CONTEMPT OF COURT

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1. Dictionary meaning of Contempt of Court

(a) 1. Failure to comply with an order of a superior court, or an act of resistance or insult to the court or the judge.
2. Conduct likely to prejudice the fair trial of an accused person; punishable by fine or committal to prison.
A Concise Law Dictionary 5th edn, PG Osborn. Sweet & Maxwell, 1964, p86.

(b) Any act which is calculated to embarrass, hinder or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity.
Black's Law Dictionary, 6th edn, by the Publisher's Editorial Staff, 1990, p319.

2. Statutory Provisions

***MAGISTRATES' COURT ACT* 1989**

Section 133

Contempt in face of the Court

(1) If it is alleged or appears to the Court that a person is guilty of contempt of court committed in the face of the Court, the Court may—

(a) by oral order direct that the person be arrested and brought before the Court; or

(b) issue a warrant for his or her arrest in the form prescribed by the Rules.

(2) On the person being brought before the Court, the Court must cause him or her to be informed of the contempt with which he or she is charged and adopt any procedure that the Court thinks fit.

(3) The *Bail Act* 1977 applies, with any necessary modifications, to and in respect of a person brought before the Court under this section as if the person were accused of an offence and were being held in custody in relation to that offence.

(4) If the Court finds that the person is guilty of contempt of court, it may order that the person be sentenced to a term of imprisonment of not more than six months or fined not more than 25 penalty units.

(5) If a person found guilty of contempt of court is ordered to be imprisoned, the Court may order his or her discharge before the end of the term.

(6) The Court may accept an apology for a contempt and may remit any punishment for it either wholly or in part.

(7) Persons who by conduct in the Court or in the precincts of the Court interrupt the proceedings of the Court in circumstances in which it appears to the Court that those persons are acting in concert with the object of interrupting the proceedings of the Court may each be dealt with under this section for contempt of court committed in the face of the Court.

Section 134

Contempt of court

(1) A person is guilty of contempt of court if—

(a) having been summoned as a witness and having been given or tendered any conduct money required to be given or tendered, the person refuses or neglects without sufficient cause to attend or to produce any documents or things required by the summons to be produced; or

(b) having been summoned as a witness and having attended as required, the person refuses to be sworn or to answer any lawful question; or

(c) being examined as a witness or being present in court and required to give evidence, the person refuses to be sworn or to answer any lawful question or, without sufficient excuse, to produce any documents or things that the person has been or is required to produce; or

(d) being present in court and required to give evidence, the person wilfully disobeys an order made under section 127; or

(e) in the opinion of the magistrate the person is guilty of wilful prevarication.

(2) In the case of a contempt referred to in subsection (1), the Court may direct the arrest of the person and, on the person being brought before the Court, the Court must cause him or her to be informed of the contempt with which he or she is charged and adopt any procedure that the Court thinks fit.

(3) If the Court finds that the person is guilty of a contempt referred to in subsection (1), it may order—

(a) that the person be sentenced to a term of imprisonment of not more than 1 month; or

(b) that the person be fined not more than 5 penalty units and that in default of payment of the fine within a specified time the person be imprisoned for a term of not more than 1 month.

(4) Without limiting subsection (3)—
S134(4)(a) amended by No. 68/2009 s97 (Sch. item 82.52).
(a) if a person commits a contempt referred to in subsection (1) at a committal proceeding, the Court may adjourn the proceeding for a period of not more than 8 clear days and section 331 of the *Criminal Procedure Act* 2009 applies as if the person were an accused in a criminal proceeding; and
(b) if at the adjourned hearing the contempt is repeated, the Court may—
(i) proceed under paragraph (a); or
(ii) punish for the contempt in any manner provided in subsection (3).

(5) A person is guilty of contempt of court if—
(a) having been summoned in accordance with the Rules to attend at a sitting of the Court to be orally examined by the appropriate registrar concerning the failure to comply with an order for the payment of money and having been given or tendered any conduct money required to be given or tendered, the person refuses or neglects without sufficient cause to attend; or

S134(5)(ab) inserted by No. 12/2006 s174.
(ab) having been summoned under Part 9 of the *Infringements Act* 2006 to attend at the Court to be orally examined by an infringements registrar and having been given any conduct money required to be given or tendered, the person refuses or neglects without sufficient cause to attend; or
(b) having been so summoned and having attended as required, the person refuses to be sworn or to answer any lawful question; or
(c) in the opinion of the appropriate registrar the person is guilty of wilful prevarication.

(6) In the case of a contempt referred to in subsection (5), the appropriate registrar must report the contempt to the next practicable sitting of the Court constituted by a magistrate at the proper venue and the Court may direct the arrest of the person and may punish for the contempt as in the case of a contempt referred to in subsection (1).

(7) If a contempt referred to in this section also constitutes a contempt of court committed in the face of the Court, the Court may deal with the contempt under this section or under section 133, as it thinks fit.

S134(8) inserted by No. 34/1990 s4 (Sch. 3 item 13).
(8) The *Bail Act* 1977 applies, with any necessary modifications, to and in respect of a person brought before the Court under this section as if the person were accused of an offence and were being held in custody in relation to that offence.

3. Judicial Considerations

(a) The High Court and appellate courts in Australia have, on a number of occasions, emphasised that a summary trial for contempt by the same judge is "extremely rare": *Keeley v Brooking* [1979] HCA 28; (1979) 143 CLR 162, 170-171, 186; 25 ALR 45; 40 ALT 139,

(b) "extraordinary": *Fraser v R* (1984) 3 NSWLR 212, 224-225; 15 A Crim R 58

(c) and should only be adopted in "serious cases": *Lewis v Ogden* [1984] HCA 28; (1984) 153 CLR 682, 693; 53 ALR 53; 58 ALJR 342.

(d) In *Fraser v R*, Kirby P and McHugh JA said of summary proceedings (at pp224-225):

> "In the case of summary proceedings for contempt in the face or hearing of the court, there are special reasons for the extension of facilities and privileges to the alleged contemnor. By any standard the procedure is extraordinary. The judge may be, at once, the witness, possibly even the victim, of the contempt. He may be the initiator of the former curial proceedings to bring the contemnor before the court, as was the case here. It is he who has to decide the issues of fact, to determine the charge, and then to make the order for punishment or discharge the contemnor. This unusual concatenation of roles imposes upon the judge peculiar responsibilities and equivalent duties to ensure that justice is done and seen to be done. If he decides to deal with a matter summarily...It is trite to say that a person faced with a serious charge, and the risk of punishment, including imprisonment, should be given an ample opportunity to be heard...The rule as to hearing parties is fundamental to due process of law. But it is specifically important in the extraordinary summary procedure for contempt for the reasons already suggested. The requirement of the appearance of justice imposes on the judge a special obligation to ensure that he has not made up his mind until everything that can reasonably be placed on the scale is allowed to be put there."

(e) In *Clampett v Attorney-General (Cth)* [2009] FCAFC 151; (2009) 260 ALR 462; (2009) 181 FCR 473, Greenwood J said of the exercise of the power of contempt:

> "The election to exercise the power to punish contempt in the face of the court in this way, although of early origin in the common law and expressly conferred by the *Federal Magistrates Act* and addressed by the *Federal Magistrates Court Rules*, is apt to place the judicial officer in a difficult position of framer and prosecutor of the charge; repository of the knowledge of the relevant events as the personification, in one sense, of the court in whose face the contempt has occurred; and the person required to determine whether the charge is made out beyond reasonable doubt. Thus, the power ought to be exercised sparingly and with great caution so as to engage the class of case in which the integrity of the court or its proceedings must necessarily be protected by invoking the exercise of the power by the court as constituted at the time of the contempt."

(f) In England the Court of Appeal in *Balogh v St Albans Crown Court* [1975] QB 73; [1974] 3 All ER 283 described the contempt power as "salutary and dangerous" and to be "exercised with scrupulous care and only when the case is clear and beyond reasonable doubt".

(g) In *Rich v Attorney-General for the State of Victoria* [1999] VSCA 14; 103 A Crim R 261 the Court of Appeal said:

> "None the less, contempt of court is a criminal offence and the summary nature of the proceedings cannot be permitted to subvert principles of fairness or to become an instrument of oppression to an alleged contemnor. Thus the courts over the years have required strict compliance with the rules, particularly those which are designed to protect the interests of the contemnor. He is entitled to know what is being alleged against him and to be given every chance to meet the allegations. He is entitled to strict compliance with the rules as to personal service of the motion."

(h) "1. It is a necessary attribute of a court that it has the power to deal with acts that are a challenge to its authority. Sometimes a challenge occurs in the course of proceedings and the need to address it is immediate. This type of challenge is referred to as contempt in the face of the court.

2. The power to deal with contempt summarily, that is, not on indictment but quickly and without procedural formalities, is one to be exercised sparingly. This is because it has some features which are usually avoided in the administration of justice. These include the fact that the judicial officer acts as both accuser and judge. He or she may rely on his or her own observations of what occurred and, in that sense, also plays a role as witness. These features can detract from the ability to conduct a fair hearing. They may also detract from an appearance of fairness.

3. Yet there will be occasions where the only appropriate course is to deal with an alleged contempt summarily. In such cases it is important that the judicial officer bear in mind the risks of unfairness or an appearance of bias. Things can be done to mitigate these risks. They include adjournments, affording the alleged contemnor an opportunity to take legal advice, providing the contemnor with a clear articulation of the alleged contempt and an opportunity to answer the allegation by giving or calling evidence and making submissions."
Per Hall J (Supreme Court of Western Australia) in *Mansell v Mignacca-Randazzo* [2013] WASC 66; MC 23/2013, 5 March 2013.

4. Cases involving Contempt of Court

(a) Contemnor blew and popped bubble gum in court – contemnor sentenced to one month's imprisonment

Whilst attending a Magistrates' Court, Z. blew and popped bubble gum when facing the Magistrate. The Magistrate took the view that this conduct was a gross contempt in the face of the court, charged Z. with contempt and was satisfied beyond reasonable doubt that Z. was guilty of contempt of court. The matter was stood down to enable Z's counsel to take instructions. A formal written charge of contempt was prepared and served on Z. Upon resumption of the court, a plea was made by Z's counsel. The magistrate then imposed a sentence of one month's imprisonment and Z. was taken into custody where he was detained for a period of 12 hours. Upon an originating motion seeking a quashing of the order—

HELD: Application granted. Decision of the Magistrate quashed.
1. There is no doubt that where a judicial officer perceives that there is a challenge to his or her authority, then that officer is entitled to take steps, including the laying of a charge of contempt, to preserve the authority of the Court. It is readily accepted that a Magistrate in a busy court is subject to many instances of untoward behaviour not usually encountered in higher courts and

that the preservation of his or her authority is integral to the office and the interests of justice. However, in the application of the law – particularly that of a charge of contempt – firmness must be accompanied by fairness.

> *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128, and *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186; (1996) 89 A Crim R 403, applied.

2. In the present case it was appropriate for the Magistrate to deal with this matter himself and to exercise summary jurisdiction. It would appear that he was the only witness to the asserted contempt which was committed in the face of the Court. Given that the Magistrate in this case was the only person who appeared to have perceived the "popping" of the bubble gum, it was reasonable for him to determine the charge himself. However, once the Magistrate decided to hear the charge there were two important propositions that had to be borne in mind. The first was that contempt of court is a criminal offence which has the potential (and as it transpired, the reality) to result in a period of imprisonment. As such it was essential that the Magistrate ensured that the rights of the alleged contemnor to a fair hearing were preserved. Second, as the authorities demonstrate, the Magistrate was required to proceed with great caution, because of the position he was in – namely witness, prosecutor and judge.

3. In light of the authorities and unambiguous statements of principle, a fair hearing of the charge of contempt against Z. required the following steps to be taken by the Magistrate prior to determination of the charge:

> First, to set out the charge. This could be done either orally or in writing. What was essential was that Z. understood the charge the Magistrate was laying.
>
> Second, to afford Z. the opportunity to consider the charge and if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.
>
> Third, to give Z. the opportunity to state whether he pleaded guilty or not guilty to the charge.
>
> Fourth, in the event that Z. pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.
>
> Then, having adopted this procedure, the Magistrate was required to be satisfied beyond reasonable doubt that Z. was guilty of the charge. In doing so, he was required to consider carefully all the evidence and keep at the forefront of his mind the unusual role he was undertaking in this process.

4. Nothing in what has been said should be taken to condone actions which constitute a deliberate contempt of court. The Court's authority must be upheld and alleged contemnors should be subject to due process. But due process, particularly where the end result may be incarceration, must be accompanied by procedural fairness. Each concept is an essential pillar of the proper administration of justice in this State.

