06/11; [2011] VSC 141

SUPREME COURT OF VICTORIA

ZUKANOVIC v MAGISTRATES' COURT OF VICTORIA at MOORABBIN

J Forrest J

29 March, 20 April 2011 — (2011) 32 VR 216

CONTEMPT – PRACTICE – CONTEMPT IN FACE OF COURT – CONTEMNOR BLEW AND POPPED BUBBLE GUM IN COURT – CONTEMNOR SENTENCED TO ONE MONTH'S IMPRISONMENT – JUDICIAL REVIEW OF MAGISTRATE'S FINDING OF CONTEMPT – *CERTIORARI* – PROCEDURAL FAIRNESS – SUMMARY PROCEDURE: *MAGISTRATES' COURT ACT* 1989, S133.

When 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.

J FORREST J:

1. On 17 June 2010, the plaintiff Mr Mirza Zukanovic attended the Moorabbin Magistrates' Court with his solicitor to seek the adjournment of a charge of assault which had been laid against him. No doubt he anticipated a brief appearance and returning to visit his father in hospital.

2. Things did not turn out as expected. As a result of blowing bubble gum in the presence of the presiding Magistrate, Mr Zukanovic was convicted of contempt of court and sentenced to one month's imprisonment. By the time of his release on bail, he had been incarcerated for nearly 12 hours.

3. I have concluded that the process by which Mr Zukanovic was charged and convicted of contempt was flawed. His application to quash the Magistrate's order must succeed and he should not have to face this charge again, given the events that transpired that day.

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.

7. I shall in these reasons endeavour to explain how it is that these unfortunate events came to pass and why the Magistrate's decision cannot be allowed to stand.

8. But before I do so I need to make one other point. This case involves the supervisory role of the Supreme Court in its judicial review of a decision of a Magistrate. It is not an appeal against the sentence imposed by the Magistrate, nor is it a review of sentencing practices in the Magistrates' Court.

The events at the Magistrates' Court at Moorabbin

9. Mr Zukanovic and two other defendants, Mr Jaha and Mr Saracevic were charged in relation to an assault on 17 August 2009. Mr Zukanovic was granted bail and was required to attend Moorabbin Magistrates' Court on 17 June 2010.

10. Each of the three defendants were represented by Ms Klopper, an employee solicitor with one year's experience as a qualified practitioner.

11. At about 11.10am,[1] the case was called on before the Magistrate, his Honour Crisp M, and Ms Klopper made what is a routine application that the charge be adjourned to a summary

case conference on 6 July 2010. Mr Zukanovic and Mr Saracevic were seated directly behind her. [2]

12. Up until this point, things had proceeded uneventfully. The application for the adjournment was unopposed and the charges were adjourned to the summary case conference. Then the following occurred:

> HIS HONOUR:---Just a minute, your client's committed a gross contempt in the face of the court. He blew a bubble in court and popped it, I think that's what I heard, kept hearing this clicking noise.
> COUNSEL:---I apologise your Honour.
> HIS HONOUR:---No, no, there's no use apologising. I mean – what's his name?
> COUNSEL:---It's Mirza.
> HIS HONOUR:---Well yes you're charged with contempt in the face of the court for blowing a bubble deliberately and popping it. As I say it's a gross contempt of court you've stood in legal parlance, you've stood the court; you've defied the court's authority by doing that, apparently deliberately. You'll have to decide what you're going to do now, that's it. I am satisfied beyond reasonable doubt at this stage as I should be that having perceived your client doing that, pointing and looking in my direction as he did that he's committed, as I say, a gross contempt so you'll have to – he's no longer free to leave. I won't have him placed immediately in custody but he's not free to leave and you'll have to seek some instructions.
> COUNSEL:---Yes Your Honour, if I could seek some instruction that would be preferable.
> HIS HONOUR:---You are now representing him; no conflict of interest is there?

13. His Honour, after short discussion with Ms Klopper, then added:

> That was an appalling performance, it's a serious contempt I can tell you now.[3] and then adjourned the Court.

