce an order for maintenance seems to seek to provide an inexpensive, quick, easy and effective means of enforcing orders for maintenance.

[31] The Maintenance Rules provide, *inter alia*, various forms for amongst other things, making an application to the court for maintenance as well as for enforcement of a maintenance order. The application for enforcement of arrears is made by way of a prescribed form set out in the Maintenance Rules. The father is summoned to appear by way of another prescribed form set out in the Maintenance Rules. On the summons being served, and the defendant appearing, the magistrate enquires as to the reason for the non-payment of the maintenance.

[32] Section 23 of the Maintenance Act provides for, *inter alia*, the enforcement of a maintenance order and is germane. It provides as follows:

> *"23. (1) Where it is provided in any order made or deemed to be made under this Act that payments shall be made to the clerk of a magistrate's court, it shall be the duty of the clerk*

(a) to receive such payments as may be directed to be made under the order and to pay forthwith to the mother of the child to whom the order relates or to such other person as may be entitled to the payments of money required to be made under the order, the sum directed to be paid under the order, or such part thereof as the clerk receives, without making any deduction therefrom; and

(b) to take proceedings for the enforcement of a maintenance order in accordance with this section.

"(2) Where any payment of money required to be made under a maintenance order has not been made, the clerk of the court for the district in which such order was made shall make an application to the magistrate of the district for the recovery of those payments.

"(3) Where

"(a) an application is made under subsection (2), the magistrate shall summon the father and enquire into the application, and if satisfied that the amount claimed is due and has not been paid or tendered, the magistrate shall make enquiry as to whether the failure of the father to pay the sum in respect of which he has made default was due either to his wilful refusal or to his culpable neglect;

"(b) after making an enquiry under paragraph (a), the magistrate is satisfied that the failure of the father to pay the sum in respect of which he has made default was not due either to his wilful refusal or culpable neglect, the magistrate may extend the time for payment or may remit part of the sum due under the order.

"(4) Where on an application made under subsection (2) an order is made remitting part of the sum due, the application may be renewed on the ground that the circumstances of the father have changed.

"(5) ....."

[33] There are a number of pointers that the procedure adopted in this case, whereby the claimant was committed to prison for non-payment of child maintenance, is wrong in law.

[34] First, section 23 of the Maintenance Act sets out the procedure to be followed where the clerk wishes to enforce an order for maintenance. Section 23(2) provides that the clerk "*shall make an application to the magistrate.....for the recovery of arrears.*" That application is by way of a prescribed form set out in the Maintenance Rules. There is no other procedure by which the clerk of the magistrate's court may seek to enforce arrears of maintenance under the Maintenance Act. Committal to prison is one of the means of enforcing arrears of maintenance. If enforcement by way of committal to prison is the desired means of enforcement, then the procedure set out in section 23(2) must be followed. And that involves the clerk making an application to the magistrate by way of the prescribed form for enforcement, and the magistrate issuing a summons for the father's attendance before the magistrate to enquire into the reason for the default. The court then having enquired into the reasons for the default, and provided the facts justify it, the magistrate may then make an order for committal to prison. This is the procedure required under section 23(2) and (3) of the Maintenance Act. This statutory process cannot be circumvented by the clerk completing the warrant to commit and passing it to the magistrate for his or her signature and its execution to follow. The effect of section 23(2) and (3) is that every case of enforcement involves a hearing by the magistrate, and that there must be a hearing at which the order to commit to prison is made.

[35] Secondly, on an application for enforcement of arrears of maintenance, section 23(3)(a) of the Maintenance Act requires the magistrate to make an enquiry as to whether the default in paying child maintenance was due to the

defendant's wilful refusal or culpable neglect. The purpose of the enquiry under section 23(3)(a) is to separate the "won't pay" defendants, those who can pay but decide not to, from the "can't pay" defendants, those who for some reason are unable to pay. Where the defendant is a "can't pay", the court is given the discretion to extend time to pay or to remit part of the sum due. The clear intent of section 23(3) of the Maintenance Act is to treat "won't pay" defendants different from "can't pay" defendants. Enforcement by committal to prison would not help and may only exacerbate the family circumstances including the circumstance of the child where a "can't pay" defendant is committed to prison. Committing a "can't pay" defendant does not advance or attain the objects of the Maintenance Act or promote the welfare of the child. Rather, imprisonment is a disproportionate if not unjust response to a "can't pay" defendant, and does not serve the purpose of the Maintenance Act.