5. Often where *certiorari* runs against an inferior court or an administrative decision maker, directions are given by the Supreme Court as to the future disposition of the matter by the body or person whose decision is impugned. However, in the present case, the Supreme Court was not prepared to make any direction in respect of the future prosecution of the charge for several reasons. First, the charge could not, given what had happened, be determined by the Magistrate who laid it. It must be heard by another Magistrate and the difficulties associated with adducing evidence, although not insurmountable, were significant. Second, and perhaps more importantly, Z. had already been incarcerated for nearly half a day. Finally, it would be unfair, given what had happened in this case, to subject Z. to further process even if it be assumed that he would at that hearing be found guilty of contempt.

Per J Forrest J:

> "... 4. Lest I be misunderstood, there is no doubt that where a judicial officer perceives that there is a challenge to his or her authority, then that officer is entitled to take steps, including the laying of a charge of contempt, to preserve the authority of the Court.
>
> 5. I also readily accept that a Magistrate in a busy court is subject to many instances of untoward behaviour not usually encountered in higher courts and that the preservation of his or her authority is integral to the office and the interests of justice.

6. However, in the application of the law – particularly that of a charge of contempt – firmness must be accompanied by fairness. Unfortunately in this case, aspects of procedural fairness, fundamental to ensuring a fair trial, were ignored by the Magistrate, with the result that Mr Zukanovic was improperly convicted of a serious charge and imprisoned.

... 36. In my view, contrary to the written submissions of Mr Zukanovic, it was appropriate for the Magistrate to deal with this matter himself and to exercise summary jurisdiction. It would appear that he was the only witness to the asserted contempt which was committed in the face of the Court. Indeed, the Court of Appeal in *Murphy* [1997] 2 VR 186, 204; (1996) 89 A Crim R regarded the summary procedure under s133 as appropriate where a barrister was alleged to have defied the authority of a Magistrate. Given that the Magistrate in this case was the only person who appears to have perceived the "popping" of the bubble gum, I think, out of necessity, it was reasonable for him to determine the charge himself.

37. However, once his Honour decided to hear the charge there were two important propositions that had to be borne in mind. The first is that contempt of court is a criminal offence [*John Fairfax Publications Pty Ltd v Attorney-General* (NSW) [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694 [5]; *Rich v Attorney-General* [1999] VSCA 14; 103 A Crim R 261] which has the potential (and as it transpired, the reality) to result in a period of imprisonment. As such it was essential that the Magistrate ensured that the rights of the alleged contemnor to a fair hearing were preserved: *Fraser v R* (1984) 3 NSWLR 212, 224-225; 15 A Crim R 58. Second, as the authorities demonstrate, the Magistrate was required to proceed with great caution, because of the position he was in – namely witness, prosecutor and judge.

... 41. In light of these clear and unambiguous statements of principle, a fair hearing of the charge of contempt against Mr Zukanovic required the following steps to be taken by the Magistrate prior to determination of the charge.

First, to set out the charge. This could be done either orally or in writing. What was essential was that Mr Zukanovic understood the charge the Magistrate was laying.

Second, to afford Mr Zukanovic the opportunity to consider the charge and if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.

Third, to give Mr Zukanovic the opportunity to state whether he pleaded guilty or not guilty to the charge.

Fourth, in the event that Mr Zukanovic pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.

Then, having adopted this procedure, the Magistrate was required to be satisfied beyond reasonable doubt that Mr Zukanovic was guilty of the charge: *Witham v Holloway* [1995] HCA 3; (1995) 183 CLR 525 at 545; (1995) 131 ALR 401; (1995) 69 ALJR 847. In doing so, he was required to consider carefully all the evidence and keep at the forefront of his mind the unusual role he was undertaking in this process.

42. The transcript, which I have set out at [12], demonstrates that the Magistrate simply charged Mr Zukanovic, found the charge proved and then proceeded on the basis that the next step was the plea.

43. Apart from the actual laying of the charge, the Magistrate observed none of these essential aspects of procedural fairness.

44. Each of the steps that I have set out were fundamental to a fair trial of the charge of contempt in which the Court is placed in a unique position. This is not mere window dressing. The application of this process was highly relevant to how Mr Zukanovic may have sought to defend the charge. He may have desired to take issue with the procedure which the Magistrate intended to take. He may have sought to argue that another Magistrate should hear the matter, or that utilising s133 of the MCA was inappropriate in the circumstances. Whether these applications would have met with any success is not to the point – he should have been given the opportunity to canvas these matters with the Magistrate. Moreover, there was a real advantage to Mr Zukanovic having time to consider the charge and determine what course he wished to take. He had told his solicitor that the blowing of the bubble was not deliberate. This would have afforded him an arguable defence to the charge of contempt. But it was too late; by the time he gave these instructions the Magistrate had laid the charge and found it proved.

45. In summary, the process was flawed with the most unfortunate result that Mr Zukanovic was deprived of his liberty and incarcerated for a period of nearly 12 hours. On this ground, *certiorari*

should run and the decision of the Magistrate will be quashed.

46. Nothing in what I have said should be taken to condone actions which constitute a deliberate contempt of court. The Court's authority must be upheld and alleged contemnors should be subject to due process. But due process, particularly where the end result may be incarceration, must be accompanied by procedural fairness. Each concept is an essential pillar of the proper administration of justice in this State. ..."

Per J Forrest J in *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; (2011) 32 VR 216; MC 06/2011, 20 April 2011.

(b) Refusing to answer questions in court – Failure by magistrate to follow steps in *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; (2011) 32 VR 216 – need for clear articulation of the charge

G. was found guilty of contempt of court when he failed to answer some questions before a Magistrate. The Magistrate ruled that G. had no reasonable grounds for refusing to answer the questions and found him to be in contempt and sentenced him to 14 days' imprisonment. Upon an application for an order in the nature of *certiorari* to quash the Magistrate's order—

HELD: Application granted. Orders set aside and remitted to the Magistrates' Court for directions and re-determination.

1. Contempt of court is a serious criminal offence which requires a Magistrate to ensure that an alleged contemnor has a fair hearing. In *Zukanovic v Magistrates' Court of Victoria at Moorabbin* J Forrest J considered the steps necessary to be taken by a Magistrate prior to determining a charge of contempt of court under s133 of the *Magistrates' Court Act* 1989 (Vic).

Zukanovic v Magistrates' Court of Victoria [2011] VSC 141; (2011) 32 VR 216, applied.

2. Whilst the Magistrate may have thought it sufficient to proceed as he did in view of what had occurred before him only moments before, a fair hearing of the contempt charge required the Magistrate to articulate the charge as a separate step in the proceeding and to do so with sufficient precision to have enabled G. to address submissions on the charge as formulated. The Magistrate had not long before ruled that the privilege against self-incrimination had not been made out during that part of the hearing in which G. had been attending to give evidence. G. was not formally represented during that part of the hearing under s56A of the *Magistrates' Court Act* 1989 (Vic). He was subsequently charged with a failure to answer questions without excuse and of prevarication but was not given details of the charge beyond the earlier ruling which had been made in the context of whether he had reasonable grounds to object to answering questions on the basis of self-incrimination. The conclusion, and the ruling, on that question did not automatically or inevitably mean that G. was in contempt.

3. G. had refused to answer questions claiming reliance upon the privilege against self-incrimination protected by s128 of the *Evidence Act* 2008 (Vic). He was charged with contempt under a different section of a different Act. G. ought to have had the benefit of a sufficient articulation of the charge for consideration of that part of the procedure dealing with that charge under that section. It may have seemed obvious and inevitable to all present that the plaintiff would be found to be in contempt because the Magistrate had only minutes before ruled that G. was not entitled to refuse to answer questions relying upon the privilege against self-incrimination, but a finding of contempt was not an automatic consequence of the ruling which required no separate process to be followed. The finding of contempt in this case required the laying of a charge under a particular section and carried with it the right and obligations considered by Forrest J in *Zukanovic*.

4. The failure by the Magistrate to take a plea was contrary to the principles as enunciated in *Zukanovic*. For present purposes it may be sufficient to note that s134 did not depend upon or use the words "exceptional circumstances" as a factor in the finding of contempt or in the imposition of a penalty.

5. The absence of an articulation of a separate charge of contempt and the apparent treatment of the ruling and direction in the context of s128 of the *Evidence Act* 2008 during a hearing under s56A of the *Magistrates' Court Act* 1989 (Vic) as sufficient for the finding of contempt under s134(2) of the *Magistrates' Court Act* 1989 (Vic) were revealed on the face of the record and constituted a misconception of the nature of the function which the learned Magistrate was performing.

Per Pagone J:

"... 11. The first ground relied upon in challenge of the Magistrate's decision is that of error on the face of the record. The error was said to lay in the learned Magistrate's failure to adopt the steps identified in *Zukanovic v Magistrates' Court of Victoria at Moorabbin*.[7] It was submitted that consistently with *Zukanovic* the Magistrate's invocation of the jurisdiction under s134(2) required "a direction to arrest, a charge being laid, being informed of the charge by way of adequate particulars, and an opportunity to plead".

12. Contempt of court is a serious criminal offence[8] which requires a Magistrate to ensure that an alleged contemnor has a fair hearing.[9] In *Zukanovic v Magistrates' Court of Victoria at Moorabbin*[10] J Forrest J considered the steps necessary to be taken by a Magistrate prior to determining a charge of contempt of court under s133 of the *Magistrates' Court Act* 1989 (Vic). His Honour reviewed the authorities and identified what needs to be done as follows:

First, to set out the charge. This could be done either orally or in writing. What was essential was that Mr Zukanovic understood the charge the Magistrate was laying.

Second, to afford Mr Zukanovic the opportunity to consider the charge and if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.

Third, to give Mr Zukanovic the opportunity to state whether he pleaded guilty or not guilty to the charge.

Fourth, in the event that Mr Zukanovic pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.

It may be necessary (as was argued in *Zukanovic*) to take care not to construe ss133 and 134 by reference to each other in all respects, but the principles enunciated by his Honour which I have set out above have ready application to a charge of contempt under s134 as much as under s133. In this case it was submitted for the DPP that the steps needed to be followed in laying, considering and finding a charge of contempt may fairly be said to have been followed by the Magistrate. The plaintiff was said to have been given an opportunity to consider the charge in general terms and he did have access to legal advice. The plaintiff was said to have had an opportunity to state whether he pleaded guilty or not guilty albeit that it may have occurred implicitly in his counsel's submissions on penalty. In that context Mr Burns had submitted to the Magistrate that what had occurred "in relation to contempt is contempt" and that the plaintiff had answered some questions as far as they could be answered but that in relation to his answer about whether the plaintiff was a member of Hell's Angels the contempt was "at the lower end of the scale because he has co-operated with the material questions". The plaintiff was also said to have been given an opportunity to present evidence and to make submissions relevant to the determination of the charge in the context of having been asked more than once about the basis upon which he refused to answer questions.

14. ... The plaintiff had refused to answer questions claiming reliance upon the privilege against self-incrimination protected by s128 of the *Evidence Act* 2008 (Vic). He was charged with contempt under a different section of a different Act. The plaintiff ought to have had the benefit of a sufficient articulation of the charge for consideration of that part of the procedure dealing with that charge under that section. It may have seemed obvious and inevitable to all present that the plaintiff would be found to be in contempt because the Magistrate had only minutes before ruled that the plaintiff was not entitled to refuse to answer questions relying upon the privilege against self-incrimination, but a finding of contempt was not an automatic consequence of the ruling which required no separate process to be followed. The finding of contempt in this case required the laying of a charge under a particular section and carried with it the right and obligations considered by Forrest J in *Zukanovic*.

... 18. It was also contended that the learned Magistrate erred in not formally taking a plea upon the charge of contempt and that in considering the penalty his Honour revealed an error in the construction of s134 by requiring that the plaintiff was guilty "unless exceptional circumstances" were made out. The failure to take a plea is something which the learned Magistrate ought to have done and his failure to have done so was contrary to the principles as enunciated in *Zukanovic*.

19. The second ground relied upon in challenging the decision is that the plaintiff was denied procedural fairness. It was submitted in answer to that ground that the Magistrate had informed the plaintiff "early on in the compulsory examination" that if he failed to answer any lawful questions he "may be charged with contempt" under s134 of the *Magistrates' Court Act* 1989 (Vic). This response, however, does not address the need for the clear articulation of the charge and the need to take the other steps set out in *Zukanovic*. In *Coward v Stapleton*[33] it was said:

[I]t is a well-recognized principle of law that no person ought to be punished for contempt of court

> unless the specific charge against him be distinctly stated and an opportunity of answering it given to him.[34]
>
> The duty was not discharged by an earlier warning of the risks of a failure to answer questions. What ought to have occurred was an articulation of the charge said to come within s134(1) of the *Magistrates' Court Act* 1989 (Vic)...."