14. Notwithstanding the fact that the Magistrate had laid the charge and, on a fair reading of the transcript, found the charge proved beyond reasonable doubt, there was then a curious, indeed strange, twist. The Magistrate (apparently believing it was necessary to comply with the Magistrates' Court Rules), during the course of the adjournment determined to have a written charge drawn up and provided to Mr Zukanovic and Ms Klopper which alleged:

> The accused at Highett on 17 June 2010 being a person in the face of the Moorabbin Magistrates' Court did commit a contempt of that court that in standing to leave the body of the court did deliberately blow and popped a bubble of gum whilst looking in the direction of the presiding Magistrate thereby scandalising the court and challenging its authority.

The charge was said to be laid under s133 of the *Magistrates' Court Act*[4] and was signed by the Registrar of the Court.

15. During the adjournment, Ms Klopper, understandably, contacted the principal of her firm seeking guidance. While she was on the phone, a "prison guard" spoke to Mr Zukanovic and told him that he was not allowed to go anywhere. This was consistent with instructions given by the Magistrate prior to the adjournment.

16. During the break, Ms Klopper also spoke with Mr Zukanovic, stating that:

> ... He admitted blowing the bubble. He stated that he had not meant it as any sign of disrespect and he did not mean to upset the Magistrate. He stated that he did not to do it deliberately.[5]

17. The Magistrate returned to the bench at approximately 12.30pm and then stated that he required Mr Zukanovic to be handed a copy of the charge.[6]

18. The Magistrate then said this:

> ... No difficulty about that well you are equipped with the requisite...documentation now so the matter can proceed, yes.[7]

19. Ms Klopper then proceeded to make a plea on behalf of Mr Zukanovic in the following terms:[8]

> (a) he acknowledged remorse for his actions;

(b) he understood and acknowledged that it was the wrong thing to do in the circumstances;
(c) he had come to court after visiting his father in hospital who had just had a heart attack and was about to return to see him;
(d) he was 20 years of age and working full-time as a painter earning approximately $500 per week;
(e) he had no prior convictions;
(f) he acknowledged that he was ignorant and incredibly rude and "in contempt of court";
(g) that the appropriate disposition was the imposition of a fine.

20. His Honour then delivered his sentencing remarks. He described the incident as "a grave calculated act".[9] He said that:

> I perceived and rightly perceived that the actions by you as quite deliberate and calculated to cause offence to the court.[10]

21. Dealing with the blowing of bubble gum and the charge of contempt, he said as follows:

> Usually it involves expletives on the way out of court but it'd be a very busy magistrate who took too much notice of all of that. Unfortunately though in your case the act was, as I say calculated, involved blowing a very large bubble and popping it whilst looking in my direction. I can only see that as calculated, as I said to you previously and as has been outlined in the charge as a deliberate and calculated attempt to challenge the authority of the court and scandalise the court.
>
> I mention the Frankston situation because any personal insult to the magistrate doesn't matter that's something that's happening all the time. But it occurred to me when I saw it that your act was an expression of contempt to all in the court and to the whole institution so I'm afraid I'm unable to overlook it, there's no prospect of accepting an apology. I certainly wished you hadn't done it but as I say it wasn't the spontaneous act of a fraught, possibly drug affected or alcohol affected out of control defendant so in those circumstances the penalty for the offence is a month's imprisonment, it's not susceptible of a fine because of the gravity of the offence. All right, just take a seat thank you.

Events subsequent to Mr Zukanovic's conviction

22. Mr Zukanovic was taken into custody at about 12.40pm and detained in the cells at the Moorabbin Justice Centre. He was, in the evening, transferred to the Melbourne Custody Centre.

23. During the course of the late afternoon and evening, an application was made to this Court to have Mr Zukanovic released on bail. That application was granted by Hargrave J, and Mr Zukanovic was released from custody at about midnight and remains on bail.[11]

24. This proceeding was issued on 21 June 2010 and seeks an order in the nature of *certiorari* quashing or setting aside the Magistrate's decision. The application is supported by three affidavits of Ms Klopper which, in effect, detail the events at the Magistrates' Court and shortly thereafter.

25. The Magistrates' Court as defendant does not seek to act as a contradictor of Mr Zukanovic's application. Rather, it took what is commonly referred to as the *Hardiman* approach[12] – agreeing to abide by the determination of the Court.[13]

26. The Attorney-General appeared on the hearing as *amicus curiae*, having filed written submissions.[14] This was appropriate as there was no contradictor to Mr Zukanovic's application and important matters of public interest were raised. Indeed, in both discussion and written submissions, I was particularly assisted by counsel for the Attorney-General.

