**47/79**

**HIGH COURT OF AUSTRALIA**

# *KEELEY v THE HONOURABLE MR JUSTICE BROOKING*

**Barwick CJ, Stephen, Mason, Murphy and Aickin JJ**

**21 June 1979 — [1979] HCA 28; (1979) 143 CLR 162; 53 ALJR 526; 25 ALR 45**

**CONTEMPT OF COURT – SUMMARY PROCEDURE – EVIDENCE – STANDARD OF PROOF – PROOF BEYOND REASONABLE DOUBT – FALSE ASSERTIONS BY WITNESS OF INABILITY TO REMEMBER. APPLICATION FOR SPECIAL LEAVE TO APPEAR – CONTEMPT OF COURT – COMMITTED IN FACE OF THE COURT – VICTORIAN LAW NOT PROVIDING FOR APPEAL – APPLICATION FOR SPECIAL LEAVE TO APPEAL.**

**HELD: (Per Stephen, Mason and Aickin JJ) Application for special leave to appeal granted and appeal dismissed.**

**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, 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.**

**STEPHEN J:** This is an application for special leave to appeal from an order committing the applicant to prison for six months for contempt of court. No criticism is made of the procedure adopted by the learned primary judge. Instead the attack is confined to one narrow aspect: whether for his Honour to have been satisfied beyond reasonable doubt of the applicant's deliberate untruthfulness in repeatedly denying any recollection of matters asked of him was enough to justify a summary committal for contempt of court. It was contended that something more was required, that the applicant's denials must be such as to be seen by all the world to be plainly absurd, palpably false. It was contended that had that approach been adopted there could not properly have been a committal of the applicant. It was also contended that in any event the sentence imposed was excessive.

2. I have had the advantage of reading the joint reasons for judgment of Mason and Aickin JJ and agree with all that they say concerning the way in which Brooking J approached the question of whether or not the applicant was in contempt.

3. What was said by Judge Learned Hand in *United States v Appel* (1913) 211 Federal Reporter 495 and in subsequent American authorities upon which the applicant relied, like certain passages which appear in the judgments in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573, provides no support for the submission that some quite especially high standard of proof was called for in this case. Because the applicant, unwilling to give evidence, chose to feign forgetfulness rather than openly refuse to testify, a seeming paradox ensued, that of a testifying witness punished for his refusal to testify. The paradox resolves itself when it is recognized that there may exist testimony which is in truth no testimony at all but is only given, in the words of Judge Hand, "to fob off inquiry". Such conduct will necessarily involve the witness in perjury but it will be for his contempt and not for his perjury that the witness is dealt with summarily. Because the very nature of this sort of alleged contempt involves the possibility that the testimony may in fact be honest truth, the witness indeed having made "a bona fide effort to answer the questions" (*United States v Appel* (1913) 211 Federal Reporter, at p496), great care is called for on the Court's part in satisfying itself that he is in fact lying so as to fob off inquiry; what was said in *Coward v Stapleton* (1953) 90 CLR, at p580 does no more than emphasize this. In the present case the judge gave the issue the requisite care, exemplified in his carefully reasoned judgment, and his Honour's approach to the appropriate standard of proof discloses no ground for interfering either with his Honour's finding or with the sentence imposed.

4. Because the applicant's submissions were confined to the one aspect to which I have referred, there being a specific disavowal of any complaint concerning the procedure by which the applicant's contempt was determined, it is inappropriate to canvass in any detail the use of the summary contempt procedure in this case, particularly since the Crown has had no occasion to direct any submissions to this aspect. However in dismissing this appeal I am not to be taken to be in any way dissenting from views that have been expressed in recent years concerning this summary contempt procedure. I have in mind in particular the emphatic views expressed by each of the members of the Court of Appeal in *Balogh v St. Albans Crown Court* (1975) QB 73, esp at pp85-86 per Lord Denning MR, per Stephenson LJ and per Lawton LJ (1975) QB at pp87, 89-91, 92-93 and again in *Weston v Central Criminal Court Courts Administrator* (1977) QB 32, esp at p42 per Lord Denning MR, per Stephenson LJ.(1977) QB at p46 and per Bridge LJ (1977) QB at p48: the judgment of Laskin J (with which Spence J agreed and to which he added certain observations of his own) in *McKeown v The Queen* (1971) SCR 446, which, although in dissent, is not on that account the less important for the light it casts on summary contempt procedure: the judgment of Hope JA in *Attorney-General (NSW) v Mundey* (1972) 2 NSWLR 887, esp at pp911-912. Reference may also be made to the article by Z. Cowen "Some Observations on the Law of Criminal Contempt", University of Western Australia Law Review, vol. 7 (1965), p1, to the Report of the Committee on Contempt of Court, the Phillimore Committee, Cmnd 5794 (1974) pars. 21 and 34, and to Miller, Contempt of Court (1976), pp21-23, 63-65.

