

IN THE SUPREME COURT OF JUDICATURE  
IN THE COURT OF APPEAL (CIVIL DIVISION)  
ON APPEAL FROM THE WORCESTER COUNTY COURT  
(HIS HONOUR JUDGE KING)

CCRTF 96/0750/G

Royal Courts of Justice  
Strand  
London WC2

Friday 20 December 1996

B e f o r e:

THE MASTER OF THE ROLLS  
(LORD WOOLF)  
LORD JUSTICE AULD  
LORD JUSTICE WARD

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ANGELA MARY NICHOLLS

Petitioner/Respondent

- v -

SIDNEY JOHN NICHOLLS

Respondent/Appellant

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(Transcript of the Handed Down Judgment of  
Smith Bernal Reporting Limited, 180 Fleet Street,  
London EC4A 2HD  
Tel: 0171 831 3183  
Official Shorthand Writers to the Court)

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MR N COLE (Instructed by Messrs Middleton Dummer, West Midlands, B69 4QX) appeared on behalf of the Appellant.

MR R ROWLAND (MR P EDWARDS 20.12.96) (Instructed by Messrs March & Edwards, Worcester) appeared on behalf of the Respondent

MR H KEITH appeared on behalf of the Amicus.

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J U D G M E N T  
(As approved by the Court)

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THE MASTER OF THE ROLLS: This judgment, which I have prepared, is a judgment of the Court.

On this appeal it is necessary to consider the effect of procedural irregularities on the validity of committal orders. It is an area where there has been a change of emphasis in the approach of this court in recent years. Because of this it is desirable for this court to review fully the previous authorities on this subject in the hope that it will be possible to provide greater clarity than exists at present as to the state of the law. For this reason the Attorney General was invited to instruct an amicus to assist the court. He instructed Mr Hugo Keith and we are grateful for the help which he and his instructing solicitor, the Treasury Solicitor, have provided.

### The Facts In This Case

In these proceedings Angela Mary Nicholls ("the wife") is the petitioner and Sydney John Nicholls ("the husband") is the respondent. They were married on the 20th August 1989. There is one child who was born on the 2nd January 1991. The husband is a self employed metal trader and his wife runs her own photographic business. There is no dispute that the relationship between the husband and wife is extremely acrimonious. The wife commenced divorce proceedings by a petition dated 10th February 1995 alleging unreasonable behaviour. The husband denied her allegations and filed an answer dated 2nd March 1995 but subsequently allowed the petition to proceed undefended.

On the 9th March 1995 the wife applied for an injunction preventing the husband from molesting her. This was followed by a further application by the wife for an injunction restraining the husband from disposing of the contents of the matrimonial home and two motor cars.

At the Worcester County Court on the 22 March 1995 the husband gave two undertakings. The first (the non molestation undertaking) was not to pester, harass or otherwise interfere with the wife and the second:

"Not to dispose of, sell, charge or transfer within the jurisdiction or otherwise deal with the contents of the matrimonial home" (the contents being detailed in the attached valuation and an inventory). or with "a Vauxhall motor car."

Both undertakings were reduced to writing and signed by the husband under a statement which read:

"I understand the undertaking I have given, and that if I break any of my promises in the Court I may be sent to prison for contempt of Court."

The wife applied for an order committing the husband to prison for breaching the undertakings.

That application was heard by His Honour Judge Mott on 6th April 1995. The judge found that one of the allegations relied upon by the wife namely moving certain of her property from the former matrimonial home was not established because the husband may well have removed the articles before he gave the undertaking. However with regard to an allegation of harassment and pestering of the wife the judge found this was established and fined the husband £250.00.

On the 27th July 1995 the wife made a further application to commit the husband for contempt for breaching the undertaking of the 22nd March not to molest her based on a series of allegations commencing on the 13th April and ending in July 1995. This was followed by a further application on the 18th August 1995 also relying on alleged breaches of the same undertaking between the 3rd April and July 1995. On the 6th September 1995 the husband was sentenced to two months imprisonment for 8 breaches of the non-molestation undertaking of the 22nd March 1995 but this was suspended for one year on condition that he did not pester harass or otherwise interfere with the wife. The suspended order was made by His Honour Judge Smythe. He found proved the first, second, fourth, seventh eighth and ninth of the allegations made in the application of the 27th July (but not the third fifth and sixth) and found proved the second and third allegation in the additional application made on the 18th August 1995.