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[7] [2011] VSC 141; (2011) 32 VR 216.
[8] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694, [5] (Spigelman CJ); *Rich v Attorney-General (VIC)* (1999) VSCA 14; 103 A Crim R 261; *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [37]; (2011) 32 VR 216 (J Forrest J).
[9] *Fraser v R* (1984) 3 NSWLR 212, 224-5; 15 A Crim R 58 (Kirby P and McHugh JA); *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [37]; (2011) 32 VR 216.
[10] [2011] VSC 141; (2011) 32 VR 216.
[33] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.
[34] *Ibid* 579-8 (Williams ACJ, Kitto and Taylor JJ).

Per Pagone J in *Green v Magistrates' Court of Victoria & Anor* [2011] VSC 584; MC 39/2011, 16 November 2011.

(c) ON APPEAL
HELD: Appeal dismissed.
1. Strict compliance with the demands of procedural fairness is required to ensure not only that a court provides a just and open-minded hearing, but also that this is apparent to the accused and to the world.

2. The differences that exist between s133 and s134 of the *Magistrates' Court Act* 1989 are ultimately superficial and do not support the proposition that the procedural steps identified in *Zukanovic v Magistrates' Court* are inapplicable to the forms of contempt recognised in s134. This is so for the very reason that those steps are no more than an expression of the fundamental principle that where the rules of procedural fairness apply, as they do here, 'the party liable to be directly affected by the decision is to be given the opportunity of being heard' and this entails being given the opportunity to address the decision-maker on those issues which are to be determinative of the allegation against him.

3. No doubt J Forrest J in *Zukanovic* did not intend that the procedural steps he identified were to be treated as a set of rigid prescriptive rules that bore no capacity to adapt to the circumstances of a proceeding. The steps set out in *Zukanovic* were no more than an expression of the principle in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128 that 'no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him'.

4. The failure by the magistrate to articulate any charge against Green at all, and to consider laying a charge only after he had determined the charge proven, together with the absence of any opportunity afforded to Green to be heard in relation to the charge before being held in contempt, demonstrated that the magistrate acted in breach of the rules of natural justice. The trial judge was correct to so hold.

> *Green v Magistrates' Court of Victoria and Anor* [2011] VSC 584, approved; and
> *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; (2011) 32 VR 216; applied.

Per Tate JA:

> "... 26. There was discussion as to which additional paragraph of s134 Mr Rose was relying on until he settled on paragraph (e) of s134(1), whereupon the magistrate entertained the application to find Green in contempt.
>
> > "His Honour: And paragraph (e) of s134(1), a person is guilty of contempt of court if in the opinion of the magistrate the person is guilty of wilful prevarication. I'm satisfied with the proceedings as they have gone this morning that those two paragraphs of s134(1), (c) and (e), are made out and *that you are a person who is guilty of contempt and I so inform you of that.*"
>
> 27. It was conceded by the DPP on the appeal, quite properly in my view, that these statements by the magistrate, expressed as they were in conclusionary language, amounted to a finding by the magistrate that Green was in contempt under s134(1)(c) (refusal to answer questions) and s134(1)

(e) (wilful prevarication). While some indication had been given earlier by the magistrate to Green that a refusal to answer a question might amount to contempt, under paragraph (c) of s134(1), there had been no mention in the hearing up until this point that paragraph (e) of s134(1) might also be relied on. Nor was there any explanation given to Green before the finding of contempt was made that s134(1)(e) involved wilful prevarication. Most importantly, there was no articulation of the charge of contempt because there was no identification of which particular questions had elicited a response found to be contemptuous; nor was there an articulation of which of Green's responses amounted to a refusal to answer and which amounted to wilful prevarication. This was despite the fact that the immediately preceding sequence of questions starting with words to the effect, 'Are you known as Greenie?', elicited a variety of responses, including an absence of recollection as well as 'no comment'. Furthermore, this was in the context of an earlier series of questions and answers where many of the answers were substantive and responsive, as indicated by the emphasis I have placed upon particular answers above.

28. The charge of contempt was thus not properly articulated and no formal charge was ever laid. Nor was a separate inquiry conducted into whether any charge of contempt was made out. This could have elicited a defence (for example, had Green misunderstood the question? Did he wish again to claim privilege against self-incrimination in respect of answering particular questions? Might he have made submissions about the state of his memory or the potential duplicity of the charge?) Nor was any plea taken to any charge of contempt (Did Green wish to plead guilty or not guilty to the charge of contempt?).

... 53. It is these unusual features of the summary procedure for contempt that inform what must be done to observe procedural fairness in this context and to avoid the summary nature of the proceedings becoming 'an instrument of oppression to an alleged contemnor'.[40] These considerations underpin the recognition, expressed by the High Court in *Coward v Stapleton*,[41] of the importance of the articulation of a specific charge and the affording of an opportunity to the person charged of answering it:[42]

The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations ... The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law ... either upon the charge itself or upon the question of punishment.

Resting as it does upon accepted notions of elementary justice, this principle must be vigorously insisted upon.

54. Strict compliance with the demands of procedural fairness is required to ensure not only that a court provides a 'just and open-minded hearing, but also that this is apparent to the accused and to the world'.[43]

... 61. Thus, in my view, the differences that exist between s133 and s134 are ultimately superficial and do not support the proposition that the procedural steps identified in *Zukanovic* are inapplicable to the forms of contempt recognised in s134. This is so for the very reason that those steps are no more than an expression of the fundamental principle that where the rules of procedural fairness apply, as they do here, 'the party liable to be directly affected by the decision is to be given the opportunity of being heard'[65] and this entails being given the opportunity to address the decision-maker on those issues which are to be determinative of the allegation against him.[66]

... 76. No doubt J Forrest J did not intend that the procedural steps he identified in *Zukanovic* were to be treated as a set of rigid prescriptive rules that bore no capacity to adapt to the circumstances of a proceeding. I have already indicated that I consider the steps to be no more than an expression of the principle in *Coward v Stapleton* that 'no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him'.

77. The advantage conveyed by the setting out of separate procedural steps, in the way J Forrest J has done, is to emphasise that the order in which these steps take place is of critical importance. In particular, the laying of the charge must come at the commencement of the summary procedure for contempt, not at some later stage. As his Honour said, this can be done orally or in writing – all that matters is that the alleged contemnor understands what he or she is charged with. Extending an opportunity to plead guilty or not guilty to the charge, before the charge is determined, is simply a component part of affording an opportunity to be heard. It may well incorporate, expressly or implicitly, an opportunity to consider the charge, and request an adjournment, legal assistance, or further particulars of the charge. Such matters are clearly contingent on the circumstances of a particular proceeding and may be as compressed or as extensive as the circumstances permit.

> The obligation then to allow an alleged contemnor to raise a defence lies at the heart of procedural fairness in this context, to provide an opportunity of answering the charge so that the court can defer its determination until it has 'considered everything which the [alleged contemnor] may fairly wish to urge in his defence'.
>
> ... 84. The failure by the magistrate to articulate any charge against Green at all, and to consider laying a charge only after he had determined the charge proven, together with the absence of any opportunity afforded to Green to be heard in relation to the charge before being held in contempt, demonstrates that here the magistrate acted in breach of the rules of natural justice. The trial judge was correct to so hold.
>
> ... 93. When the magistrate sentenced Green to 14 days' imprisonment, he said that 'imprisonment is the appropriate punishment, unless exceptional circumstances are made out'. The Director conceded at the hearing of the appeal that there was no authority to support the proposition relied on by the magistrate and the requirement for exceptional circumstances was not consistent with sentencing practice. ..."

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[40] *Rich v Attorney-General (Vic)* [1999] VSCA 14; (1999) 103 A Crim R 261.
[41] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.
[42] *Ibid* 580.
[43] *Kift* [1993] VicRp 51; [1993] 1 VR 703, 709.
[65] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, 162 [32]; (2006) 231 ALR 592; (2006) 93 ALD 300; (2006) 81 ALJR 515, ('*SZBEL*') the Court referring to the judgment of the Full Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone* [1994] FCA 1074; (1994) 49 FCR 576, 590-1; (1994) 127 ALR 699; (1994) 34 ALD 324.
[66] *SZBEL* [2006] HCA 63; (2006) 228 CLR 152, 165 [44]; (2006) 231 ALR 592; (2006) 93 ALD 300; (2006) 81 ALJR 515.

Per Tate JA (Whelan JA and Kaye AJA agreeing) in *DPP v Green & Magistrates' Court of Victoria* [2013] VSCA 78; MC 16/2013, 12 April 2013.

(d) Refusal to appear by video link when directed to do so – whether contempt 'in the face of the court'

1. In this case, a number of the theft charges which came before the Magistrates' Court on 16 December 2011 were indictable. As a consequence an appearance by the appellant was required: s38 and s39 *Criminal Procedure Act* 2004 (WA) 2004 (WA) ('CPA'). The circumstances in which the court can proceed with indictable charges in the absence of the accused are limited: s140 CPA. The appellant's refusal to appear on the video link had the effect of preventing the court from taking necessary procedural steps in respect of those charges on that day. A direction to appear by video link was, in these circumstances, both lawful and appropriate: s77 CPA.

2. On 16 December 2011 the matter was stood down to enable the appellant to comply with the direction. His non-compliance was clearly connected to those continuing proceedings and had the effect of interfering with them. The refusal to comply with the direction was proximate to those proceedings and was, therefore within the meaning of the term 'in the face of the court'.

Per Hall J:

> " ... 38. There is no requirement that an allegation of contempt under s15 of the *Magistrates' Court Act* 2004 (WA) ('MCA') be in writing or be contained in a prosecution notice. This reflects the fact that in some circumstances an alleged contempt may be dealt with immediately. Where a magistrate or justice of the peace decides to deal with an alleged contempt summarily, he or she must, if practicable, orally inform the defendant of the nature and particulars of the alleged contempt: r31(2) *Magistrates' Court (General) Rules* 2005 (WA) ('MCGR').
>
> 39. The importance of the allegation of contempt being precisely formulated was referred to by the High Court in *Macgroarty v Clauson* [1989] HCA 34; (1989) 167 CLR 251 [255] [256]; 86 ALR 167; 63 ALJR 514. That is particularly so where the contempt is said to constitute a statutory offence. The need to deal with some alleged contempts promptly is not inconsistent with the 'fundamental requirement' that 'a person should not be punished for a statutory offence of contempt of court unless the particular offence charged has been distinctly identified and he has been given an adequate opportunity of answering the charge': *Macgroarty* [256], *Lewis v Judge Ogden* [1984] HCA 28; (1984) 153 CLR 682, 693; 53 ALR 53; 58 ALJR 342 and *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.

40. In this case, the magistrate decided that it was appropriate to deal with the alleged contempt summarily. In those circumstances, he had the power to issue a summons or warrant, however it was unnecessary to do so as the appellant was in custody. There was no requirement for a prosecution notice; the only requirement was that the magistrate orally inform the appellant of the nature and particulars of the alleged contempt. In this case the magistrate did more than that, he prepared and had delivered to the appellant a written notice of the alleged contempt. No doubt he did so to ensure that the requirements of procedural fairness were met. That was an entirely appropriate course in the circumstances.

... 73. The phrase 'in the face of the court' is not defined in the MCA but it is one that is familiar in the common law context. On one view, the phrase may be limited to matters where all the issues of fact are in the personal knowledge of the presiding judge: *McKeown v The Queen* (1971) 16 DLR (3d) 390, 408. However, a broader view was taken in *Balogh's* case. In the latter case Lord Denning said:

> Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So 'contempt in the face of the court' is the same thing as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognisance of the court' [287]

74. In *Registrar of the Court of Appeal v Collins* [1982] 1 NSWLR 682, Moffitt J (with whom Street CJ and Hope JA agreed) said that in considering the phrase 'in the face of the court' it would be misleading to adopt a literal meaning of the term as if it had been used today for the first time. Interpretation should be informed by the historical use of the term over time because it can be assumed that the legislature intended to adopt the meaning as developed by the courts. His Honour said that the weight of authority was against contempt so described being confined to conduct which is in the courtroom in the sight of the judge. The purpose of the power is to protect the trial of proceedings then in progress or imminent by ending a threatened disruption and preventing repetition and thereby establishing the court's authority in the proceedings. The essential feature of this type of contempt is proximity between the conduct and the trial of proceedings then in progress or imminent. His Honour then said:

The view of what is sufficiently proximate to necessitate exercise of the power has changed. Originally, so far as can now be discerned, only conduct which could be seen by the judge was regarded as sufficiently proximate, leaving other conduct to be dealt with on indictment....In more modern times the disposition to deal in the same summary way with contempt without resort to trial on indictment has expanded so what is now regarded as proximate has been enlarged to encompass conduct outside the actual courtroom.

