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(Court of Appeal)
(Civil Appeal Nos 295 and 296 of 2005)

Rogers V-P, Le Pichon JA and Sakhrani J
7 December 2006

Family law — ancillary relief — maintenance — variation — whether should be reduction on ground of new circumstances, namely second marriage breaking up

Family law — ancillary relief — maintenance — failure to pay — committal order made — effect on all parties would be devastating — order discharged

Family law — ancillary relief — maintenance — attachment order — s.23 prohibited attachment orders in respect of salaries of civil servants — Crown Proceedings Ordinance (Cap.300) s.23

[Crown Proceedings Ordinance (Cap.300) s.23; Matrimonial Proceedings and Property Ordinance (Cap.192) s.28, 28(1), 28(4)]

家庭法—附屬濟助—贍養費—更改—應否基於出現新情況(即第二段婚姻破裂)而削減贍養費

家庭法—附屬濟助—贍養費—未有支付贍養費—作出交付羈押令—將對各方造成災難性影響—解除命令

家庭法—附屬濟助—贍養費—扣押令—第23條禁止對公務員薪金作出扣押令—《官方法律程序條例》(第300章)第23條

[《官方法律程序條例》(第300章)第23條；《婚姻法律程序與財產條例》(第192章)第28、28(1)、28(4)條]

H, a civil servant, appealed against an order that he pay maintenance of \$10,000 per month to his first wife, W, seeking a reduction on the ground of new circumstances. H's second marriage had broken up with proceedings for maintenance for his second wife and their child pending, and he was paying a large part of his salary each month for bank and credit card debts. H was in arrears of maintenance to W and their son and also at issue was whether a committal order made against H for 1 month's imprisonment, suspended on condition that he pay the current maintenance per month and the arrears be attached to his lump sum pension, should be discharged. W cross-appealed, arguing that an attachment order should have been made in respect of H's salary.

A **Held**, allowing the appeal in part, that:

- (1) W was clearly entitled to some maintenance and both H and W were coming to the end of their working careers. The order for maintenance of \$10,000 should be maintained and the judge hearing the maintenance application in respect of the second marriage would proceed upon such basis and come to his conclusion in respect of that accordingly. (See paras.3–4.)
- (2) The consequences of the committal order, if put into effect, would be devastating on all parties: H would be subject to disciplinary proceedings and would very likely lose his job which might have repercussions on his pension. Thus, the order would be discharged in respect of the committal. (See para.6.)
- (3) However, it would not be discharged in relation to the attachment of the arrears to the lump sum pension. (See paras.6–7.)
- (4) Finally, W's cross-appeal was dismissed. Under s.28(1) of the Matrimonial Proceedings and Property Ordinance (Cap.192), there could be an attachment of income in respect of a maintenance order, with s.28(4) providing "nothing in [s.66 of the Employment Ordinance (Cap.57), which provided wages were not to be attached,] shall be construed as precluding the making of an attachment order". There was no corresponding provision in respect of s.23 of the Crown Proceedings Ordinance (Cap.300), which prohibited any attachment order to the salaries of civil servants. (See paras.8–9.)

F **Appeal**

This was an appeal by the appellant-husband in ancillary relief proceedings seeking a reduction in an order for maintenance against the respondent-wife and for the discharge of a suspended committal order against him. The respondent-wife also cross-appealed. The facts are set out in the judgment.

Mr Eugene Yim, instructed by Philip K H Wong, Kennedy YH Wong & Co, for the petitioner.

Mr L, respondent, in person.

Legislation mentioned in the judgment

Crown Proceedings Ordinance (Cap.300) s.23, 23(1), 23(2)

Employment Ordinance (Cap.57) s.66

I Matrimonial Proceedings and Property Ordinance (Cap.192) s.28(1), 28(4)

Rogers V-P

J 1. This is an appeal and a cross-appeal. On the appeal, the husband, who is the appellant in this Court but the respondent to the petition, seeks a reduction in the order for maintenance, both for wife and his son by what I shall term "the first marriage".

2. Mr Yim, who has appeared on behalf of the wife, who is the petitioner, has helpfully informed the Court that, on instructions, he has been informed that the son, who is now 18 years old, has taken employment and, although he is not paid very much — it is \$6,000 a month which is slightly more than the order for payment of his maintenance — he is prepared not to seek an order for payment of maintenance from the father. In those circumstances, the order for payment of maintenance of \$5,000 per month in respect of the younger child of the first marriage can be discharged as of 1 September this year.

3. That leaves the order for maintenance in respect of the wife, the petitioner, of \$10,000 per month. Having considered the respondent's circumstances, it is clear that he owes considerable amounts of money to various banks and credit card companies and this entails a very large part of his salary every month having to be paid out in respect of those debts. The circumstances in which the appellant has found himself are seemingly explicable but unfortunate. Nevertheless, the first wife is clearly entitled to some maintenance and they are both coming to the end of their working careers. The order for maintenance of \$10,000 per month appears to us to be something which should be maintained.

4. We have given consideration as to whether new circumstances have arisen by reason of the fact that the respondent's second marriage has regrettably, it seems, also fallen apart and proceedings for maintenance in respect of that by the wife of the second marriage, on her part and on the part of the child of that marriage, are due to take place in January next year. At one stage thought was given as to whether the judge hearing that case should be empowered to consider the circumstances of this case but, on reflection, we have come to the conclusion that this order for maintenance should be maintained and that the judge who will be hearing the maintenance application in respect of the second marriage in January will proceed upon the basis that this order for maintenance is in existence and come to his conclusion in respect of that accordingly.