On the 1st March 1996 the wife was granted an injunction restraining the husband from disposing of the contents of the former matrimonial home by District Judge Dickinson. This prolonged sequence of applications and orders continued and on the 5th March 1996 the wife made an application for:

1. an order committing the husband to prison for breaching the undertaking of the 22 March 1995 not to dispose of the contents of the matrimonial home, by removing those contents from the home prior to the 28th February 1996.

2. the suspended committal order made by His Honour Judge Smythe to be activated on the grounds that the husband had harassed the wife on five different occasions.

On the 15th March 1996 His Honour Judge King only found proved the final incident of harassment alleged in the application of the 5th March 1995. Having done so he ordered 2 months imprisonment imposed by His Honour Judge Smythe to be served and in addition passed an additional sentence of 14 days imprisonment in respect of the final incident of harassment to be served consecutive to the 2 months imprisonment, making a total of 2 months and 14 days imprisonment.

The husband having commenced to serve his period of imprisonment at HM Prison Blakenhurst, made an application from the prison to purge his contempt. On the following day he supported his application by writing to the judge stating how much he regretted his behaviour and indicating that his imprisonment had been "a real devastating shock to my system".

The husband's application to purge his contempt was dismissed by His Honour Judge Morris on 29th March 1996. The Official Solicitor's office drew the husband's solicitors attention to the fact that the committal order was defective. Instead, after Legal Aid had been obtained, on the 4th April

1996 notice of appeal was given. This was followed by a hearing before Lord Justice Ward on the 10th April 1996 when the husband was granted bail.

### The Grounds of Appeal

The notice of appeal sets out three different grounds. They are as follows:

- "1. That the committal order dated the 15th March 1996 in form N79 failed to give proper details of the Contempts found proved.
2. That the Committal Order served on the 15th March 1996 did not state the Order in that His Honour Judge King did not find Breach of the Undertaking dated 22 March 1995 or the specific Acts relied upon.
3. That on the whole of the evidence the learned judge failed to pay sufficient regard to the fact that Committal to Custody is an Order of final resort and the Sentence of 2 months 14 days as a whole was excessive."

Although this is not relied upon in the Notice of Appeal, the consecutive sentence of 14 days imprisonment was clearly defective since it was imposed in relation to the only breach proved of the allegations relied upon by the wife as constituting a breach of the terms imposed by His Honour Judge Smythe on the 6th September 1995 as a condition for his suspending the order of 2 month imprisonment. This condition was that the husband was not to pester, harass or otherwise interfere with the wife. The husband did so, and this was a ground for activating the 2 months imprisonment but it was not alleged to be a separate contempt which if proved would justify imposing an additional sentence as well as activating the 2 months imprisonment. What the judge did was not to sentence the husband twice over for the same matter since the sentence of 2 months imprisonment was in relation to earlier breaches of the undertaking of the 22 March 1995. It would therefore have been open for the wife to include in her application of the 5th March 1996 an allegation that the further harassment was a breach of the original undertaking of the 22 March 1995. No such allegation was included in the application. Instead reliance was placed upon an alleged breach of the other undertaking which was

given on the 22 March 1995 but the breach of that undertaking was not found proved. It follows therefore that the sentence of 14 days imprisonment has to be set aside.

### The Defects in the Notices of Committal

Both the suspended committal order of the 6th September 1995 (the suspended committal order) and the committal order of the 15th March 1996 are defective. In drawing up both orders form N79 was used. This is the correct county court form for this purpose. However the suspended committal order recites that the husband is guilty of contempt by telephoning the wife at her work on 5 occasions. This was the sixth allegation in the wife's notice of application to commit of the 27th July 1995. That is an allegation which His Honour Judge Smythe found was not proved. The incorrect inclusion of this "finding" could not have prejudiced the husband because His Honour Judge Smythe imposed a separate sentence of 2 months imprisonment in respect of each allegation. We observe on even closer examination of the order that, having included this breach which was not proved, the order failed to include the last allegation in the additional application which was proved. This failure likewise caused no prejudice.