5. The concern of all this material is with the occasion for the use of summary contempt procedure, involving, as it sometimes may, a denial of many of the principles of natural justice and requiring, as it did in this instance, that a judge should not only be both prosecutor and adjudicator but should also have been witness to the matters to be adjudicated upon. It was the necessary assumption of these several roles, not readily compatible the one with the others, that placed his Honour in the position of adjudicating upon whether the applicant's conduct constituted contempt only after his Honour had first concluded that the applicant "was falsely claiming that he was unable to remember" and should accordingly be required to show cause why he should not be dealt with for contempt.

6. His Honour was, of course, zealous in safeguarding such rights as the summary procedure afforded to the applicant. The applicant was represented by counsel, with whom his Honour carefully and in detail defined the conduct which was in question. Affidavit evidence on behalf of the applicant was received and much time was devoted to submissions urged on the applicant's behalf. His Honour delivered a reasoned judgment in which he carefully considered all relevant matters of fact and of law. Nevertheless the position of the applicant remained that of an accused facing a charge initiated by the adjudicator himself and his fate depended upon what his Honour

described as "the opportunity of seeking to persuade me that he has not been guilty of contempt". The matter for decision was no simple question of fact, as whether or not he had done some observable physical act while in court, but turned upon an evaluation of the truthfulness of his evidence as to his state of recollection. There was an alternative course open, that of having the applicant face a charge of perjury, to be tried before judge and jury. There was no imperative need for instant punishment, as was shown by the six weeks or so which elapsed between the respondent being required to show cause and the show cause hearing.

7. It has been of just such considerations as these that the authorities to which I have referred have spoken in concluding that summary procedure for contempt not only should be employed most sparingly but should rarely be resorted to except in those exceptional cases where the conduct is such that "it cannot wait to be punished" because it is "urgent and imperative to act immediately" to preserve the integrity of "a trial in progress or about to start".

8. Having regard to the basis upon which this application was initiated and argued, the proper course is, I think, to grant special leave but dismiss the appeal.

**MASON AND AICKIN JJ:** The applicant in this case seeks special leave to appeal against an order made by Brooking J in the Supreme Court of Victoria committing the applicant to six months' imprisonment for contempt of court.

2. Both parties to the application have proceeded upon the view that no appeal from the order lay to the Full Court of the Supreme Court. They may well be correct. Certainly, an appeal to the Full Court under the *Crimes Act* 1958 (Vict.) can only be made by a person convicted on indictment. And there is considerable support for the view that appeals to the Full Court from an order made by a single judge of the Supreme Court under the *Supreme Court Act* 1958 (Vict.) are confined by s42 of that Act to those relating to "civil or mixed" matters, a description which does not comprehend a matter of criminal contempt arising out of the conduct of a criminal trial: see *In re Thompson* (1893) 19 VLR 286; *In re Glassford; Ex parte Ferntree Gully and Gembrook Extension Trust* (1902) 27 VLR 584, at p586; *La Trobe University v Robinson and Pola* (1973) VR 682, at p688. In the absence of argument upon the question, we shall merely assume, without deciding, that the Full Court of the Supreme Court lacks jurisdiction to hear the appeal, and it is upon that footing that we approach the determination of the present application.

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 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".