5. The other aspect of this case concerns the committal order that was made on 11 August 2005. The judge making the order came to the conclusion that he was not empowered to make an attachment order in respect of the respondent's salary because of s.23 of the Crown Proceedings Ordinance (Cap.300). That is a matter to which I will come in a moment. In view of that, he considered that a suspended committal order should be made in the terms that the order should be for imprisonment for one month suspended on condition that the respondent continues to pay the current maintenance at the rate of \$15,000 per month — that was \$10,000 for the petitioner and \$5,000 for the younger son — and that the arrears of the then outstanding \$322,500 be attached to the lump sum pension of the respondent.

6. One matter which raised immediate concern is as to the effect if that order were to be put into effect. It would appear that it would

A be quite likely to have a devastating effect for all the parties concerned because the respondent would then not only lose his salary for the month for which he was in prison but would very likely lose his job and this might even have repercussions on his entitlement to a pension. He would clearly be subject to disciplinary proceedings and what the outcome of those would be is not for this Court to determine. In those circumstances, it seems to me that, although the threat of committal to prison may in many circumstances be justified, the risk of that coming into effect and the consequences which would follow would be a matter which would dictate that such an order should not be made in the present case.

7. I would therefore propose that that order be discharged. However, it would only be discharged to the effect of the committal order, but not in relation to the order whereby the arrears were to be attached to the lump sum pension. In that respect, the matter can be varied to bring that up to date to include not only the \$322,500 but also the arrears up to date in so far as they have increased from that sum.

8. There then remains the question of the cross-appeal on behalf of the petitioner. What is said is that the Judge should have made an attachment order in respect of the respondent's salary. To my mind, there is a very short answer to that, and that is that s.23 of the Crown Proceedings Ordinance prohibits that. Section 23(1) of that Ordinance reads:

F Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the Supreme Court may, subject to the provisions of this Ordinance and in accordance with the rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver.

Provided that no such order shall be made in respect of:

(a) any wages or salary payable to any officer of the Crown as such;

Subsection (2) of that section applies the same provisions to the District Court.

9. It was sought to be argued on behalf of the petitioner that matters have been overtaken by the Matrimonial Proceedings and Property Ordinance (Cap.192), which empowers attachments to be made in respect of salaries. In fact, s.28(4) provides that sub-s.(1), which

is the empowering section, applies despite s.66 of the Employment Ordinance (Cap.57), and accordingly, nothing in that section shall be construed as precluding the making of an attachment order in respect of any wages of an employee. But as was pointed out by this Court in the course of argument, no such corresponding provision was made in respect of the Government and in respect of the provisions of s.23 of the Crown Proceedings Ordinance. The short point is that s.23 is an empowering section. Without it, no attachment order could be made in respect of any money sums due from the Government. But there is a proviso in that which prohibits — whether anachronistically or not, it matters not — any attachment order being made in respect of any wages or salary. Whether or not the provisions of s.23 should be reconsidered is not a matter open to this Court to consider. The fact of the matter is that the law is clear that no attachment order can be made in these circumstances and, therefore, the cross-appeal must be dismissed.

10. So in those circumstances, the order which I propose should be made is that the order of 2 August 2005 be varied by discharging the order for payment of \$5,000 per month for the younger child as of 1 September 2006, and the order of committal of 11 August 2005 be discharged as far as the continuation of payment of current maintenance, but the order for the payment of arrears of \$322,500 together with the arrears up to date be attached to the lump sum pension of the appellant. There should be a further order that the Director of Accounting Services, upon payment to the appellant of his commuted lump sum pension, should pay to the petitioner the arrears of \$322,500 together with the arrears up to 7 December 2006. If the parties can agree that sum, then that sum can be inserted in the order.

Le Pichon JA

11. I agree.

Sakhrani J

12. I also agree.

A Secretary for Justice
and
HKDN Ltd
B
C (Court of Appeal)
(Application for Review No 9 of 2006)

C Ma CJHC, Stuart-Moore V-P and Lunn J
8 December 2006

Criminal sentencing — obscene and indecent articles — newspaper published indecent photographs with no cover or packaging — lower end of offending — written materials accompanying photographs written in style of pornographic magazine — had prosecution principally aimed at written materials, sentences would have been far greater — Control of Obscene and Indecent Articles Ordinance (Cap.390) s.24

E 判刑 — 淫褻及不雅物品 — 報章在沒有封面和封底或包裝物下刊登不雅照片 — 罪行的嚴重性屬於較低 — 照片附帶着仿照色情雜誌風格寫成的文字 — 若然控方主要針對該等文字提出檢控，法庭的判刑將遠較被告人現時所受的嚴厲 — 《淫褻及不雅物品管制條例》(第390章)第24條

F D, publishers of the *Hong Kong Daily News*, pleaded guilty to three summonses of publishing indecent articles with no cover or packaging and which did not bear a notice in the form specified under s.24(1D) of the Control of Obscene and Indecent Articles Ordinance (Cap.390). D published three articles on separate days in February 2006 which featured photographs of either nude or topless women. The shapes of the women's breasts were clearly shown with either their hands or a "scramble effect" used to cover their nipples. The Magistrate imposed a fine of \$15,000 in respect of the first two summonses, and a fine of \$10,000 in respect of the third summons. D had been convicted previously on no less than 47 occasions for the same offence and fined between \$3,000 and \$80,000. The Secretary for Justice applied for a review of the sentences, pursuant to s.81A of the Criminal Procedure Ordinance (Cap.221), arguing that enhanced sentences were called for as the constant repetition of these offences had increased their gravity.

I Held, dismissing the application, that whilst the photographs were undeniably "indecent material", they were "not in the worst category" and "in the lower end of offending" and would unlikely to give rise to any serious complaint from the public. However, the written material which accompanied these photographs, about which no complaint was made, was where the gravamen of the offences lay. The texts went well beyond mere titillation and were written in the