The issues

27. Although the particulars of relief and the submissions on behalf of Mr Zukanovic traverse a large number of issues, essentially the application raises two matters of significance:

- Firstly and primarily, was Mr Zukanovic afforded procedural fairness once he was charged by the Magistrate with contempt?
- Secondly, given that the charge was laid under s133 of the MCA, did the Magistrate follow the correct procedure prior to laying the charge; if he did not, then was he deprived of jurisdiction to determine the charge?

28. A number of other subsidiary issues arose, including the application of the *Charter of*

Human Rights and Responsibilities Act 2006[15], which are dealt with either in the analysis of the two major arguments or at the conclusion of these reasons.

Was Mr Zukanovic afforded procedural fairness?

29. The Magistrate, faced with what he perceived as a contempt in the face of the Court, determined to exercise summary jurisdiction and to hear the charge himself.

30. As Charles JA explained in *Murphy*:

> Summary jurisdiction to deal with contempt of court has long been recognised as a necessary incident of the courts of justice and is a corollary of the unfettered powers courts possess to regulate conduct of their own proceedings.[16]

31. In the Magistrates' Court, summary jurisdiction is provided by s133 which reads as follows:

> **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.

32. The High Court and appellate courts in this country have, on a number of occasions, emphasised that a summary trial for contempt by the same judge is "extremely rare",[17] extraordinary"[18]and should only be adopted in "serious cases".[19] In *Fraser*, Kirby P and McHugh JA said of summary proceedings:

> 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.*(emphasis added and citations omitted).[20]

33. More recently, in *Clampett v Attorney-General (Cth)*[21], Greenwood J[22] 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.[23]

34. In England the Court of Appeal in *Balogh v St Albans Crown Court*[24] described the contempt power as "salutary and dangerous"[25] and to be "exercised with scrupulous care and only when the case is clear and beyond reasonable doubt".[26]

35. However, it is also clear that in cases of urgency or necessity, a court is entitled to hear a summary charge of contempt in the face of the Court as s133 provides. In *Kift v R* the Full Court said[27]:

> The matter that was alleged against the appellant was that she had committed a contempt otherwise than in the face of the court. Accordingly, as his Honour indicated, the procedure which was set in train was an application made under Pt 3 of O.75. *It is helpful to bear in mind that this procedure is different in important respects from the summary procedure which is available where there is a contempt in the face of the court which demands an immediate response from the court. In such a case, which usually arises from events of which the court itself is a witness, special procedures are permitted, including the receiving of hearsay evidence*. Moreover, the alleged contemnor does not have an unrestricted right to cross-examine witnesses against him or her. That this summary procedure is exceptional and to be adopted only where the circumstances clearly demand it is emphasised in the judgments of the Court of Appeal.(emphasis added and citations omitted)[28]

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*[29] 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[30] 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.[31] 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.

38. In *Coward v Stapleton*,[32] the High Court made clear the process necessary for a charge of contempt in the face of the Court:

> ... it 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 ... 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, 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.*[33] (emphasis added and citations omitted)

39. In *Kift*, the Full Court said:-

> It is of particular importance in contempt applications, where the court is often in a sense an interested party, that the judge do whatever is possible to ensure that there be observed not only the requirements of a just and open-minded hearing, but also that this be apparent to the accused and to the world.[34]

40. And finally in *Rich v Attorney-General for the State of Victoria*,[35] 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. (citations omitted)[36]

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.[37]

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.[38] 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.

Did the Magistrate have the power under s133 to determine the contempt charge?

47. Counsel for Mr Zukanovic contended that the Magistrate, in exercising his powers under

s133(2), had failed to comply with a precondition to that power as prescribed in the form of s133(1). He argued that s133(1) required the Court to direct that the alleged contemnor be arrested or that a warrant be issued for his or her arrest. Without such steps, it was said, then the jurisdiction to deal with Mr Zukanovic under s133(2) and the following provisions was not enlivened.

48. This argument could only succeed if it was accepted that:
(a) the exercise of the power under s133 was dependent upon compliance with s133(1); and
(b) that the legislature intended that the direction for an arrest or the issue of a warrant was an essential preliminary for the exercise of power under s133.