The elements of immediacy and necessity to which earlier reference has been made require that before the power is exercised there must be such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides a present confrontation to the trial then in progress. Each case will require consideration on its own facts. The seriousness of the consequences to the trial if the tendency to interfere with it takes effect, the persistence of the contemnor, the likelihood of the continuance and repetition of such conduct unless stopped and the unavailability of unsuitability of any other remedy will all be relevant to whether the time at which and the place where the conduct has occurred is sufficiently proximate for the exercise of the power.

75. In *Fraser v R* (1984) 3 NSWLR 212; (1984) 15 A Crim R 58, 230 a more narrow interpretation of the term was preferred. However, the observations of the court in that case, being *obiter dicta*, related to the expression 'in the face of the court or in the hearing of the court' in the relevant legislation. The inclusion of the reference to 'hearing' influenced the court to give a narrower meaning than the phrase has at common law. See also *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445.

76. There is limited authority in this State as to the meaning of the expression. In *CarewReid v Carew Corp Pty Ltd* (Unreported, WASC, Library No BC9301051, 23 April 1993) Malcolm CJ (with whom Franklyn and Nicholson JJ agreed) observed that the contempt in question:

> [M]ight have been regarded as being in the face of the court had the alleged contempt, or reasonable grounds for suspecting that it had taken place, come to the knowledge of the judge before whom the relevant affidavits were read [5]

77. In the present case the phrase appears in s15(1)(e) without any words that would suggest that a limited meaning was intended. The phrase should be interpreted having regard to its use as developed over time. Accordingly, s15(1)(e) should be interpreted as referring to acts which interfere with the conduct of proceedings that are in progress or imminent. It is not limited to acts which are seen or heard by the presiding magistrate. It may include acts which occur outside the courtroom so long as those acts are proximate to the proceedings and have the effect of, or tendency to, interfere with them.

... 112. As I have said, the maximum penalty for contempt in the Magistrates' Court is a fine of $12,000 or imprisonment for not more than 12 months: s16(4) MCA.

113. The purpose of punishment for contempt is to ensure 'the undisturbed and orderly administration of justice in the courts according to law': *R v Razzak* [2006] NSWSC 1366; (2006) 166 A Crim R 132 [39] quoting *Registrar of the Court of Appeal v Maniam (No 2)* (1992) 26 NSWLR 309, 314 (Kirby P); *Attorney General v Times Newspapers Ltd* [1974] AC 273, 302; [1973] 3 All ER 54; [1973] 3 WLR 298.

114. The factors relevant to sentencing for contempt were summarised by Dunford J in *Wood v Staunton* [1995] NSWSC 61; (1996) 86 A Crim R 183. That summary has been referred to with approval in a number of cases from this court, including *Corruption and Crime Commission v Allbeury* [2011] WASC 26; (2011) 205 A Crim R 386 [216] (Buss JA):

> In *Wood v Staunton (No 5)* [1995] NSWSC 61; (1996) 86 A Crim R 183, the defendant was found guilty of contempt of the Royal Commission into the New South Wales Police Service. The contempt was the defendant's refusal to answer a series of questions at the Royal Commission. Dunford J said that relevant matters for consideration in assessing the proper punishment for this type of contempt included:
>
> 1. the seriousness of the contempt proved;
> 2. whether the contemnor was aware of the consequences to himself of what he did;
> 3. the actual consequences of the contempt on the relevant trial or inquiry;
> 4. whether the contempt was committed in the context of serious crime;
> 5. the reasons for the contempt;
> 6. whether the contemnor has received any benefit by indicating an intention to give evidence;
> 7. whether there has been any apology or public expression of contrition;
> 8. the character and antecedents of the contemnor;
> 9. general and personal deterrence; and
> 10. denunciation of the contempt (185).
>
> See also *Principal Registrar of the Supreme Court of New South Wales v Jando* [2001] NSWSC 969; (2001) 53 NSWLR 527 [16] - [18]; 125 A Crim R 473 (Studdert J). In that case, Studdert J also cited *Registrar of the Court of Appeal v Gilby* [1991] NSWCA 235, 20 August 1991), which referred to 'whether the contempt was motivated by fear of harm should evidence be given' [16].

115. A review in *Allbeury* of sentences imposed in other cases showed that there was no discernible range and that the circumstances of the cases varied widely [228] [236]. However, sentences of imprisonment were not rare and had been imposed in those cases of sufficient seriousness.

116. Having regard to the nature of this contempt, its effect upon the proceedings and the persistence of the appellant's refusal to comply despite being given opportunities to do so, a sentence of 1 month's imprisonment was well within the discretionary range. It was important to also ensure that the penalty acted as a deterrent both to the appellant and to others who might be inclined to act in a similar way in the future. There is no proper basis for a claim that the sentence in this case was manifestly excessive. ..."

Per Hall J (Supreme Court of Western Australia) in *Mansell v Mignacca-Randazzo* [2013] WASC 66; MC 23/2013, 5 March 2013.

(e) Defendant admitted using a camera to film a witness in court giving evidence in a criminal trial before a judge and jury

Rakete ('R.') used a digital camera to film a Crown witness giving evidence in court. Whilst seated in a position from which he had a direct and unobstructed view of the witness box, R. held the camera roughly at low chest height and recorded audio and visual images of the witness giving evidence. R. was approached by a Sheriff's officer and deleted the images on his camera. He was escorted from the courtroom, the camera seized and subsequently charged with two offences firstly, with doing an act with the intention of interfering with the administration of justice and secondly, that this was done in a manner which had the tendency to interfere with the administration of justice. At the trial, R. pleaded not guilty to each charge.

HELD: Defendant guilty of contempt in that he acted in a manner which had a tendency to interfere with the administration of justice but not guilty of doing an act with the intention of interfering with the administration of justice.

1. The test that applies to the second charge requires a Court to be satisfied beyond reasonable doubt that the defendant's act in filming the witness was an act done in a manner that had a tendency to interfere with the administration of justice. That test is objective. An intention to

interfere with the administration of justice is not necessary to constitute a contempt; the critical question is whether the act is likely to have that effect, but the intention with which the act was done is relevant and sometimes important.

Lane v The Registrar of the Supreme Court of New South Wales (Equity Division) [1981] HCA 35; (1981) 148 CLR 245 at 258; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529;

Attorney-General v Butterworth (1963) 1 QB 696; [1962] 3 All ER 326; [1962] 3 WLR 819;

John Fairfax & Sons Pty Ltd v McRae [1955] HCA 12; (1955) 93 CLR 351; [1955] ALR 265, applied.

2. At one level there was evidence in the present case that the defendant's actions did in fact interfere with the administration of justice in that the defendant was escorted from the court following a request by a Sheriff's officer that he leave. Even if on one view that was only at the lower end of the scale of seriousness, it must clearly be regarded nevertheless as an interference with the administration of justice. It was at least potentially and probably actually disruptive to the court process and to the smooth and efficient running of the trial.

3. More particularly, the use of a camera in the courtroom during this trial would have been something that none of the jurors would be likely to have observed at any time before in the course of this particular trial up to that point. It was also a reasonable inference that none of the jurors would have experienced the use of a camera by an apparently unauthorised private person filming from the public gallery at any time previously in other similar circumstances either. A distraction of this sort, potentially interfering with the concentration and focus of jurors and diverting their attention from the very important task confronting them, would clearly have a tendency to interfere with the administration of justice. The fact that there was no evidence to suggest that the witness was not intimidated by what R. did or whether he was aware of what R. was doing was not relevant.

Per Harrison J (NSW Supreme Court):

"... 41. The test that applies to the second charge permits me to be satisfied beyond reasonable doubt that the defendant's act in filming the witness was an act done in a manner that had a tendency to interfere with the administration of justice. That test is objective. As was said by the High Court of Australia in *Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* [1981] HCA 35; (1981) 148 CLR 245 at 258; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529:

> "An intention to interfere with the administration of justice is not necessary to constitute a contempt; the critical question is whether the act is likely to have that effect, but the intention with which the act was done is relevant and sometimes important (*Attorney-General v Butterworth* (1963) 1 QB 696 at pp725-726 and see at pp722-723; [1962] 3 All ER 326; [1962] 3 WLR 819; *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351, at p371; [1955] ALR 265)."

42. At one level there is evidence in the present case that the defendant's actions did in fact interfere with the administration of justice, even though the evidence has not satisfied me that the defendant intended that his actions should have that result or effect. The defendant was escorted from the court following a request by a Sheriff's officer that he leave. Even if on one view that is only at the lower end of the scale of seriousness, it must clearly be regarded nevertheless as an interference with the administration of justice. It was at least potentially and probably actually disruptive to the court process and to the smooth and efficient running of the trial.

43. More particularly, the use of a camera in the courtroom during this trial would have been something that none of the jurors would be likely to have observed at any time before in the course of this particular trial up to that point. It is also a reasonable inference that none of the jurors would have experienced the use of a camera by an apparently unauthorised private person filming from the public gallery at any time previously in other similar circumstances either. A distraction of this sort, potentially interfering with the concentration and focus of jurors and diverting their attention from the very important task confronting them, would clearly have a tendency to interfere with the administration of justice.

... 49. I find the defendant Te Rana Rakete guilty of contempt on the second charge in that I am satisfied beyond reasonable doubt that he performed an act that had a tendency to interfere with the administration of justice. ..."

Per Harrison J (NSW Supreme Court) in *Prothonotary of the Supreme Court of NSW v Rakete* [2010] NSWSC 5; MC 02/2010, 14 January 2010.

(f) Suppression order made by magistrate prohibiting publication identifying witness – order posted on court door – order referred to "witness A" – witness' name published interstate

Where a suppression order made by a Magistrate prohibited publication of the true identity of "witness A", the order was not unclear, uncertain or ambiguous. Whilst it was true that "witness A" could not be identified by reference to the order itself, the reference to "witness A" was a reference to a particular person identified in the committal proceedings and known to the court and the parties. The identity of "witness A" was readily capable of ascertainment by any person having notice of the order and wishing to publish material concerning the proceedings. Further it would defeat or frustrate the purpose of any order protecting a person's safety if the person's identity were disclosed in the order posted on the court door.

Per Mandie J:

> "... 59. A meaningless order would clearly be unenforceable (*Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; (1965) 112 CLR 483, 492; [1966] ALR 387; (1965) 39 ALJR 32 per Barwick CJ) and could not be the subject of a contempt proceeding. An order should be clear, precise and unambiguous, (See *Iberian Trust Ltd v Founders Trust and Investment Company Ltd* [1932] 2 KB 87; [1932] All ER 176; 48 TLR 292; *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; (1965) 112 CLR 483, 516; [1966] ALR 387; (1965) 39 ALJR 32 per Owen J; *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd* [2003] VSC 201; *Scott v Evia* [2007] VSC 15; *R v Australian Broadcasting Association* [2007] VSC 498) although, in the case of an undertaking to the court, Barwick CJ did express some qualifications to this principle: *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; (1965) 112 CLR 483, 492; [1966] ALR 387; (1965) 39 ALJR 32.
>
> 60. However, in the present case, I do not accept the defendants' submission that the order is unclear, uncertain or ambiguous. It is true that "witness A" cannot be identified by reference to the order itself but I am satisfied, and the contrary was not suggested, that the reference to "witness A" was a reference to a particular person identified in the committal proceedings and known to the court and to the parties. Thus, the identity of "witness A" was readily capable of ascertainment by any person having notice of the order and wishing to publish material concerning the proceedings, and that, in my view, is sufficient for the validity of the order.
>
> 61. As the DPP contended, it would defeat or frustrate the purpose of any order protecting a person's safety (such as a police informer) if the person's identity was disclosed in the order that had to be posted on the court door. (It would no doubt be relevant to conviction or, at least, to penalty if a person contravening the order had no knowledge of the identity of "witness A" and the "contravention" was innocent and unintended.)
>
> ... 70. I do not consider that the DPP has provided any support for his submission that the territorial presumption cases no longer accurately represent the law.
>
> 71. In my view, given the absence of express provision to the contrary, the local and territorial rule applies to the interpretation of s126 of the *Magistrates' Court Act*. That section creates an offence, namely contravention of any order made and posted thereunder. It should be presumed that Parliament intended the conduct constituting such contravention to have occurred in Victoria. It follows that the power to make an order proscribing conduct, including publication of material, must likewise relate to conduct occurring in Victoria.
>
> ... in my opinion, if the Orders are properly treated, for the reasons already given, as prohibiting publication only in Victoria, their purpose cannot be said to be frustrated by publication elsewhere. Further, if it be relevant, I am not satisfied, on the evidence adduced by the DPP, and also having regard to the publicity and available information about witness A throughout the world, that the publication of the said newspaper articles in New South Wales and Queensland had any tendency to interfere with or obstruct the due administration of justice. ..."