The order of committal of the 15th March has a number of defects. First of all in relation to the breach of the suspended order, it merely states:

"Breach of suspended order made by His Honour Judge Smythe in particular number 5 on the application to commit in an aggravated form."

Mr Rowland who appears on behalf of the wife accepts that on its face it fails to give sufficient particulars of the breach which the judge found proved. It refers to particular number 5 but it does not indicate where that particular is to be found so it can be identified. It is in fact a reference to paragraph 2(v) of the application by the wife dated 5th March 1996. Instead of making this shorthand reference

to the notice of application, it would have been preferable if the order had stated that the husband had harassed the wife on the 28th February 1996 by initially refusing her access to the former matrimonial home and by abusing her. Complaint is also made of the fact that the order includes the word "aggravated". This word no doubt appears because the judge according to counsel's note at the end of his judgment said "I find contempt proved and aggravated". However the presence of this word is superfluous and not of any significance.

Order 29 rule 3 of the County Court Rules 1981 gives the person who has been committed the right to apply to purge his contempt. Form N 79 is the prescribed form. It is therefore a form the use of which is required by the County Courts (Forms) Rules 1982. Form N79 recites below the statement of the period of committal that "the contemnor can apply to the (court)(judge) to purge his contempt and ask for release". The committal order of the 15th March 1996 had for some unknown reason a line drawn through "applying to purge his contempt" although it could still be read. The statement of the right to apply to purge a contempt is obviously a matter of which it is important that a contemnor should be aware. The deletion of the sort that occurred here could in some cases cause prejudice. However in the case of the husband it certainly did not cause any prejudice. He apply to purge his contempt.

The third defect in the committal order is that it recites that the husband was being sentenced to 14 days imprisonment consecutive for breach of the undertaking made on the 22 March 1995. As already pointed out the wife did not rely on any breach of the non molestation undertaking of the 22 March 1995 in support of the application to commit. Reliance was placed by the wife in the application on the breach of the other undertaking which was not proved. Again no prejudice has been caused to the husband by this error. The error is however a significant one because if a contemner makes an application to purge his contempt the judge considering his application could be misled as to the scale of the contempt as a result of the error.

Mr Cole who appeared on behalf of the husband on this appeal submits that the defects in the committal order to which we have referred either taken individually or together render the committal order beyond remedy so that the committal order has to be set aside. This he submits is the position on the authorities, notwithstanding that no prejudice has been caused to the husband for the reasons already indicated, including his presence at the hearing before the judge when the committal order was made, so he must have known the reason for his committal.

Mr Cole submits that the suspended committal order is defective because it includes a finding of contempt which was not proved. He contends that once drawn up the order cannot be amended. If this contention is correct, then the defect in the suspended order will contaminate the committal order of the 15th March 1996. This is because if the earlier order is set aside clearly the subsequent order made, activating the earlier order, cannot stand.

In the county court Order 29 rule 1 of the County Court Rules 1981 deals with the enforcement of a judgment to do or abstain from doing any act. Rule 1(1) provides the power to commit for non observance of an order. Order 29 rule 1 (2) provides:

"Subject to paragraphs (6) and (7), a judgment or order shall not be enforced under paragraph (1) unless -

(a) a copy of the judgment or order has been served personally on the person required to do or abstain from doing the act in question ... and

(b) in the case of a judgment or order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act and was accompanied by a copy of any order made between the date of the judgment or order and the date of service, fixing that time."

Paragraph (6) and (7) provide:

"(6) A judgment or order requiring a person to abstain from doing an act may be enforced under paragraph (1) notwithstanding that service of a copy of the judgment or

order has not been effected in accordance with paragraph (2) if the judge is satisfied that pending such service, the person against whom it is sought to enforce the judgment or order has had notice therefore either -

- (a) by being present when the judgment or order was given or made, or
- (b) by being notified of the terms of the judgment order whether by telephone telegraph or otherwise.

(7) Without prejudice to its powers under Order 7, rule 8 the court may dispense with service of a copy of a judgment or order under paragraph (2) or a notice under paragraph (4) if the court thinks it just to do so.