[36] The approach to the "won't pay" defendant is different with the aim of securing the provision of maintenance for the child, which is the intent of the Maintenance Act. In the case of a "won't pay" defendant, committal is used more to extract payment than to punish, even though it may properly have a punitive element. Committal seeks to put pressure on the defendant to pay. The carrot or the stick of committal to prison may be the only chance, in some cases, of recovering arrears of maintenance from the "won't pay" defendant.

[37] The manner in which the warrant to commit was issued in this case has no way of discriminating between the "won't pay" defendant and the "can't pay"

defendant. The routine and automatic way the warrant to commit was issued, as occurred in this case, would be a dragnet for the imprisonment of the "won't pay" defendant and the "can't pay" defendant alike. The differentiation in treatment between the "won't pay" defendant and the "can't pay" defendant, as required by section 23(3) of the Maintenance Act, would be circumvented.

[38] Thirdly, is the nature of the power to commit to prison given to the magistrate under section 110 of the Magistrate's Courts Act where default is made in paying sums ordered to be paid for maintenance by the magistrate. Section 110 gives the magistrate a general power to commit to prison for default in paying sums ordered to be paid, which includes default in paying maintenance as ordered. There is no provision providing how or when the power under section 110 is to be exercised where default is made in making payments of child maintenance as ordered. This is unlike section 124 of the Magistrate's Courts Act, which provides that a magistrate shall not commit a person to prison for default of payment of an amount enforceable under an order for payment of taxes, contributions and other statutory remittances unless the person had the means to pay and refused or neglected to pay.

[39] I do not think that the absence of any specific provision limiting the power of the magistrate to make an order for committal to prison only where the defendant's failure to pay arrears of maintenance is due to the defendant's wilful refusal or culpable neglect would permit a process whereby a warrant to

commit to prison could be issued in an automatic or mechanical manner. Even in the absence of such limitation, the power to commit to prison to enforce the orders or judgments of the court - whether the court is described as supreme or superior or inferior - has always been regarded as an exceptional power. It is a power that is to be exercised with care.

[40] In the High Court, committal to prison for breach of the court's order or judgment is reserved for where the disobedience is intentional and where the circumstances justify the appropriateness of such an order. Lord Justice Moore-Bick and Lord Justice Wilson in *Broomleigh Housing Association Ltd v Okonkwo* [2010] EWCA Civ 1113 (hereinafter referred to as *Broomleigh v. Okonkwo)* aptly summarise the court's approach to committal for contempt as follows (at paragraph 1):

> "*The power to commit a person to prison for contempt is one of the most powerful sanctions available to the court to punish those who flout its authority and to compel compliance in the future. Since it involves an interference with the liberty of the subject it is a power which is exercised with care and only in cases where disobedience is intentional and where in all the circumstances the order is appropriate.....*"

See also the case of *Baho and others v. Meerza* [2014] EWCA Civ 669, at paragraph [15], following *Broomleigh v. Okonkwo.*

[41] Ormond LJ in *Ansah v Ansah* [1977] Fam. 138 at 144, articulated the place of committal orders in family law cases thus:

> "*Committal orders are remedies of last resort; in family cases they should be the very last resort. They are likely to damage complainant spouses almost as much as offending spouses, for example, by alienating the children. Such orders should be made very reluctantly and only when every other effort to bring the situation under control has failed or is almost certain to fail.*"