Per Mandie J in *R v Nationwide News Pty Ltd* [2008] VSC 526; (2008) 22 VR 116; (2008) 222 FLR 295; MC 54/2008, 4 December 2008.

(g) Address to jury by barrister – suggestion by barrister that trial judge's attitude adverse to accused and that trial judge one-sided – whether wilful insult to judge – whether contempt of court

L., a barrister, representing an accused in a criminal trial for conspiracy, and whilst addressing the jury on the accused's behalf, made remarks capable of the interpretation that the trial judge had expressed a consistently adverse view of the accused's case and its presentation, that the trial judge's treatment of it was one-sided, and that accordingly, there was a real risk that the trial judge's summing up would be of the same character. The trial judge, concerned about the effect which these remarks would have on the jury, discharged the jury without verdict, and indicated that L. should be dealt with for contempt of court. After hearing submissions the following day, the trial judge convicted L. and fined him the sum of $500. In

proceedings by way of *certiorari*, the imposition of the fine was quashed on the ground that the trial judge failed to provide L. an adequate opportunity to adduce evidence as to the question of penalty; however, the order nisi challenging the conviction was discharged. L. appealed against the conviction.

HELD: Appeal allowed.
(1) In construing the expression "wilfully insults" in s54A(1) of the *County Court Act* 1958, the word "wilfully" means "intentionally" or "deliberately", and imports the notion of purpose.

(2) It is recognised that in representing a client, counsel may be required to plead his client's case fearlessly and with vigour and determination, whilst having at the same time an overriding duty to the court, to the standards of the profession and to the public.

(3) Proceeding on the basis that L.'s remarks were relevant to the issues to be determined by the jury, and germane to his client's case, it could not be said – although the question is by no means easy to answer – that L.'s remarks were insulting or intended to be so, or that they trespassed beyond the bounds of legitimate advocacy.

(4) Accordingly, although L.'s conduct was extremely discourteous, perhaps offensive, it could not be said to constitute a contempt of court.

Obiter:
(a) The contempt power is rarely, if ever, exercised to vindicate the personal dignity of a judge.
(b) The summary power of punishing for contempt should be used sparingly and only in serious cases.
(c) The charge of contempt should specify the nature of the contempt, i.e., that it consists of a wilful insult to the judge, and the alleged insult should be identified.

Per The Court (Mason, Murphy, Wilson, Brennan and Dawson JJ):

> "... a person who wilfully insults a judge in the course of proceedings in court does something which necessarily interferes, or tends to interfere, with the course of justice. In construing the expression "wilfully insults" and in evaluating the relevant part of the appellant's address we must keep firmly in mind the high responsibility which counsel has to ensure that his client's case is fully and properly presented, especially at a criminal trial. It has been recognized on many occasions and by judges of great distinction that the responsibility of counsel in representing his client may require him to plead his client's case fearlessly and with vigour and determination. At the same time it has always been recognized that counsel has "an overriding duty to the court, to the standards of his profession and to the public", to quote the words of Lord Reid in *Rondel v Worsley* [1969] UKHL 1; [1970] AC 132 at p227; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470.
>
> This overriding duty requires him to "contribute to the orderly, proper and expeditious trial of causes in our courts" (*Saif Ali v Sydney Mitchell & Co* [1978] UKHL 6; [1980] AC 198 at p233; [1955-95] PNLR 151; [1978] 3 All ER 1033; [1978] 3 WLR 849). It was for this reason that the Full Court of the Supreme Court of New South Wales in *Ex parte Bellanto re Prior* (1963) 63 SR (NSW) 190, at p204; 80 WN (NSW) 616; [1963] NSWR 1556, after acknowledging the necessity for "courage and firmness" on the part of counsel and after expressing agreement with Lord Denning's discussion in *The Road to Justice* (1954) at pp55-56 of Lord Erskine's conduct in the celebrated case of the *Dean of St Asaph* (1792) 21 Stair Rep 847, observed that "courage and courtesy should go hand in hand".
>
> However, mere discourtesy falls well short of insulting conduct, let alone wilfully insulting conduct which is the hallmark of contempt. The freedom and the responsibility which counsel has to present his client's case are so important to the administration of justice, that a court should be slow to hold that remarks made during the course of counsel's address to the jury amount to a wilful insult to the judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client. This is not to say that comments made in counsel's address, apparently relevant to the client's case, may not constitute a contempt. Counsel might wilfully insult a judge "under colour of addressing the jury", to use the words of Blackburn J. Or he might yield to the temptation of seeking to divert the jury's attention away from the issues by promoting a dispute with the judge, in the belief that this tactic would advantage his client. A deliberate manoeuvre of this kind, calculated to interfere with the due course of the trial, would amount to a contempt, even if it involves no insult to the judge, for example, under pars (c) or (d) of s54(1).
>
> But when the remarks which are said to be wilfully insulting are relevant to the issues to be determined by the jury and are germane to the client's case, the context in which they are to be found is, generally speaking, unlikely to stamp them with the imprint of a deliberately insulting message. If the words

bear that character in such a context, it is because they convey, according to their primary or natural and ordinary meaning, a wilful insult.

... The main thrust of the comments made by the barrister, which we have just quoted, perhaps obscured by the manner in which they were expressed, was to inform the jury that they needed to distinguish between the judge's observations on the facts and his observations on the law, to point out that the jury was at liberty to disregard the observations on the facts and to urge the jury to treat them with caution, because his Honour's attitude, as manifested in some instances during the trial, and mentioned later in the address, was adverse to Paul and to the way in which the appellant presented his defence. This message, which might have been expressed simply, forcefully and unoffensively, was complicated by the melodramatic and unhelpful reference to the role of the Collingwood umpire, a role which was contrasted with that of the judge.

... The critical question then is whether in the way in which he made those points the appellant trespassed beyond the bounds of legitimate advocacy and wilfully insulted the judge. Although the question is by no means easy to answer, we have come to the conclusion that what was said was neither insulting nor intended to be so. As we have already indicated, the appellant's remarks are susceptible of the interpretation that the judge had expressed a consistently adverse view of the accused's case and its presentation, that the judge's treatment of it was one-sided, and that, accordingly, there was a real risk that his summing up would be of the same character. The appellant had no means of knowing in advance what the trial judge would say in his summing up. Having concluded that there was a risk that adverse comments would or might be made, the appellant was placed in the difficult position of endeavouring to counter such comments in advance by raising the matter directly in his address.

The appellant, in embarking upon this delicate undertaking, by his reference to the Collingwood umpire and the statement from the dock, and the manner and tone of his delivery – a matter to which the judge referred – came close to insulting the judge. However, having regard to the interpretation which we place on what the appellant said, namely that his Honour's attitude to Paul's case was adverse and unfair in the sense of being "one-sided", we do not consider that the learned judge could have been satisfied beyond reasonable doubt that the appellant's comments amounted to an insult. The appellant's conduct was extremely discourteous, perhaps offensive, and deserving of rebuke by his Honour, but in our view it could not be said to constitute contempt.

In conclusion three comments should be made. The first is to recall that the contempt power is exercised to vindicate the integrity of the Court and of its proceedings; it is rarely, if ever, exercised to vindicate the personal dignity of a judge (*Ex parte Fernandez* [1861] EngR 556; 142 ER 349; (1861) 10 CBNS 3; (1861) 30 LJCP 321 at p332; *R v Castro*; *Skipworth's Case* (1873) LR 9 QB 219, at p232; *Bellanto* at pp200 and 202).

The second is that the summary power of punishing for contempt should be used sparingly and only in serious cases (*Parashuram Detaram Shamdasani v King-Emperor* [1945] UKPC 25 [1945) AC 264 at p270; *Izuora v R* [1953] AC 327, at p336; [1953] 1 All ER 827; [1953] 2 WLR 700).

The final comment is that the charge of contempt should specify the nature of the contempt, i.e., that it consists of a wilful insult to the judge, and identify the alleged insult. In the result we would allow the appeal."

Per the High Court in *Lewis v Judge Ogden* [1984] HCA 26; (1984) 153 CLR 682; [1984] 53 ALR 53; [1984] 58 ALJR 342; noted 58 ALJ 666; 58 Law Inst Jo 919; MC 17/1984, 15 May 1984.

(h) Contempt of court – in the face of the court – role of barrister in relation to court

T., a member of the legal profession carrying on practice as a member of the Central Australian Aboriginal Legal Aid Service, was representing C. charged with a serious indictable offence. In the course of the committal proceedings, the prosecutor put many leading questions to a witness who was "tribally married" to C. T. made objection "in courteous and proper terms to these leading questions", whereupon M, the magistrate directed the prosecutor not to lead the witness. The prosecutor put another question to which T. objected. The prosecutor reframed the question and put it again, but before the witness could reply, M. spoke to T. in a "loud and forceful manner", to which T. replied:

"The whole situation is a farce, Your Worship, forcing this woman to give evidence against her husband when she clearly does not want to do so. If she were a white person, she would not be required to do so. It seems to me to make a mockery of the whole court process, your worship".

Without "warning, request for apology or explanation" M. told T. to "stand up", and M. then formally charged him with "contempt of court" and adjourned the proceedings to the following morning to enable T. to be legally

represented. The following morning, M. charged T. who pleaded not guilty and was represented by counsel who unsuccessfully sought an adjournment so that the matter could be determined by another magistrate. Submissions and explanations were made on T's behalf, M. found the charge proved and convicted and fined T. $10 in default imprisonment. T. appealed against this conviction—

HELD:

(1) Conviction quashed. The evidence fell far short of that required to establish contempt within the usual meaning of that doctrine.

(2) For words or actions to constitute contempt in the face of the court, they must be such as to interfere or tend to interfere with the course of justice.

Per Muirhead ACJ:

> "... The following day, during the course of argument, the magistrate stated that there were three matters which constituted the contempt. He expressed it in these words: "... the situation is a farce; that I had reached my decision — that I was biased because the person is an Aboriginal, and thirdly, that the proceedings I was conducting was a mockery."
>
> With respect to the magistrate, that was an extreme interpretation. The appellant, who I consider was called upon to reply, was surely referring to "the situation" in which the law required this witness to give evidence against her "husband". His comment that she "clearly does not want to do so" was fair comment and his observations which related to racial disadvantage, whilst again perhaps better not made, obviously related to the law in this sphere not recognizing tribal marriages. His final words were an unnecessary comment, but expressed concern for the processes of justice.
>
> To interpret them as some type of attack or reflection on the magistrate himself was too hasty a conclusion. In my view, following the very sharp and somewhat colloquial reprimand the appellant had received, the words in reply were neither disrespectful to the court itself nor intended to be so. I consider the magistrate erred in finding himself satisfied beyond reasonable doubt that the appellant thereby conducted himself disrespectfully and as a matter of law I do not consider the words, said as they were, were such as to be capable of constituting an offence against s46(1)(b).
>
> In the case of *Ex parte Bellanto; Re Prior* (1963) SR (NSW) 190 at 201; 80 WN (NSW) 616; [1963] NSWR 1556, the Full Court of New South Wales had this to say about the issue of contempt by a barrister:
>
> > "If in the course of a case a person whether layman or barrister persists in a line of conduct or use of language in spite of the ruling of the presiding judge, he may well be guilty of contempt of court, the offence being disregard of the ruling and setting the court at defiance. But the use of summary procedures to suppress methods of advocacy which are merely offensive, eg to an opposing barrister, or as a measure of reprisal by a judge after a brush with counsel, is to use it for a purpose for which it was never intended."
>
> For words or actions to constitute contempt in the face of the court they must be such as to interfere or tend to interfere with the course of justice: *Parashuram Deteram Shamdasani v King Emperor* [1945] UKPC 25; (1945) AC 264. Their Lordships, dealing again with contempt proceedings against a barrister, stated (at AC 270) and with respect there is much wisdom here:
>
> > "It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction."
>
> In *R v Commissioner of Police; Ex Parte Blackburn (No 2)* (1968) 2 QB 150 at 154-5; (1968) 1 All ER 319 at 320; [1968] 2 WLR 1204, Lord Denning referred to the power to punish for contempt. He said:
>
> > "It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise; more particularly as we ourselves have an interest in the matter. Let me say it once that we never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations."
>
> It was argued before me, and the magistrate made mention of the fact himself, that here we are dealing with a breach of a statutory provision and caution must be exercised before drawing too much upon the "contempt" authorities. But the magistrate initially charged the appellant with contempt and he refers to contempt in the subsequent proceedings. Section 46 is designed to give courts of summary jurisdiction summary powers to prevent interference with their functions. But they are, in fact, provisions designed to cope with contemptuous behaviour and the Territory legislation follows the format of the South Australian legislation in prefixing the section by the words "contempt of court". The section will generally apply to lay persons.