No dispensation from the requirements of rule 1(2) applies in the present case. The presence of rule 1(6) and (7) do at least indicate that the non service of the original order is not always critical in the sense that the order is still effective even without service.

Rule 1(5) requires the committal order to be served on the person to be committed at the time of execution or where it has been signed by a judge within 36 hours of the execution of the warrant.

While these requirements on Order 29 rule 1 are there to be observed, in the absence of authority to the contrary, even though the liberty of the subject is involved, we would not expect the requirements to be mandatory, in the sense that any non compliance with the rule means that a committal for contempt is irremediably invalid.

#### The Relevant Statutory Provisions

Normally Order 15 rule 5 of the County Court Rules (which corresponds to Rules of the Supreme Court Order 20 rule 11) enables a court to correct any clerical mistakes in the judgments or orders or errors arising therein due to any accidental slip or omission.

Furthermore section 15 (3) Supreme Court Act 1981 provides that:

"For all purposes of or incidental to -

(a) the hearing and determination of any appeal to the Civil Division of the Court of Appeal; and

(b) the amendment, execution and enforcement of any judgment or order made on such appeal,

the Court of Appeal shall have all the authority and jurisdiction of the court of tribunal from which the appeal was brought."

In addition Order 59 rule 10 (3) gives the Court of Appeal

the power to "make any order which ought to have been given or made, and to make such further or other order as the case may require".

Finally section 13 of the Administration of Justice Act 1960 sets out the Court of Appeal's powers in cases of contempt. Section 13(3) provides:

"The court to which an appeal is brought under this section may reverse or vary the order or decision of the court below, and make such other order as may be just..."

These provisions are drafted in generous terms and where a defect in the application for a committal order or the committal order itself causes no injustice you would expect that powers would enable this court to overcome a purely technical error which has not caused any prejudice.

### The Authorities

In the past the courts have indicated that strict adherence to the rules is required and any significant departure from them would result in a committal being set aside irrespective of the fact that such a result would be far from just. The explanation for this approach appears clearly from the judgment of Lord Greene, MR in *Gordon v Gordon* [1946] 62 TLR 217. In that case it was decided that where an order is made that one of the parents of a child should hand over the custody of that child

to the other parent, but service of the order - which should state both time and place - is not made until after the time stated for the handing over of the child, an order for committal or attachment cannot be made against the parent who refuses to hand over the child as directed, even if the parent was well aware of the order. In his judgment, Lord Greene M.R. said at 218:

"Attachment and committal are very technical matters, and as orders for committal or attachment affect the liberty of the subject such rules as exist in relation to them must be strictly obeyed. However disobedient the party may be against whom the order is directed, he is entitled to his freedom unless the process of committal or attachment has been carried out strictly in accordance with the rules..."

The process of enforcing orders in civil litigation, made for the benefit of one party against the other party, by committal or attachment is nothing more than a form of execution. It is that form of execution by which the successful litigant enforces his right against his unsuccessful opponent. If he fails to comply with the strict rules he is the sufferer, because he has not succeeded in protecting or enforcing his right by this very effective means. In the case of an infant the position is fundamentally different, because orders in respect of infants are not made for the benefit of any litigating party, such as a party to a divorce suit. They are made for the benefit of the infant and, therefore, one would expect to find that in the rules relating to enforcement of orders in the matter of infants by committal or attachment would recognise that fundamental difference."

Later in his judgment Lord Greene went on to say:

"It becomes more manifestly unfortunate - I will not say absurd - that strict compliance with the rule as to service is required where the person against whom the order is made is perfectly aware of it, is perhaps in court when it is made, and deliberately sets himself to flout it. In the case of ordinary litigation between parties the strictness of requiring service of the order is a thing one can understand but why should an infant suffer by a strict rule of this kind ..."

However Lord Greene still went on to decide that the court had no sort of inherent power to dispense with compliance with a perfectly clear rule requiring an order to be brought in a particularly formal way to a persons knowledge merely because he knows of the order from a different source ... "and in my opinion the court has no dispensing power".