49. This submission faced a significant hurdle in the form of the decision of the Court of Appeal in *R v Perkins*.[39] In that case, the Court considered the contempt in the face of court provisions of s137 of the *Victorian Civil and Administrative Tribunal Act*. Sub-sections 2 and 3 of that section are a mirror of sub-ss1 and 2 of s133 (with appropriate alterations to the title of the Court/Tribunal).

50. An identical argument to that put here by counsel for Mr Zukanovic was mounted in *Perkins* to the effect that the exercise of jurisdiction for contempt was dependent upon either arrest or the issue of a warrant. Vincent JA (with whom Phillips CJ and Chernov JA agreed) rejected the submission.

51. Vincent JA noted the use of the word "may" in s137(2) – the equivalent of s133(1) – provided a discretionary power to the Magistrate and concluded that there was no necessity for the enlivening of the Court's jurisdiction for the alleged contemnor to be arrested saying:-

> Recognizing that the word "may" in s137(2) cannot simply be read as "must", for if that were the case, the Tribunal would possess no discretion at all with respect to the arrest of any person alleged to have committed contempt, counsel for the applicant contended that, in effect, it should be read as meaning "may only". There is no foundation by reference to the language or statutory scheme for the adoption of this interpretation. The word "may" should be treated as indicating the presence of an ability to act but not the necessity to do so. [40]

Then his Honour noted the practical consequences of requiring a person to be arrested, before proceeding to determine a charge of contempt:

> The various forms of conduct which can constitute contempt of the Tribunal under s137(1) may occur in the face of the Tribunal, at some other place, in relation to a specific matter or scandalize the Tribunal generally. The acts constituting the perceived contempt may vary from the very serious to the relatively minor. There may be a need, in some cases, to have a recalcitrant individual arrested and brought before the Tribunal. On other occasions, as in the present case, to do so would involve gross overreaction. Recognition of the diversity of situations in which contempt may be committed and the degree of seriousness to be attributed to particular pieces of behaviour is reflected in the dispositions available. In some circumstances, the provision of an adequate apology may be regarded as sufficient. Others may require the imposition of a fine up to $100,000 or imprisonment for a maximum period of five years or both a fine and imprisonment. [41]

Next his Honour observed another consequence which could not have been Parliament's intention – the unnecessary deprivation of the liberty of the alleged contemnor in every case:

> As the applicant rightly contends, the Victorian Civil and Administrative Tribunal is not a court and it possesses no inherent jurisdiction. The only power which it has with respect to contempt is that conferred by s137. No formal requirements with respect to the manner in which charges are to be laid are set out in the section, but the Tribunal is able to determine its own procedure once a person charged with contempt is brought before it. Presumably, if an alleged contemnor refuses to attend or ignores a Notice of the kind served upon the present applicant, the issue of an arrest warrant may, as a matter of judgment, be considered to be necessary. Once before the Tribunal, the individual *must* be informed of the contempt with which they are charged. Thereafter the Tribunal may adopt any procedure that it thinks fit, consistent, of course, with its obligation to accord natural justice to the person charged. An interpretation of s137(2) which would necessitate arbitrary and, I suspect, generally unnecessary deprivation of liberty in every case encompassed by s137 before the matter could be dealt with by the Tribunal, is one which, in the absence of a clear statutory direction to that effect, should be rejected. [42]

There is nothing in s137 itself or in the nature of the power conferred which could give rise to any reasonable suggestion that the jurisdiction of the Tribunal to deal with charges of contempt is dependent upon the exercise of the power under s137(2), still less the kind of arbitrary power already discussed.

His Honour concluded that s137(2) was patently facilitative and not a condition of jurisdiction:

> The Tribunal has been given under s137, the jurisdiction to deal with alleged or perceived acts of contempt. At most, s137(2) is concerned with the manner in which the potential risk of non-attendance of the alleged contemnor before the Board can be secured. The provision is patently facilitative with respect to the jurisdiction conferred by the section. The situation is not one in which:
> "the statute ... establishing [the Tribunal] and conferring its jurisdiction requires that that particular matter [the absence of an arrest warrant] be taken into account ... as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case."[43] (citation omitted)

52. It is not necessary to determine whether I am bound by the decision in *Perkins*,[44] as I am firmly of the view that the reasoning is, with respect, impeccable and directly applicable here. It is entirely consistent with the approach formulated by the High Court in *Project Blue Sky Inc v Australian Broadcasting Authority*.[45] There is no reason to depart from the conclusion reached by the Court of Appeal in relation to an identical provision concerning the same offence.