[42] In the High Court, civil contempt involves, in short, disobedience to the orders and judgments of the court or the breach of an undertaking given in civil proceedings (see *Witham v Holloway* (1995) 183 CLR 525). The magistrate court, being a creature of statute, does not have inherent jurisdiction to punish for contempt of court as the High Court does. The magistrate is given other specific powers to commit to prison for disobedience to orders of the magistrate other than for the payment of money (see section 101(3) of the Magistrate's Courts Act). However, there is similarity between the High Court exercising its civil contempt jurisdiction to commit to prison for disobedience to its orders and judgments and the magistrate exercising his power under section 110 of the Magistrate's Courts Act to commit to prison for disobedience to the orders of the magistrate for payment of maintenance. Each case involves disobedience to the orders of the court. The power under section 110 of the Magistrate's Courts Act is no less exceptional a power than that which exists in the High Court to commit to prison for disobedience to an order or judgment of the High Court. No less care is to be taken in the magistrate's court than required in the High Court in relation to the committal of a person to prison for disobedience to an order of the court. In each case, a man is being sent to prison for disobedience to an order of the court. Therefore, in my view, there is no good reason why a different approach should be taken in the magistrate's court to that in the High Court when exercising the court's exceptional power to commit to prison for disobedience to an order of the court.

[43] Further, the power to commit to prison under section 110 of the Magistrate's Courts Act is discretionary. It provides that "*.....where default is made in paying a sum adjudged to be paid by ..... order of a magistrate, the magistrate **may** .....issue a warrant committing the defaulter to prison*" – emphasis supplied. Since the power is discretionary, the magistrate has to consider whether it is a proper case to commit. To exercise the discretion properly or lawfully, the magistrate must take into account all relevant circumstances regarding the non-payment of arrears of maintenance. This therefore requires that the magistrate should hear the father before an order to commit is made and by extension before a warrant to commit is issued. The process of the clerk completing the warrant to commit on the clerk being satisfied that the claimant in this case was in default, without any hearing or enquiry, and the magistrate signing the warrant to commit, amounts to a routine and automatic way of issuing a warrant to commit. It does not involve the magistrate properly exercising a discretion by taking all relevant facts into account, which could only be properly done at a hearing.

[44] I have come to the conclusion that the power under section 110 of the Magistrate's Courts Act to commit a defendant for arrears of maintenance under the Maintenance Act, is exercisable where the default was due to the defendant's wilful refusal or culpable neglect. The court's power to commit to prison for non-payment of arrears of maintenance cannot be properly and reasonably exercised by the court in relation to the person who lacked the ability to pay. In effect, the jurisdiction to commit to prison can only be exercised properly, reasonably and lawfully in relation to the "won't pay"

defendant. Therefore, the mechanical manner in which the warrant to commit was issued in this case cannot be justified.

[45] Counsel for the claimant referred me to the Constitution of Barbados and the Debtors Act Cap 198 of the Laws of Barbados. In particular, he argued that section 5 of the Debtors Act of Barbados applies. The UK Debtors Act 1869 applies to family proceedings in the High Court there, as applied in *Bhura v Bhura* [2012] EWHC 3633 and other cases. Similarly, the Debtors Act Cap 70 of the Bahamas was applied by Bain J in High Court family proceedings in *A v E* BS 2015 HC 541. In *Bhura v Bhura* [2012] EWHC 3633, Moystyn J was of the view that the same principles apply to the court's power to commit to prison whether the application was made under the UK Child Support Act 1991 or under the corresponding power under the UK Debtors Act 1869. *Bhura v Bhura* concerned an application for committal to prison for failing to comply with a maintenance order. Bain J, in *A v E,* agreed with the position of Mostyn J in *Bhura v Bhura,* namely that the same principles apply to corresponding powers under two enactments to commit to prison for failing to comply with a maintenance order. There is a dearth of authority regarding the applicability of the Debtors Act to domestic proceedings in the magistrate's court. I do not think it is a matter which requires resolution in this action; this Court having already arrived at its decision.