In accordance with this approach in *Cinderby v Cinderby (1978) 8 Fam Law 244* this court set aside committal orders where the order which had been drawn up did not state the particular contempt of which the contemnor had been guilty. Lord Denning MR indicated that it was very important when the liberty of the subject was concerned that all legal requirements including particularising the contempt should be satisfied. However *Hill Samuel & Company v Littaur (2)* [1985] 135 NLJ 556 a three judge court of the Court of Appeal presided over by Kerr LJ upheld a committal order where the order did not state the particular contempt the defendant was alleged to have committed. Parker LJ in the course of his judgment pointed out that in an earlier case there was no argument that the court had any power to amend an order. He further stated that in that earlier case the court may have carried technicalities too far. A contemnor knew perfectly well what he had done wrong. Later Parker LJ said "I am also entirely satisfied that this court has ample power, under RSC Order 59 rule 10.(3) to vary the order and put it right. But in *Hegarty v O'Sullivan* [1985] 135 MLJ 557 Kerr LJ explained the reliance on Order 59 rule 10 (3) in the *Hill Samuel* case on the basis that the order for committal had been suspended and the contemnor had never lost his liberty because of the appeal. He considered very different considerations apply when a defendant has in fact gone to prison. Then an appeal against a defective order cannot be allowed to subject a contemnor to the risk that the appeal will fail solely on the basis of the exercise of the discretion vested in the court by RSC Order 59 rule 10 (3). The same distinction between those cases where the appellant had received a suspended committal order and those where he had been to prison is also drawn in *Re M (Minors)* [1991] 1FLR 355 and *Smith v Smith* [1992] 2 FLR 40.

A middle position was taken by Mustill LJ in *Linkleter v Linkleter* [1988] 1 FLR 360. This was a case where the order again did not specify the matters of contempt which had been found proved. At page 363 D Mustill LJ said:

"I accept, as was accepted by another division of this court in the case of *Re C (a Minor) (Contempt)* [1986] 1FLR 578 that the court does have power under RSC Order 59 rule 10.3 to

replace an order of the court below with "such other order as the case may require". I also accept that, in an exceptional case, this court may use its powers to cure a defective order in a case where a contemnor had been reduced to custody, and *Hill Samuel & Company Limited* (2)[1985] 135 NLJ 556 is an example of such a case. All the same, I am of the opinion that the very limited power of rectification contemplated by the court in that case was to be given effect only in exceptional circumstances. The defect in the present case could not properly be cured by the Court."

In *Linnett v Coles* [1987] QB 555, a case in which the Court of Appeal in fact allowed the appeal because the contemnor had already served 8 days, Lawton LJ (at page 562 C) indicated a much less technical approach. He stated:

"Anyone accused of contempt of court is on trial for that misdemeanor and is entitled to a fair trial. If he does not get a fair trial because of the way the judge had behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is no trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there has been no unfairness or no material irregularities in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one."

This approach was endorsed in *Harmsworth v Harmsworth* [1987] 3 AER 816 at p824 C. Scott LJ commended Lawton LJ's judgment in *Linnett v Coles* in *Smith v Smith* [1992] 2 FLR 40. However he did go on to say that it is "not for this court in cases which are on the facts indistinguishable from *Linkleter and Hegarty v O'Sullivan* to correct the approach held in those cases to be the right one. The same approach was taken by Nourse LJ who gave the first judgment. Both Nourse and Scott LJ recognised that the court had a discretion under RSC Order 59 rule 10 (3) and section 13 (3) of the Administration of Justice Act 1960 but both felt they were bound by previous decisions as to how the discretion should be exercised where a warrant for committal had not only been issued but executed as well. In that situation the court thought that the powers could only be used in exceptional circumstances.

*Duo v Duo* [1992] 2FLR 425 was a rather different type of case. The trial judge had not granted an adjournment when he should have done so and in consequence the alleged contemnor's lawyers were not able to represent him properly. In such circumstances the court is using its powers under section 13 of the 1960 Act ordered a retrial. In doing so it again approved of the approach of Lawton LJ in *Linnet v Coles*.