53. Counsel for Mr Zukanovic sought to rely upon s134 of the MCA as pointing to a different interpretation of s133 than that which *Perkins* dictates. He referred to sub-section (2)(a) which provides 'the Court may order the arrest of the person and, on the person being brought before the Court' then deal with the charge. He submitted that s134 mandates a precondition of arrest because of the use of the conjunctive 'and', in that section in contrast to the disjunctive 'or' in s133(1). It follows, he argued, that where arrest is mandatory on the less serious charge of contempt set out in s134 (the penalties for breach of s133 are heavier than those for breach of s134), then logically, arrest would be required in the case of a more serious charge of contempt in the face of the court under s133. Further, the use of the phrase 'before the Court' required that Mr Zukanovic be brought specifically before the Magistrate in respect of that discrete contempt charge. This, he said, led to the conclusion that arrest was a precondition to jurisdiction.

54. I do not accept this submission. Section 134(1) deals with a number of specific instances of contempt and sets out a process for dealing with these specified forms of contempt whilst s133 sets out a scheme for dealing with contempt in the face of the Court. On that basis alone, it is distinguishable. It would be wrong, I suggest, to endeavour to construe s133 by reference to a separate section dealing with different forms of contempt.

55. In any event I do not accept that s134(2) mandates arrest as a precondition to exercising the contempt power. Section 134(2)(a) is, like s133(1) facilitative, and the considerations set out in Perkins are directly applicable. By use of the word 'may' the Court is given the discretion to have the contemnor arrested in circumstances to which s134(1) apply. As with s133(1), s134(2)(a) is not a statutory precondition to jurisdiction.

56. Finally, it is also of note that in *Murphy*, there was no suggestion by the Court of Appeal that s133 necessitated an arrest before the jurisdiction of the Court was enlivened.[46]

57. In summary, the Magistrate was acting within jurisdiction when he laid the charge of contempt against Mr Zukanovic and this ground of review should be rejected.

Other matters

58. A number of matters were raised in the course of oral argument which I should, out of deference to the helpful submissions made by counsel for Mr Zukanovic and the Attorney-General, address albeit briefly.

59. First, there was discussion as to whether the breach of procedural fairness by a judicial officer preferring a contempt charge was a ground *simpliciter* for an order in the nature of *certiorari*, or whether such a breach was to be characterised as constituting jurisdictional error. The argument, in the context of this case at least, was superfluous, however it was characterised; the inevitable result is that *certiorari* should run.

60. For my part, I am, until convinced otherwise, prepared to treat procedural fairness alone as a proper ground, for the issuing of *certiorari*. I am content to rely upon what was said by the High Court in *Craig v The State of South Australia*:[47]

> Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and "error of law on the face of the record".[48]

61. Whilst I accept that in certain situations, denial of procedural fairness may constitute jurisdictional error[49], I do not think that anything said recently by the High Court in *Kirk v Industrial Relations Commission of New South Wales*[50] as to the scope of *certiorari*, affects the proposition stated in *Craig*. In any event, as I have said, whichever route is taken the result is no different.

62. Second, it was accepted by counsel for Mr Zukanovic and for the Attorney-General that the provisions of the *Charter* did not add anything to the common law position in relation to either the question of procedural fairness[51] or the statutory interpretation of s133 of the MCA.

63. Third, the question of the extent, if any, of the implied powers of a Magistrate to deal with contempt did not require consideration as it was clear that the Magistrate acted under s133 of the MCA.

64. Finally it is not necessary to deal with the allegation of bias made by Mr Zukanovic given my findings as to the deficiencies associated with the hearing of the charge.

Should the charge be remitted to the Magistrates' Court?

65. Having determined to grant *certiorari* and quash the Magistrate's decision, the question now arises as to what else, if anything, is to be done by this Court.

66. Often where *certiorari* runs against an inferior court or an administrative decision maker, directions are given by this Court as to the future disposition of the matter by the body or person whose decision is impugned. It is not necessary to determine on this application whether such a direction is within the power of this Court when granting *certiorari*, as I am not prepared to make any direction in respect of the future prosecution of this charge.