I have no previous experience of it being applied either in South Australia or in this Territory to counsel. Counsel appearing before me were unable to refer to any precedent of such use in this Territory. This is not to say that it should not be applied where the disrespect is manifest and where it does constitute an interference with the court process. But I do regard those authorities which called for sparing use of contempt powers as important and relevant. As Lord Denning has emphasized, it is not the feeling of the judges which matter, it is interference with the processes of justice which are of concern. Here, there was no such interference save that the magistrate elected to adjourn the preliminary examination until the next day. This was his decision which followed the incident; it was not forced on him by the appellant's conduct.

Our courts function, and hopefully function effectively, because of traditional discipline and respect which exists between the bench and the bar. This is almost an inbuilt discipline which depends for its maintenance, not upon sanctions or the threat of sanctions, but by professional recognition that the trial processes can only be successfully so conducted. The roles of the barrister, magistrate and judge are different, but the goal is a mutual one; The proper administration of justice, an important goal to maintain if we seek a free and just society. The barrister's role requires energy and the freedom to plead his client's case with vigour. All concerned must at times exercise restraint and understanding of the pressures to which all are subject. At times there are brushes and misunderstandings; these are part and parcel of litigation.

But justice will suffer if practitioners appearing before a court are constrained in the performance of their responsibilities by fear of finding themselves charged with a quasi-criminal offence by reason perhaps of excess of enthusiasm or comments made in exchanges with the bench, particularly unguarded comments. The brushes which inevitably occur can generally be dealt with the patience and restraint on the part of all concerned. Practitioners are bound by codes of professional conduct by well established ethics. If professional misconduct occurs, it can always be dealt with under the *Legal Practitioners Act*.

For the reasons set out above. I am satisfied that the learned special magistrate was in error and the conviction was wrongly entered. As the appellant's professional reputation is involved (and he was originally charged by the magistrate with contempt) I add that the evidence fell far short of that required to establish contempt within the usual meaning of that doctrine. The conviction is quashed. No order as to costs."

Per Muirhead ACJ (Northern Territory Supreme Court) in *Tippett v Murphy* (1982) 16 NTR 13; (1982) 62 FLR 183; MC 06/1983, 3 September 1982.

(i) Remark made by witness in the witness box to counsel during an inquest – remark treated by coroner as wilful misbehaviour

During an inquest, E., a witness said to counsel from the witness box "You'd better watch out for yourself when I get out of this court. ... He's a liar, a thief and a cheat for saying that". Without either charging E. with any alleged offence and without giving E. any opportunity to say anything further, the Coroner stated that he was of the view that what E. had said amounted to wilful misbehaviour and that the court might accept an apology and might remit the punishment in whole or in part. E. made his apology which the Coroner regarded as a qualified apology and then imposed a sentence of one month's imprisonment. Upon appeal—

HELD: Coroner's order quashed.

1. The expression "wilful misbehaviour" is not defined in the sections referred to, but the words "wilful" and "misbehaviour" are words well known to the law and in the context which the phrase appears in s46(3) of the *Magistrates' Courts Act* 1971 and s7 of the *Coroners Act* connotes misbehaviour which is deliberate and intentional, and it may include the spoken word. The conduct complained of, however, must be wilful, and such proceedings against an offender, though summary in the sense that the tribunal takes it upon itself there and then to deal with the alleged contempt, are nevertheless criminal.

2. No person should be punished for contempt of court, which is a criminal offence, unless the specific charge against the person be distinctly stated, and an opportunity of answering it given to the person. The person must be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment. Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon.

In re Pollard (1868) LR 2 PC 106; and
Coward v Stapleton [1953] HCA 48; (1953) 90 CLR 575; [1953] ALR 743; 17 ABC 128, applied.

3. In the present case, the threat of violence was not initially put to E. and E. was not afforded the opportunity of explaining the interpretation which could have been placed on the words uttered. When E. was afforded the opportunity it was too late because the Coroner had already determined what he was going to do.

Per Anderson J:

> "... In *In re Pollard* (1868) LR 2 PC 106, at p120, the Judicial Committee of the Privy Council were at pains to point out that in their judgment "no person should be punished for contempt of court, which is a criminal offence, unless the specific charge against him be distinctly stated, and an opportunity of answering it given to him". The coroner, having earlier told the applicant that in his opinion his words were contempt, similarly indicated, when the applicant was brought back into court, that he considered the applicant guilty – "I am of the view that that is wilful misbehaviour" – without first giving the applicant an opportunity on either of the two occasions of addressing him.
>
> As appears from the material before me, the coroner, when the applicant was brought back into court, having read to the applicant the relevant parts of the transcript, then stated that he was of the view that what the applicant had said was wilful misbehaviour. The applicant was, to my mind, not charged either formally or informally with any alleged offence, but was informed without any preliminaries that his behaviour constituted wilful misbehaviour, and he was not afforded any opportunity at all to say anything before the coroner expressed his view which was tantamount to a declaration that the applicant was guilty of wilful misbehaviour. Immediately upon the coroner expressing his view that there had been wilful misbehaviour, he proceeded to inform the applicant of his powers to deal with the offence and he went on to say that where a person was guilty of misconduct, the court might if it thought fit accept an apology for the misconduct and might remit the penalty or punishment either wholly or in part.
>
> I consider there are two instances in the case before me where the rules of natural justice have been transgressed. In the first place, I consider that the coroner pronounced his finding of wilful misbehaviour without first giving the applicant an opportunity of answering the charge. The circumstance that the applicant apologised is not to the point, for that took place at a time when, an adverse finding having been stated, he spoke for the first time by way of apology and it was then only on the aspect of penalty in circumstances in which I am of the opinion the applicant reasonably concluded that all that was being sought was an apology.
>
> Indeed, it was not until almost the end of the proceedings that the coroner indicated that he was treating the applicant's words to counsel as a threat of physical violence, and it was only then that the applicant twice endeavoured to protest that he had not stated or intended physical action but that his intention was to report counsel's behaviour to the Bar Council. He had had no earlier opportunity of advancing this alternative interpretation of his words, and it is clear, I think, that the coroner himself had not adverted to this alternative aspect. It is not to the point that he now rejected it or might earlier have rejected it had the applicant had an opportunity of so explaining his interpretation. The fact is that, in my opinion, he had not been afforded the opportunity and that it was then too late in the final stages for the applicant to remedy the oversight, because the coroner had already determined what he was about to do.
>
> As was said by the Full High Court in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 575 at p580; [1953] ALR 743; 17 ABC 128:
>
> > "The person must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment. Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon."
>
> I think, therefore, that grounds A and B of the order nisi have been made out. Ground C, if it is taken to mean that the real gravamen of the offence, i.e. a threat of violence, was not initially put to the applicant, has likewise been made out. The much used and abused assertion that justice must be seen to be done has particular application in contempt matters."

Per Anderson J in *Ericksen v The Coroner* [1980] VicSC 544; [1981] VicRp 22; [1981] VR 205; MC 14/1981, 18 December 1980.

(j) In court the defendant said: "the magistrate does everything you say. He is in your pocket" – defendant in court as an interested observer

1. A court is strictly sitting during the period that a magistrate retires to his/her chambers to

consider a ruling on a submission made in court. The word "sitting" should not be given a restricted meaning so that the court is not sitting when the magistrate is not physically seated on the Bench.

2. Whilst the magistrate was not in error in finding the charge proved, the imposition of the maximum sentence was a strong thing to do. Some greater tolerance should perhaps have been allowed. Defendant sentenced to the time already served namely, 10 days' imprisonment.

Per McGuire DCJ (Queensland District Court):

"... The appellant was neither a party nor a witness to the proceedings then before the court. He was in court as an interested observer. Sanderson informed the magistrate of the appellant's alleged contemptuous utterance. In purported pursuance of s40(3)(b) of the *Justices Act*, the magistrate ordered that the appellant be taken into custody and brought before the court to show cause why he should not be dealt with for contempt of court.

Several hours elapsed between the alleged making of the contemptuous statement and the appellant's apprehension. When apprehended he was in the precincts of the office of the Clerk of the Court. On his being brought to the court the appellant was tried summarily for contempt of court and sentenced to 14 days' imprisonment, the maximum.

In *Westcott v Lord* [1911] VicLawRp 79; [1911] VLR 452; 17 ALR 433; 33 ALT 54, the headnote reads:

> "The jurisdiction of the Court of Petty Sessions to punish for misbehaviour in court is not limited to cases where the justices have themselves observed the misbehaviour ..."

In the case of *Balogh v St Albans Crown Court* (1975) 1 QB 73; [1974] 3 All ER 283, Lord Denning, when speaking of contempt committed in the face of the court, said this:

> "But I find nothing to tell us what is meant by "committed in the face of the court". It has never been defined. Its meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempts for which a judge of his own motion could punish a man on the spot. So 'contempt in the face of the court' is the same thing as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognisance of the court' ..."

With great respect, it seems to me that Lord Denning's rather liberal interpretation of the phrase "committed in the face of the Court" is sensible and realistic. For present purposes, I adopt it. See also *R v Wright (No. 1)* [1968] VicRp 15; (1968) VR 164; *R v Lefroy* (1873) LR 8 QB 134; *In re Johnson* (1888) 20 QBD 68; *R v Judge of the Brompton County Court* (1893) 2 QB 195.

It seems to me that a court is strictly sitting within the meaning of section 40(1)(a) during the period that a magistrate retires to his room to consider his ruling on a submission made to him in court, and before his return to the court to make his ruling. Alternatively, I would be prepared to hold that the magistrate was on his way to or from the court within the meaning of those words in the context of section 40(1)(a) when the alleged insult was made.

When does a Court cease to sit? Is the Court sitting only when the Judge or Magistrate is physically seated on the Bench? I think not. To afford the term 'sitting' as used in Section 40 of the *Justices Act* so restricted and narrow a meaning would, I think, in the circumstances of this case, tend to lend to it an air of artificiality and unreality. I have listened carefully to the submissions of the appellant that the proceedings were not regularly conducted according to law, but it seems to me that the requirements of section 40 and of natural justice were substantially observed. Lord Denning said in *Balogh's case*, referred to above:

> "The power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the Court and to ensure a fair trial. It is to be exercised by the Judge of his own motion only when it is urgent and imperative to act immediately so as to maintain the authority of the Court to prevent disorder, to enable witnesses to be free from fear, and jurors from being improperly influenced, and the like. It is, of course, to be exercised with scrupulous care and only when the case is clear and beyond reasonable doubt."

See also *Keeley v Brooking* [1979] HCA 28; (1979) 143 CLR 162; 25 ALR 45; 40 ALT 139; (1979) ALJR 526; and *Dow v Attorney*-General (1980) Qd R 58; 2 A Crim R 176. It is here that I would like to strike a note of warning and caution: Courts of Justice, although naturally concerned to protect their dignity, integrity and authority when they are contemptuously challenged, should not react too strongly, too precipitously or over sensitively to every apparent insult. Finally, I would say this: Judicial respect is not a purchasable commodity. It cannot be traded in the market place. It cannot

> be commanded. It has to be deserved. It has to be earned. A Judge's authority is not the mailed fist any more than it is the language of sweet reasonableness. It is compounded of intangibles such as trust and confidence, impartiality and humanity – and, of course, learning. And because of this example of contemptuous conduct, in or out of the face of the Court, are, fortunately, rare. The appeal against conviction must fail.
>
> I consider now the appeal against sentence. The appellant was sentenced to a maximum period of 14 days. The Magistrate said in his reasons for judgment the appellant had admitted a previous conviction for a similar offence. I must say, and say emphatically, that I think the Magistrate overreacted on sentence. To impose the maximum period was in the circumstances, I think, a strong thing to do. I would not myself have imposed such a sentence. Bad though the case, on the face of it, might seem, I think some greater tolerance should perhaps have been allowed. I think the appellant has been punished sufficiently. I allow the appeal on sentence. I reduce the sentence to the time already served, namely, 10 days. The appellant will serve no further imprisonment over this matter."

Per McGuire DCJ (District Court of Queensland) in *Winmill v Curr* (1980) 7 Queensland Lawyer 265; MC 04/1981, 14 November 1980.

(k) False assertions by witness of inability to remember

1. The degree of satisfaction required before there can be a conviction for contempt of court is proof beyond a reasonable doubt. Anything less would be inappropriate to a finding of criminal contempt. There is no basis for saying that some higher standard of proof can and should be employed in a case of contempt. The law acknowledges no higher standard of proof than proof beyond a reasonable doubt and, indeed, it is the standard which the law prescribes in criminal cases. No doubt a judge should be cautious in finding that an offence has been committed, but if there is satisfaction beyond a reasonable doubt that the relevant criteria defining the offence, however stringent, have in fact been fulfilled, no more is required.