It is now necessary to refer to the critical case of *M v P and Others* and *Butler v Butler* [1993] Fam. 167. The two cases were heard together before the then Master of the Rolls, Lord Donaldson, Nolan and Scott LJJ so that this court could provide clarification as to the proper approach to the same problems which the court is again considering in this judgment. In the first case the contemnor attended the hearing but the committal order was not served on him personally although a copy was sent to the solicitors representing him. In the other case again in the contemnor's presence, the judge committed him to prison for 8 months. No copy was served on the contemnor and the order was drawn up using the wrong form. Despite the nature of the procedural errors which occurred, both contemnor's appeals were dismissed. In his judgment Lord Donaldson MR refers to many of the authorities cited including those to which he was a party. He then referred to the case of *Williams v Fawcett* [1986] QB 604 which was one to which he was also a party and pointed out that in the course of his judgment in that case he considered whether it was a breach of the rule of stare decisis, having reached the conclusion that the earlier authorities betrayed a manifest slip or error, to correct the decision and he concluded that it was not. He then went on to say that in this case the court was again in the same position:

"The rule of law which seems to have evolved, or at least to be evolving, is that "a failure to comply with the requirements of Order 29 are 1 (5) of the County Court Rules 1981 is fatal to the lawfulness of the committal...and that in contempt cases the court's powers under section 13(2) of the Administration of Justice Act 1960 will be used only in exceptional cases."

Lord Donaldson referred to section 13 of the 1960 Act and

*Linnett v Coles*. Having done so he then went on to make the

following statement of principle:

"In all contempt cases, justice requires the court to take account of the interest of at least 3 categories of person, namely, (a) the contemnor (b) the "victim" of the contempt and (c) other users of the court for whom the maintenance of the authority of the court is of supreme importance. The interests of the alleged contemnor require that he should have the right to be informed of the charges which he has to meet, to be advised and represented if he so wishes (subject to his being eligible for legal aid or otherwise able to finance his defence), and to be given a full and fair opportunity of meeting those charges and, if found guilty of contempt of court to be informed in sufficiently clear terms of what has been found against him.

In all these cases the court has been concerned to ensure that these fundamental requirements are met in the way in which, particularly in the case of the county courts, they are intended to be and should be met. However, we have tended to overlook the fact that they may in some circumstance be met in other ways. This court should always be quick to identify and condemn any departure from the proper procedures, the interest of the victim and of maintaining the authority of the court require that in deciding what use to make of its powers under section 13(3) of the Act of 1960, this court should ask itself whether, notwithstanding such a departure, the contemner has suffered any injustice. It does not follow that he has. Nor does it follow that the proper course is to quash the order. If he has not suffered any injustice, the committal order should stand, subject if necessary, to a variation of the order to take account of any technical or procedural defects. In other cases it may be possible to do justice between the party by exercising the court's power under section 13 (3) by making "such other orders may be just". If the circumstances are such that justice requires a committal order to be quashed amongst the options available is that of ordering a re-trial."

Nolan LJ agreed with the Master of the Rolls and Scott LJ gave a short judgment which he concluded by saying that he was in complete agreement with the Master of the Rolls judgment as to the statutory discretion conferred by section 13 (3) of the Administration of Justice Act 1960 and by RSC Order 59 rule 10 (3). A Further example of this court correcting what are no more than statements as to the procedural position which are manifestly in error is provided by *Rikards v Rikards* [1989] 3 AER 193 (see p 199 and 204).

There are two subsequent cases to which we should briefly refer. The first of those is *Loseby v Newman* [1995] 2 FLR 754. In this case the judge had ordered 3 months imprisonment suspended for 1 year. The committal order failed to set out the alleged breaches and the breaches in relation to which

the suspended committal order was made. It also failed to set out the precise period of suspension. Balcombe LJ did not regard the case as one where the errors should be corrected because he regarded the orders which had been made as being excessive and set aside the order on that basis. However he did make comments suggesting that *M v P, Butler v Butler* indicated that committal orders which were defective could only be rectified if "there were exceptional circumstances". This is an incorrect reading of Lord Donaldson's judgment in the earlier case. The other case is *C v Hackney London Borough Council* [1995] 2 FLR 681. This was a case which involved a suspended sentence. The order was inaccurate in that it intimated that a sentence of 6 months imprisonment which had been imposed concurrently with the other sentences had in fact been imposed consecutively. The Court of Appeal interfered by reducing the sentence. In giving the judgment of the court Leggatt LJ cited the passages from Lord Donaldson's judgment in *M v P, Butler & Butler* to which we have already referred and concluded his judgment by saying:

"It should also be emphasised that, unless in the particular circumstances of the case justice so requires, an order will not be upheld that does not specify the contempts on account of which it was activated."