67. I say that for several reasons. First, the charge could not, given what has happened, be determined by the Magistrate who laid it.[52] It must be heard by another Magistrate and the difficulties associated with adducing evidence, although not insurmountable, are significant.[53] Second, and perhaps more importantly, Mr Zukanovic has already been incarcerated for nearly half a day. Finally, I think it would be unfair, given what has happened in this case, to subject Mr Zukanovic to further process even if it be assumed that he would at that hearing be found guilty of contempt.

68. Accordingly, I will not make any direction as to further hearing of the charge.

Orders

69. The decision of the Magistrate on 17 June 2010 sentencing Mr Zukanovic to one month's imprisonment is quashed.

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[1] Affidavit of Ms Sophie Klopper of 21 June 2010 [4] – [6].
[2] Mr Jaha was on remand and did not attend.
[3] T 2.
[4] "MCA".
[5] Affidavit of Ms Sophie Klopper of 21 June 2010 [17].
[6] T 2.
[7] T 2.
[8] T 2-T 3.
[9] T 3.
[10] T 4.
[11] Affidavit of Ms Sophie Klopper of 30 March 2011 [3] – [15]. Bail was subsequently extended by Pagone J on 24 June 2010.

[12] *R v Australian Broadcasting Tribunal: ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13, 15; 29 ALR 289; (1980) 54 ALJR 314. See also the comments in *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186, 200; (1996) 89 A Crim R 403 "*Murphy*".
[13] Letter of 2 August 2010.
[14] Leave to appear as *amicus curiae* was granted by Daly As J on 3 August 2010.
[15] "The Charter".
[16] *Murphy*, 202.
[17] *Keeley v Brooking* [1979] HCA 28; (1979) 143 CLR 162, 170-171, 186; 25 ALR 45; 40 ALT 139.
[18] *Fraser v the Queen* (1984) 3 NSWLR 212, 224-225 "*Fraser*".
[19] *Lewis v Ogden* [1984] HCA 28; (1984) 153 CLR 682, 693; 53 ALR 53; 58 ALJR 342.
[20] *Fraser* 224-225.
[21] [2009] FCAFC 151; (2009) 260 ALR 462; (2009) 181 FCR 473.
[22] Although his Honour was, in part, in dissent on the facts, I do not understand this statement of principle to be in issue.
[23] Ibid, [158].
[24] [1975] 1 QB 73.
[25] Ibid, 91.
[26] Ibid, 85.
[27] [1993] VicRp 51; [1993] 1 VR 703 "*Kift*".
[28] Ibid, 707.
[29] [1997] 2 VR 186, 204; (1996) 89 A Crim R.
[30] *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.
[31] *Fraser,* 224-225.
[32] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.
[33] Ibid 579-580. See also *Varnavides v VCAT* [2005] VSCA 231; (2005) 12 VR 1.
[34] [1993] VicRp 51; [1993] 1 VR 703, 709.
[35] [1999] VSCA 14.
[36] Ibid [39]. See also *Murphy,* 211.
[37] See *Murphy,* 210.
[38] *Witham v Holloway* [1995] HCA 3; (1995) 183 CLR 525 at 545; (1995) 131 ALR 401; (1995) 69 ALJR 847
[39] [2002] VSCA 132.
[40] [2002] VSCA 132, [14].
[41] Ibid, [15]
[42] Ibid, [16].
[43] Ibid, [18].
[44] *Ogden Industries Pty Ltd v Lucas* [1970] AC 113, 127; [1969] 3 WLR 75; *Damjanovic and Sons Pty Ltd v Commonwealth* [1968] HCA 42; (1968) 117 CLR 390, 408-409; [1969] ALR 653; 42 ALJR 102.
[45] [1998] HCA 28; (1998) 194 CLR 355 [93]; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41.
[46] The point does not seem to have been agitated, although the Court examined, closely, the application of s133 to a charge of contempt in the face of the Court.
[47] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[48] Ibid 175-176.
[49] As to other situations see *Re Refugee Review Tribunal & anor: ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6 in which the High Court held that a denial of procedural fairness by an officer of the Commonwealth may result in a decision made in excess of jurisdiction in respect of which prohibition will issue under s75(V) of the *Constitution*.
[50] [2010] HCA 1; (2010) 239 CLR 531, [72]-[73].
[51] See s25 of the *Charter* or the construction of s133(1).
[52] *Murphy,* 212.
[53] *Murphy*, 208.

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