2. What is required is an evinced intention to leave a question or questions unanswered. The manifestation of that intention may depend upon considerations of degree, which may strike different minds in different ways. There is a difference between the case in which the witness gives a false account in answer to questions, and the case here, where the witness persistently asserts in relation to a number of transactions and events that he cannot recollect them when there is every reason for thinking that he would recall them. In the first case a finding that the witness is not telling the truth does not of itself show that he is refusing to answer. In the second case there are stronger grounds for concluding that the witness is not only giving false answers but is refusing to answer the questions put to him. In such a case a finding that the witness is not telling the truth leads inevitably to the further conclusion that he is refusing to answer, a finding that takes the case across the borderline that separates mere perjury from contempt. Deliberate falsehoods do not obstruct the administration of justice to the same extent as refusals to answer questions. Refusals to answer questions deny to the court evidence which is required for the purposes of the judicial process.

Coward v Stapleton [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128, followed.

3. The judge in the present case correctly applied the principle enunciated in *Coward v Stapleton* when he held that "a witness is guilty of contempt if by his false assertion of inability to remember he deliberately evades questions and so obstructs the administration of justice". And his Honour's specific finding was that "on numerous occasions (the applicant) had sworn falsely that he could not remember, and did so by way of deliberately evading the question. His Honour was amply justified in making a finding of contempt. The applicant persisted in a course of conduct designed to evade answers to questions put to him and thereby to obstruct the trial, conduct which fully justified a sentence of six months' imprisonment for contempt of court.

Per Mason and Aickin JJ (Stephen J agreeing):

> "... 3. The circumstances resulting in the applicant's conviction for contempt may be briefly stated. The applicant was called as a witness by the Crown at the trial at one Gaudion, a police officer, charged on four counts relating to Gaudion's alleged acceptance of a bribe in January 1974 and his solicitation of another in October 1974. It was alleged that the applicant paid the first bribe and that Gaudion urged him to pay the second bribe. In committal proceedings against Gaudion in December 1975, the applicant had given evidence which substantiated the charges. However, at the subsequent trial held before Brooking J, the applicant, when called as a witness, repeatedly professed in evidence that he was unable to remember, either in detail or at all, his evidence in the committal proceedings and the events to which that evidence related.

4. It was with respect to this asserted inability to remember that the learned trial judge eventually directed that, at the conclusion of the trial, the applicant show cause why he should not be dealt with for contempt of court. Accordingly, on 8th May 1978 the applicant, represented by counsel, appeared before his Honour to show cause. The case which the applicant was required to meet, and which was elaborately detailed by his Honour at the outset of the proceedings, was in essence that the applicant on numerous occasions in the course of his evidence at the trial "did not give . . . and did not make any serious attempt to give what could properly be called an answer to the question". After considering the submissions advanced on behalf of the applicant, the learned judge on 9th May 1978 convicted the applicant of contempt.

5. His Honour held the applicant guilty of contempt on the ground that the applicant's conduct in the witness box at the trial had been tantamount to a refusal to answer questions. His Honour relied upon the decision of this Court in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128 as authority for the proposition that "a witness may be said to refuse to answer questions where he gives purported answers which are not real answers and evinces an intention not to answer the questions". Thus, the question which arose in the present case, according to his Honour, and which he went on to answer in the affirmative, was whether he was satisfied beyond reasonable doubt that the applicant had been guilty of "prevarication", a term employed by his Honour to denote "the conduct of a witness who deliberately evades questions by falsely swearing that he has no recollection".

... 9. The judgment in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128 stipulates the circumstances in which a court will be justified in concluding that a witness has been guilty of refusing to answer questions and thus of contempt of court where the witness has, in form, given answers to the questions put to him. What is required is "an evinced intention to leave a question or questions unanswered". We do not read the judgment as saying that such an intention is established only when the purported answers can be described as "plainly absurd" or "palpably false". Indeed, it is clear that these expressions were merely employed by the Court to characterize the evidence of the appellant in that case. What does emerge as a general proposition from *Coward v Stapleton* (1953) 90 CLR at p578 is that "there must be a manifestation in some form of an intention on the part of the witness not to give a real answer". And as the Court observed, the manifestation of that intention may "depend upon considerations of degree, which may strike different minds in different ways".

10. In our opinion the judgment in *Coward v Stapleton* correctly states the law. The principle which it enunciates is in conformity with the approach which has been taken in the United States. There it has been acknowledged that, although false swearing constitutes perjury, if it is apparent from the false testimony that there is a refusal to give information, then there is an obstruction of the administration of justice which is punishable as a contempt (*Collins v United States* (1959) 269 Federal Reporter 2d 745, at pp749-750). Testimony false and evasive on its face is the equivalent of refusing to testify at all (*Richardson v United States; Ex parte Hudgings* [1919] USSC 104; (1919) 249 US 378, at pp382-384; 63 Law Ed 656, at pp658-659).

11. It follows that the learned judge in the present case correctly applied the principle enunciated in *Coward v Stapleton* when he held that "a witness is guilty of contempt if by his false assertion of inability to remember he deliberately evades questions and so obstructs the administration of justice". And his Honour's specific finding was that "on numerous occasions (the applicant) has sworn falsely that he cannot remember, and has done so by way of deliberately evading the question". On our reading of the transcript of the applicant's evidence his Honour was amply justified in making a finding of contempt. The applicant, in our opinion, persisted in a course of conduct designed to evade answers to questions put to him and thereby to obstruct the trial, conduct which fully justified a sentence of six months' imprisonment for contempt of court.

12. We would grant special leave to appeal and dismiss the appeal."

Per Mason and Aickin JJ (Stephen J agreeing) in *Keeley v The Honourable Mr Justice Brooking* [1979] HCA 28; (1979) 143 CLR 162; 25 ALR 45; 53 ALJR 526; MC 47/1979, 21 June 1979.

(l) Unqualified person purporting to appear as a legal practitioner – power of court to punish for contempt

E. appeared before the court stating he appeared for the wife and that he was a barrister of the High Court of Australia. Watson SJ cited him for contempt in the face of the court and sentenced him to be imprisoned for ninety days on condition that he be released after fourteen days upon entering into a recognizance on certain specified conditions.

Contempt in the face of the court may be broadly described as any words spoken or act done in or

in the precincts of the court, which obstructs or interferes with the due administration of justice or is calculated to do so. Such contempt must be proved beyond reasonable doubt.

Per Watson SJ:

> "When the case was called on, one Jack Victor Macklin appeared before me stating that he was appearing for Mrs Slender that he was a barrister of the High Court of Australia, and that he was instructed by a solicitor, Mr McCrudden. I had inquiries made. I confronted Mr Macklin with those inquiries. He re-asserted that he was a barrister. I cited him for contempt and adjourned the matter until today. Mr Macklin appears unrepresented. He claimed there had been a mistake and apologized to the court.
>
> I find on the facts before me that: (a) he is not a legal practitioner; (b) he has had a sexual association with Mrs Slender; and (c) he has committed a grave contempt in the face of this court. Contempt in the face of the court may be broadly described as any words spoken or act done in or in the precincts of the court, which obstructs or interferes with the due administration of justice or is calculated to do so (*Halsbury*, 4th ed. vol. 9 par.5). Such contempt must be proved beyond reasonable doubt (*Balogh v Crown Court at St Albans* (1975) 1 QB 73; [1974] 3 All ER 283; *In the Marriage of Sahari* [1976] FLC 90-086; (1976) 25 FLR 475; (1976) 11 ALR 679; 2 Fam LR 11). In *McKeown v R* (1971) 16 DLR 390 (a Canadian Case) Laskin J said:
>
> > 'Contempt in the face of the court is in my view distinct from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact which may be in dispute because of events occurring outside.'
>
> In applications of this nature the only person having any right of appearance is a party or a legal practitioner (r104(c)). As to the rights of legal practitioners, see s122 of the *Family Law Act*.
>
> The Family Court of Australia is a superior court of record (s21(2)), neither the nature of its jurisdiction nor its deliberate informality should be seen as a temptation to any person, professional or lay, to treat it as other than what it is – a specialized superior court of record. Mr Macklin's offence is grave. He has impersonated a legal practitioner. Such personation does not have to be in relation to an identified person (*R v Allison* (1965) 83 WN (Pt 1) (NSW) 220)."

Per Watson SJ (Family Court of Australia) in *In The Marriage of Slender (MH and DM)* [1977] 29 FLR 267; MC 54/1978, 5 August 1977.

(m) Witness declined to give evidence on the ground that he could not remember due to his drunkenness at the time – magistrate satisfied that witness guilty of prevarication

At a hearing before a Magistrates' Court, a witness deposed that he could not remember whether the contents of a statement made by him were true, due to his state of sobriety. On being satisfied that the witness was not being truthful, he was charged with, found guilty of and sentenced to 14 days for contempt of court by the Magistrate. On appeal—

HELD: Order absolute. Order made quashed.

1. The principles which are to be applied where a person is charged with contempt of court are (1) that there must be material before the Judge that allows him to take cognizance of the alleged contempt; (2) that if there is a *prima facie* case of contempt raised on material properly within the cognizance of the Judge, then the Judge may there and then investigate the matter and deal with it; and (3) that the Judge must afford the person alleged to have committed a contempt an opportunity of defending himself.

Re Quadara, Andrew [1977] VicSC 293, VSC, 9 June 1977, Crockett J, applied.

2. The applicant was never made aware that it was open to him to call evidence upon his sobriety on the evening. Also, the relevance of the evidence of Harris as to the conversation with the applicant on 12th July was not sufficiently brought home to the applicant in the context of the applicant being made aware that it was open to him to give evidence himself or to call evidence to contradict that given by Harris, if such evidence was available.

3. What is emphasized by the cases is whether the applicant had a real opportunity of representing his defence. It is not an arid and formal inquiry, whether in theory he did. It involves the reality of the situation, and it involves the awareness by the applicant that he had an opportunity. In this case, the question is, looking at the evidence, the probabilities and the inferences which arose from the evidence was Carpenter given a real opportunity of defending himself fully in every respect?

4. There was ample evidence on which the Magistrate, when he made his decision, and was entitled to be satisfied beyond reasonable doubt that there had been wilful prevarication. However the difficulty of a court, in a situation such as arose in this case, is all the greater when the court, before charging a person with contempt, has drawn a strong inference from the evidence, that the person has committed the offence. It is particularly in cases where such a strong inference has been drawn, the court needs to be alert to ensure that the right of the person alleged to have committed contempt, to have a full opportunity of defending himself in every respect, be not overlooked, and be not treated as being of lesser importance than in a case where the evidence is more equivocal. A court has to take particular care in a situation such as present where it appeared to the Magistrate that the applicant was flouting the authority of the court, to ensure that the person charged with contempt was accorded in full measure the opportunities of defending himself to which he is entitled. Accordingly, a ground of the order nisi was made out.