I have cited extensively from the previous authorities to indicate that they show no common pattern of approach. The later cases do however make it clear that it is now recognised that Order 59 rule 10 (3) and section 13 (3) of the 1968 Act do give a court the power to rectify procedural defects both in the procedure leading up to the making of the committal order and after a committal order has been made. Like any other discretion, the discretion provided by the statutory provisions, must be exercised in a way which in all the circumstances best reflects the requirements of justice. In determining this the court must not only take into account the interests of the contemnor but also the interests of the other parties and the interests of upholding the reputation of civil justice in general. Today it is no longer appropriate to regard an order for committal as being no more than a form of execution available to another party against an alleged contemnor. The court itself has a very substantial interest in seeing that its orders are upheld. If committal orders are to be set aside on purely

technical grounds which have nothing to do with the justice of the case, then this has the effect of undermining the system of justice and the credibility of the Court orders. While the procedural requirements in relation to applications to commit and committal orders are there to be obeyed and to protect the contemnor, if there is non-compliance with the requirements which does not prejudice the contemnor, to set aside the order purely on the grounds of technicality is contrary to the interests of justice. As long as the order made by the judge was a valid order, the approach of this Court will be to uphold the order in the absence of any prejudice or injustice to the contemnor as a consequence of doing so.

In the future therefore it should not be necessary to revisit the authorities prior to the decision in *M v P, Butler and Butler*. It should be recognised that Order 59 rule 10 and section 13 (3) of the 1960 Act give the court a discretion which they are required to exercise. To decline to exercise that discretion because of a technical error in the notice of application to commit or the committal order itself, in the absence of any prejudice, is to derogate from that discretion.

#### The Result of the Appeal

For the reasons already given the committal for 14 days imprisonment cannot be upheld. Nothing said earlier justifies two separate sentences for the same offence or making a committal order without identifying the order or undertaking alleged to be breached. In the case of activation of the suspended sentence, the position is different. The husband was present when the order was made. It is not suggested that he suffered any prejudice in consequence of the defects in the terms of the order which was served. It would be unjust to set aside the order in the absence of any prejudice. The committal order could be amended to correct the defects but this would be an unnecessary exercise in this case.

The husband has however expressed his regret for his conduct in the past and given assurances as to the future. He was released on bail and at the conclusion of the hearing it was intimated to him that the outcome of the appeal would be that the period of committal would be reduced so that he does not have to return to prison. By taking this course, the court is not suggesting that it was not right to activate the suspended sentence. This was a perfectly proper course to take. The sentence is reduced on account of the husband's change of attitude since he was committed to prison. The guidance which can be provided for future cases is as follows:

1. As committal orders involve the liberty of the subject it is particularly important that the relevant rules are duly complied with. It remains the responsibility of the judge when signing the committal order to ensure that it is properly drawn and that it adequately particularises the breaches which have been proved and for which the sentence has been imposed
2. As long as the contemnor had a fair trial and the order has been made on valid grounds the existence of a defect either in the application to commit or in the committal order served will not result in the order being set aside except insofar as the interests of justice require this to be done.
3. Interests of justice will not require an order to be set aside where there is no prejudice caused as a result of errors in the application to commit or in the order to commit. When necessary the order can be amended.
4. When considering whether to set aside the order, the Court should have regard to the interests of any other party and the need to uphold the reputation of the justice system.

5. If there has been a procedural irregularity or some other defect in the conduct of the proceedings which has occasioned injustice, the court will consider exercising its power to order a new trial unless there are circumstances which indicate that it would not be just to do so.

Order: Appeal allowed in part. No order as to costs save for Legal Aid Taxation of both parties' costs. Paragraph 4 of Committal Order to be deleted and substituted to read: "in July 1995 the Respondent contacted the Legal Aid Board and advised them that the Petitioner had a lump sum making her ineligible for Legal Aid."