[46] Counsel for the claimant raised one other issue. It relates to the standard of proof which must be established before an order to commit to prison is made for failing to pay arrears of maintenance. The liberty of the subject is a

cherished and constitutionally protected freedom. It cannot be lightly taken away. Committal to prison is the ultimate sanction. In High Court proceedings to commit to prison for disobedience to an order of the court, the standard of proof required is beyond reasonable doubt (see: *Witham v Holloway* (1995) 183 CLR 525 and *Baho and others v. Meerza* [2014] EWCA Civ 669). In my view, the same standard applies where the magistrate contemplates making an order to commit to prison on an application by the clerk to the magistrate's court for enforcement of the order of the magistrate for maintenance. This must be so, as in each case, a man is being sent to prison. There is no reason why the standard should be different or lower in the magistrate's court.

Directions

[47] I am compelled to the view that the process adopted for the issue of the warrant to commit the claimant to prison was irregular and unlawful. In my view, the proper procedure to be adopted before a defendant is committed to prison for default in paying arrears of maintenance is as follows:

(a) the clerk to the magistrate's court makes an application to the magistrate for recovery of maintenance arrears, by way of the relevant prescribed form set out in the Maintenance Rules, as is the customary practice (see: section 23(1) and (2) of Maintenance Act);

(b) the magistrate issues a summons to the defendant and on the defendant's attendance, the magistrate enquires into the reasons for

the default. The magistrate is to determine whether the failure to pay was due either to the defendant's wilful refusal or to his culpable neglect;

(c) if the magistrate is satisfied that the failure of the defendant to pay was not due to his wilful refusal or culpable neglect, the magistrate is vested with the discretion to extend the time to pay or remit part of the sum due under the order (see section 23(3)(b) of the Maintenance Act);

(d) where the magistrate is satisfied that the defendant's default is due to wilful refusal or culpable neglect, the magistrate may exercise his discretion to make an order for the defendant's committal, either immediately or on terms, that is, a suspended order for committal. The warrant to commit is issued pursuant to the magistrate's order to commit;

(e) consistent with the decision of Lord Goddard CJ in *ex parte Ames*, where the magistrate makes an order to commit which is suspended on terms, the warrant to commit may be issued without a further hearing where the defendant fails to comply with the terms upon which the issue of the warrant was suspended. By way of example, where the magistrate makes an order for committal which is suspended on terms that the defendant pays a specific sum by a specified time, then the suspension is automatically lifted and the

warrant to commit to be issued without further hearing if the defendant does not pay the specified sum by the specified time; and

(f) before a magistrate makes an order committing a father to prison for arrears of maintenance, the magistrate must be satisfied, beyond reasonable doubt, that the father's default is due to wilful refusal or culpable neglect. In most cases, it will be plain from the facts whether the default was due to wilful refusal or culpable neglect.

Conclusion

[48] Given my conclusion above, that the procedure adopted in this case by which the claimant was committed to prison for 42 days for arrears of maintenance was irregular, it follows that the arrest and detention are unlawful. The warrant to commit dated 10th January 2018 for the claimant's imprisonment at Dodds Prison for 42 days is discharged. It also follows that the routine, mechanical and automatic process by which a warrant is usually issued for a defendant's, usually a father's committal to prison for arrears of maintenance should not continue.

[49] This order does not disturb the fact that the claimant has not complied with the orders of the magistrate. Accordingly, the magistrate may determine how to deal with the claimant for the non-payment of arrears of maintenance on any application by the clerk for enforcement of the order for maintenance. It seems to me incumbent upon the claimant, if he maintains that he lacks the ability to pay, to apply to the magistrate's court to vary the order. I echo the

words of Barrett J, in *Mr. B. v The Governor of Midlands Prison and Another* [2015] IEHC 781, at paragraph 1 thus:

> "*Children are a blessing, but they come at a price. In the case of [the claimant's] child, that price has been quantified in the form of a maintenance order to which he is subject. Had [the claimant] but complied with that order, matters would not have come to where they are now. The court would respectfully encourage [the claimant] to seek both to comply with his maintenance obligations in the future and to discharge such arrears as have arisen in the past..... However, all that is by way of aside.*"

[50] The defendants are to pay the claimant's costs of the application to be agreed, and if not agreed, to be assessed.

.....

ALRICK SCOTT, QC
Judge of the High Court (Acting)