6. Before this Court, the applicant's counsel submitted that the judge applied incorrect criteria to the applicant's evidence in determining whether he was guilty of contempt. The submission was, in substance, that a judge should not treat a witness' purported answer as a refusal to answer and hence as a contempt of court unless the answer could be characterized as "plainly absurd" or "palpably false", such that an objective bystander could be left in no possible doubt that the witness was trifling with the court. In support of this submission, counsel relied upon *Coward v Stapleton* and certain American decisions.

7. At times the case presented for the applicant seemed to confuse the requisite standard of proof with the relevant legal principles to be applied. It is clear that 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. But 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. We do not regard the decision or the observations in *United States v Appel* (1913) 211 Federal Reporter 495 as supporting a contrary view, despite Judge Learned Hand's statement, "If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court" (1913) 11 Federal Reporter, at p495. It is accepted that in the United States the onus in contempt cases involving false answers given with the intention of refusing to answer questions is proof beyond reasonable doubt (*Richardson v United States* (1959) 273 Federal Reporter 2d 144, at p149; *In re Meckley* (1943) 137 Federal Reporter 2d 310 ).

8. The issue that arose in relation to the applicant's evidence was whether the applicant had in effect refused to answer questions at the trial. The approach to be taken to such an issue was considered by this Court in *Coward v Stapleton*. In that case the appellant was a bankrupt who in his public examination gave answers of which a substantial number represented, in the opinion of the Federal Court of Bankruptcy, "a shuffling and a fantastic attempt to conceal the truth" about his financial dealings. The Court thereupon ordered that the bankrupt be committed for contempt of court upon the basis that he had refused to answer questions. On appeal this Court remarked that "the order must mean that the learned judge considered that some of (the) purported answers not only were untrue but were so plainly absurd as to convey an intention not to give any real answers to the questions to which they related". It was in this context that the Court (Williams ACJ, Kitto and Taylor JJ) went on to make the following comments (1953) 90 CLR, at pp578-579:

> "It is only in a strictly limited class of cases that a witness can properly be convicted of refusing to answer a question which he has purported to answer. A disbelief on the part of the court in the truth of the purported answer is not, without more, a sufficient foundation for such a conviction. The words used, considered in their setting and in the light of the demeanour of the witness, must show that in fact the witness is declining to make any reply which can be properly called an answer to the question. There must be a manifestation in some form of an intention on the part of the witness not to give a real answer. It is essential not to lose sight of the sharp distinction that exists between a false answer and no answer at all. Of course a purported answer may be so palpably false as to indicate that the witness is merely fobbing off the question. His attitude in the box may show that he is simply trifling with the court and is making no serious attempt to give an answer that is worth calling an answer. In such cases it may well be right to say that the witness refuses to answer the question, but it cannot be too clearly recognized that the remedy for giving answers which are false is normally a prosecution for perjury or false swearing, and not a summary committal for contempt. Such a committal can be justified only by a specific finding of an evinced intention to leave a question or questions unanswered, or by a finding of contempt in some other defined respect."

In the event, the appeal was upheld upon the ground that the bankrupt had not been afforded a reasonable opportunity of being heard in his own defence. On this question of procedure, the

Court observed (1953) 90 CLR, at p580:

> "While it is clear enough that a refusal to answer may be inferred from the giving of what purports to be an answer, the power to commit summarily for a refusal so inferred is a power attended by obvious dangers, and extreme caution is required in its exercise. . . . the issue whether statements offered as answers not only are false but imply a refusal to answer may well depend upon considerations of degree, which may strike different minds in different ways. The court, especially when it has itself preferred the charge, must be alert to see that it withholds judgment on the issue until it has considered everything which the witness may fairly wish to urge in his defence."

9. The judgment in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573 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". It is scarcely necessary to make the point that there is a difference between the case such as *Coward v Stapleton*, 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: cf. *In re Michael* (1945) 326 US 224 (90 Law Ed 30) which turned on the application of statutory provisions designed to limit the exercise of the contempt power. Refusals to answer questions deny to the court evidence which is required for the purposes of the judicial process.

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 [1919] USSC 104; (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.

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