Per McGarvie J:

> "... if the applicant remembered the relevant facts but falsely stated that he did not remember them in order to avoid placing the evidence before the court he was guilty of wilful prevarication within that section; *Morriss v Withers* [1954] VicLawRp 15; (1954) VLR 100 at p103; [1954] ALR 233. See also the unreported decision of Brooking J *In the matter of the Contempt of Court Proceedings re David Joseph Hinkler Keeley* [1978] VicSC 205, given on 9th May 1978. Further, there was, in my view, ample material on which it was open to the Magistrate to be satisfied beyond reasonable doubt that in that sense the applicant was guilty of wilful prevarication.
>
> ... there were three respects in which it was submitted on behalf of the applicant that the Magistrate had not complied with the rules of natural justice; (1) that he failed to inform the applicant that he could call witnesses relevant to the issue as to whether or not he was guilty of wilful prevarication; (2) that he failed to warn or inform the applicant of the significance of Constable Harris's evidence which tended to show that the applicant had not been drunk at the relevant time and did remember the incidents; (3) that he failed to give the applicant an opportunity to present a plea in mitigation of sentence.
>
> ... In the judgment of Crockett J in *Re Quadara, Andrew* [1977] VicSC 293, VSC, 9 June 1977 a number of principles are stated as flowing from the authorities and, with respect, I adopt those principles. The first principle stated by His Honour is that there must be material before the Judge that allows him to take cognizance of the alleged contempt.
>
> The second principle is that if there is a *prima facie* case of contempt raised on material properly within the cognizance of the Judge, then the Judge may there and then investigate the matter and deal with it. In that event it is necessary for the Judge to inform the person alleged to be in contempt both of the nature of the offence that he is alleged to have committed and also of the fact that the Judge is contemplating dealing with it. A disclosure to the person concerned of the nature of the offence alleged does not require precise definition in legalistic terms of the particular breach being alleged. It is sufficient if the pith and substance of the matter of the breach alleged have been conveyed in general terms to the person whose behaviour is under scrutiny.
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> ... The third principle mentioned by His Honour was that the Judge must afford the person alleged to have committed a contempt an opportunity of defending himself.
>
> ... The applicant was never made aware that it was open to him to call evidence upon his sobriety on the evening. I take the view also, that in this case the relevance of the evidence of Harris as to the conversation with the applicant on 12th July was not sufficiently brought home to the applicant in the context of the applicant being made aware that it was open to him to give evidence himself or to call evidence to contradict that given by Harris, if such evidence was available.
>
> ... What is emphasized by the cases is that the inquiry for me to make is whether the applicant had a real opportunity of representing his defence. It is not an arid and formal inquiry, whether in theory he did. It involves the reality of the situation, and it involves the awareness by the applicant that he had an opportunity. In each case it depends on the circumstances whether the full opportunity required by the rules of natural justice was given or not. In this case, the question is, looking at the evidence, the probabilities and the inferences which arise from the evidence was Carpenter given a real opportunity of defending himself fully in every respect?
>
> As I have said, there was ample evidence on which the Magistrate, when he made his decision, and was entitled to be satisfied beyond reasonable doubt that there had been wilful prevarication. However the difficulty of a court, in a situation such as arises in this case, is all the greater when the court, before charging a person with contempt, has drawn a strong inference from the evidence, that the

> person has committed the offence. It is particularly in cases where such a strong inference has been drawn, the court needs to be alert to ensure that the right of the person alleged to have committed contempt, to have a full opportunity of defending himself in every respect, be not overlooked, and be not treated as being of lesser importance than in a case where the evidence is more equivocal. A court has to take particular care in a situation such as present where it appeared to the Magistrate that the applicant was flouting the authority of the court, to ensure that the person charged with contempt is accorded in full measure the opportunities of defending himself to which he is entitled. Accordingly, I am satisfied that a ground of the order nisi is made out, to the extent which I have intended."

Per McGarvie J in *R v Director-General of Social Welfare; ex parte Carpenter* [1978] VicSC 353; MC 47/1978, 15 August 1978.

(n) Several defendants entered a Magistrates' Court and made a gesture by raising their left arm with the hand or fist clenched – contempt of court charges found proved

HELD: Rules nisi discharged with costs.

1. It could not be said that the procedure followed by the Magistrate in these cases involved a departure from the rules of natural justice. The charges set out with particularity the conduct complained of and the applicants were given an opportunity to put their side of the case to the Magistrate.

2. It has always been recognised that contempts in the face of the Court may be dealt with immediately and that no other course may sufficiently protect the authority of the Court. It is not without significance that at first instance Lawton J dealt at once with the students whose unseemly conduct in Court gave rise to the appeal in *Morris v Crown Office* [1970] 2 QB 114; [1970] 1 All ER 1079; (1970) 2 WLR 792.

3. It is clearly established that words or acts which interfere or tend to interfere with the course of justice constitute contempt of Court although it has been emphasised that it is not possible to particularise the acts which can or cannot constitute a contempt in the face of the Court. In determining whether particular acts can constitute contempt of Court it has been said that the power to punish for contempt will not be exercised so as to protect a court from honest criticism based on rational grounds or to suppress vigorous advocacy which does not constitute a defiance of the authority of the Court. But these observations have no application to the circumstances of the present case.

4. The question here was whether on the material before him the Magistrate could properly conclude that the acts of the applicants had a tendency to interfere with the course of justice. The expression "interfere with the course of justice" is not confined to a physical disturbance of particular proceedings in a court which prevents the court from attending to its business according to law; it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments.

5. The acts of the applicants were of such a nature as to be capable of being regarded as contempt of court. The gestures were of a kind that had been in the past, and perhaps was now associated with philosophies and attitudes which have consistently denied the rule of law which forms the basis of a truly democratic society. The gestures were not the product of the particular moment but were made in concert in the sense that they were pre-arranged.

6. The Magistrate was clearly entitled to regard these statements as asserting an attitude of opposition to the authority of the Court, and as manifesting a studied disregard of the jurisdiction conferred upon the Court by the law. Indeed, the Magistrate was entitled to regard these statements as confirming an impression which he had gained from his own observation of the gestures which had been made, namely that they were made as gestures of defiance to the authority of the Court. Certainly, he would have been justified in thinking that if gestures of this kind were to be permitted and repeated, they would have had a tendency to lower the authority of the Courts and to weaken the spirit of obedience to the law.

7. Whatever in fact the gestures of the applicants were intended by them to represent, acts, words or other forms of behaviour which give the appearance of defying the authority of a Court

of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the Courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.

Per Asprey, Holmes and Mason JJA (NSW Court of Appeal):

> "... In our opinion it cannot be said that the procedure followed by the Magistrate in these cases involved a departure from the rules of natural justice. The charges set out with particularity the conduct complained of and the applicants were given an opportunity to put their side of the case to the Magistrate.
>
> As we have already said, it has always been recognised that contempts in the face of the Court may be dealt with immediately and that no other course may sufficiently protect the authority of the Court. It is not without significance that at first instance Lawton J dealt at once with the students whose unseemly conduct in Court gave rise to the appeal in *Morris v Crown Office* [1970] 2 QB 114; [1970] 1 All ER 1079; (1970) 2 WLR 792. It was not suggested by the Court of Appeal that the procedure followed was inconsistent with an application of the rules of natural justice.
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> What we have already said is in itself sufficient to dispose of the argument so far as it is directed to common law prohibition, but we should say in addition that, apart from the positive assertion that the Magistrate was under a duty to see that the applicants had the benefit of legal advice and representation, nothing was advanced to support that submission, either by reference to authority or principle.
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> ... It is clearly established that words or acts which interfere or tend to interfere with the course of justice constitutes contempt of Court (*Parashuram Detaram Shamdasani v King-Emperor* [1945] UKPC 25; [1945] AC 264 at 268), although it has been emphasised that it is not possible to particularise the acts which can or cannot constitute a contempt in the face of the Court (*Izuora v R* [1953] AC 327 at 336; [1953] 1 All ER 827; [1953] 2 WLR 700. In determining whether particular acts can constitute contempt of Court it has been said that the power to punish for contempt will not be exercised so as to protect a court from honest criticism based on rational grounds or to suppress vigorous advocacy which does not constitute a defiance of the authority of the Court. But these observations have no application to circumstances of the present case.
>
> ... In our opinion the acts of the applicants were of such a nature as to be capable of being regarded as contempt of court. The gestures were of a kind that has been in the past, and perhaps is now associated with philosophies and attitudes which have consistently denied the rule of law which forms the basis of a truly democratic society. The gestures were not the product of the particular moment but were, as we have said made in concert in the sense that they were pre-arranged.
>
> Even if it could be claimed that they were otherwise capable of having an equivocal character, that claim falls to the ground when attention is given to the statements made by the applicants in the course of the hearing of the Charges. The learned Magistrate was clearly entitled to regard these statements as asserting an attitude of opposition to the authority of the Court, and as manifesting a studied disregard of the jurisdiction conferred upon the Court by the law.
>
> Indeed, the learned Magistrate was entitled to regard these statements as confirming an impression which he had gained from his own observation of the gestures which had been made, namely that they were made as gestures of defiance to the authority of the Court. Certainly, he would have been justified in thinking that if gestures of this kind are to be permitted and repeated, they would have a tendency to lower the authority of the Courts and to weaken the spirit of obedience to the law.
>
> It has been submitted on behalf of the applicants that the acts complained of were "limited to symbolic considerations". Whatever those words may mean, the submission, however, provides no support for the arguments addressed to us. In the first place, it was not made clear to the Magistrate or, for that matter, to this Court, despite our efforts to obtain elucidation of them, that the "symbolic considerations" involved no purpose of defiance or opposition to the authority of the Court. Indeed, the statements by the applicants during the hearing of the charges tend to indicate that the "symbolic considerations" did involve such a purpose. Secondly, whatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the Courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court. ..."

Per Asprey, Holmes and Mason JJA (NSW Court of Appeal) in *Ex parte Tuckerman & Ors; Re Nash & Anor* [1970] 3 NSWR 23; MC 20/1970, 24 August 1970.

(o) Failure of witness to attend Court – whether contempt of court

L. and N. were each served with a summons to attend and produce documents at the Sandringham Magistrates' Court on 8 January, in respect of a civil proceeding involving *A.D.K. Motors (A Firm) v Chuck*. In compliance with the sub-poena, L. appeared, however the matter did not proceed and was adjourned to a date to be fixed not exceeding one month. The matter was re-listed on 20 May, and at the request of Chuck, L. attended Sandringham Court to give evidence. L. had not been notified by A.D.K. Motors nor the Court that he was required to attend pursuant to the terms of the sub-poena earlier served on him. N. had no notice of the hearing on 20 May and did not appear. When L. was unable to produce the documents on 20 May, the magistrate adjourned the proceedings and ordered that L. and N. pay the costs of the adjournment fixed at $1565. Upon originating motion for an order absolute for writ of *certiorari*—

HELD: Order absolute. Order for costs quashed.
1. Section 79(1)(d) of the *Magistrates (Summary Proceedings) Act* 1975, provides that where a court adjourns proceedings to a fixed time and place, any witness sub-poenaed to attend is bound to attend on the adjourned date. In the present case, as the proceedings were adjourned not to a fixed time and place but to a date to be fixed, the witnesses were no longer bound by their sub-poena and any order against them for costs was made without jurisdiction.

2. The power to award costs on an adjournment pursuant to section 97(e) of the *Magistrates (Summary Proceedings) Act* 1975 is only between parties. Accordingly, as the witnesses were not parties to the proceedings, there was no jurisdiction in the court to make an order against them for the costs of the adjournment.

3. Where a witness fails to comply with a sub-poena, the court may deal with the witness for contempt of court pursuant to Section 46(1) of the *Magistrates' Courts Act* 1971. However, the witness must first be charged and the court's power exercised only if the failure by the witness has been without sufficient cause. In the present case, L. could not have been convicted for contempt of court. [Ed note: See now *Magistrates' Court Act* 1989 s134.]

Per Kaye J:

> "... By the terms of the order made on 8 January, the hearing of the complaint was adjourned to a date to be fixed not exceeding one month from the date of the order. In my view, Mrs Lapirone's concession was correctly made for the following reason: by the *Magistrates (Summary Proceedings) Act* 1975, s79(1)(d) it is provided:
>
> > "All persons whose attendance has been required by summons in any case which have been adjourned or postponed shall attend at the time and place to which the case has been adjourned or postponed without the issue or service of any further summons, but shall nevertheless be entitled to additional expenses for so attending."
>
> No order was made in the terms of the provision to which I have referred. In other words, the adjournment was never made to a fixed time and place by which the plaintiffs would know where they were required to attend and when they were required to attend. Thus, the order made on 8 January did not adjourn the complaint in the terms of s79(1)(d). The obligation of the plaintiffs was merely to attend on 8 January. Indeed, the subpoena does not set out or warn them they have a continuing obligation to attend. In the absence of an order made in the terms of s79(1)(d), in my view, the plaintiffs were not under any continuing obligation.
>
> Thus to have bound the plaintiffs to attend further, the Magistrate, in exercising his power under s79(1)(d), might have adjourned the hearing of the complaint to a fixed date and a fixed place. It follows that, having attended on 8 January in answer to the sub-poena, and the hearing not having been adjourned to a fixed time and place, the plaintiffs were no longer bound by the sub-poena. The appearance of the first-named defendant or the attendance of the first-named defendant on 20 May was not in compliance with the sub-poena but voluntarily at the request of Mr Chuck.
>
> It follows the order for costs made against the plaintiffs on 20th May was made without jurisdiction. In any event, the Magistrate had no power to order a witness to pay costs. The failure of a witness, having been summonsed to attend as a witness, and who neglects to produce books required by the summons to be produced, is provided for by s46(1) of the *Magistrates' Courts Act* 1971. That section is in the form of contempt proceedings.
>
> For failure to comply with the summons to attend and to produce documents required, the person so neglecting must be charged, and he is liable to a penalty of imprisonment for not more than one

> month and for a fine of not more than $100.00. Furthermore, the power must be exercised only if the failure has been without sufficient cause. Whether there was sufficient cause was never investigated. The first named plaintiff was not dealt with under that section. Indeed, if he had been, in my view he could not have been so convicted. ..."

Per Kaye J in *Liszczak & Nicola v The Magistrates' Courts at Sandringham & Moe & ADK Motors (A Firm)* [1987] VicSC 467; MC 13/1988, 27 October 1987.

Patrick Street LL B, Dip Crim
21 April 2014