17/84; [1984] HCA 26

HIGH COURT OF AUSTRALIA

LEWIS v JUDGE OGDEN

Mason, Murphy, Wilson, Brennan and Dawson JJ

15 May 1984

[1984] HCA 26; (1984) 153 CLR 682; [1984] 53 ALR 53; [1984] 58 ALJR 342; noted 58 ALJ 666; 58 Law Inst Jo 919

CONTEMPT OF COURT – 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 – ASPECTS OF CONTEMPT POWER DISCUSSED: *COUNTY COURT ACT* 1958, S54A.

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.

MASON, MURPHY, WILSON, BRENNAN and DAWSON JJ: This appeal by special leave arises out of the conviction of the appellant for contempt under s54A(1)(a) of the *County Court Act* 1958 (Vic), as amended, by a judge of the County Court for wilfully insulting that judge in the course of an address to the jury on behalf of the appellant's client in a criminal trial for conspiracy in which the appellant's client was one of three accused. A fine of $500 was imposed in respect of the conviction. In proceedings for relief by way of *certiorari* in the Supreme Court of Victoria, King J quashed the imposition of the fine on the ground that the County Court judge failed to provide an adequate opportunity to the appellant to adduce evidence or advance argument on the issue of penalty. The order nisi, which also sought to challenge the conviction itself, was otherwise discharged. No order for costs was made. In the appeal to this Court the appellant seeks to challenge the conviction.

In the trial the appellant represented an accused named Paul. The co–accused were represented by other counsel. In the course of his address to the jury the appellant made certain remarks concerning the role of a judge in a criminal trial, drawing a distinction between the judge's comments on questions of law and his comment on questions of fact, informing the jury that they were not bound to accept his Honour's views on the facts and inviting them to consider his views on the facts with some care because, in the appellant's view, the judge had shown a strong disposition to favour the prosecution case against the case the appellant had advanced on behalf of his client.

On the following day the judge raised the question whether he should discharge the jury in view of the appellant's remarks. The judge was concerned that the remarks might have a tendency to react adversely in the minds of the jury against the appellant's client and that a warning to the jury to disregard them might have the effect of underlining the incident without removing the tendency. It seems that all the counsel appearing in the case expressed the view that there was no need to discharge the jury. However, his Honour discharged the jury without verdict and indicated that he would hear submissions on behalf of the appellant on the following day as to why he should not be found guilty of contempt of court.

On the following day the appellant was represented by Mr Berkeley QC. The judge did not distinctly formulate a specific charge of contempt. He indicated that five pages of the transcript record of the appellant's closing address to the jury contained remarks which it is alleged amounted to contempt. Apart from identifying the five pages of the transcript, his Honour did not indicate in what respect the relevant transcript evidenced specific conduct giving rise to a contravention of s54A(1)(a). After hearing Mr Berkeley's submissions on behalf of the appellant, his Honour delivered judgment in the following terms:

> "I am satisfied, beyond reasonable doubt, that the remarks that you made to the jury in your address to it were a wilful insult to the court, in the face of the court; moreover, I am satisfied that it was a calculated insult, which appeared to me to be read from prepared notes; but whether or not the words were read from prepared notes it was a calculated insult. The manner and tone of delivery of the words spoken made that clear. I do not accept the submissions made by your counsel that the remarks would more properly be interpreted, as 'merely offensive', and did not cross the borderline into insult... It was a misbehaviour as counsel and interfered with, or tended to interfere with, the course of justice... I do take into account that you held a difficult defence brief and the pressures of trial, what may sometimes be called 'The heat of battle', so to speak, may have had some effect upon your judgment; but I also take into account that you are a barrister of ten years call, or thereabouts, I believe. The sentence of the court is that you are fined $500, in default, distress."

It will be noticed that the judgment does not characterize the insult; nor does it identify the words which were held to be insulting. Section 54A of the *County Court Act* provides:

> "54A.(1) If any person—
> (a) wilfully insults threatens interferes with or obstructs any judge juror registrar bailiff clerk or officer of the court in or in the vicinity of the court or any judge who is going to or returning from court; or
>
> (b) wrongfully influences or attempts to influence any judge juror registrar bailiff clerk or officer of the court or any witness or any person concerned in any way with the proceedings of the court in relation to any criminal proceeding appeal action or matter being heard or to be heard by the court; or
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> (c) wilfully interrupts proceedings of the court; or
>
> (d) misbehaves in court in any manner—
> the judge may direct the apprehension of any such person and if he thinks fit may commit him to prison for any time not exceeding six months or may impose on him a fine of not more than $500 for every such offence and may order that in default of payment thereof immediately or within a specified time the offender be committed to gaol for a period not exceeding six months unless such fine is sooner paid.
>
> (2) An order in the form prescribed by the rules or to the like effect may be issued by the judge and shall be good and valid in law without any other order summons or adjudication whatsoever."

The case before us has proceeded on the footing that the contempt consisted of wilfully insulting the judge. That is the basis on which King J considered the matter in the Supreme Court

and it is the basis on which argument has been advanced in this Court. It is necessary, therefore, to examine with some care the actual remarks made by the appellant in his address to the jury. However, it is convenient first to construe the words of the section in the light of the history of the exercise of the contempt power by judges in relation to the conduct of counsel in court.

That s54A confers on a judge of the County Court a power to punish for contempt is evident, not merely from its terms, but also from the heading of Division 8 of the Act "Contempt of Court" in which the section is to be found. The power given by s54A(1)(a) extends to certain conduct in the vicinity of the court or in relation to a judge who is going to or returning from court and the power given by s54A(1)(b) extends to conduct of the kind there described wherever it takes place. Subject to these qualifications, s54A does not give the County Court or its judges power to deal with contempts out of court (*R v Lefroy* [1873] LR 8 QB 134).

At common law words or conduct in the face of the court or in the course of proceedings, in order to constitute contempt, "must be such as would interfere, or tend to interfere, with the course of justice" (*Parashuram Detaram Shamdasani v King-Emperor* [1945] UKPC 25 [1945) AC 264, at p268). Instead of making interference, or tendency to interfere, with the course of justice an element in the offences which it created, sub-s(1) introduces the new element of conduct which is wilful in paragraphs (a) and (c). In these two paragraphs the word "wilfully" means "intentionally", or "deliberately", in the sense that what is said or done is intended as an insult, threat, etc. Its presence does more than negative the notion of "inadvertently" or "unconsciously" (*Bell v Stewart* [1920] HCA 68; (1920) 28 CLR 419, at p427). The mere voluntary utterance of words is not enough. "Wilfully" imports the notion of purpose. It is submitted that the section should be read in the light of the common law of contempt and that, when so read, there should be imported into pars (a) and (c) the common law requirement that the acts must be such as to interfere, or tend to interfere with the course of justice. The short answer to this argument is that all the acts mentioned in pars (a) to (d) inclusive are acts which in their very nature interfere or have a tendency to interfere with the administration of justice and have been so regarded traditionally. To take but one example, a wilful insult to a judge or jury during a trial necessarily interrupts the course of the trial and tends to divert attention from the issues to be determined. So in *Ex parte Pater* [1864] EngR 452; 122 ER 842; (1864) 5 B & S 299, where a barrister was adjudged guilty of contempt in that he wilfully insulted a juryman during the course of his address to the jury, the wilful insult was treated as an obstruction of the administration of justice and, accordingly, as a contempt. Cockburn CJ observed (5 B & S at p310; 122 ER at p846):

> "... they are words which counsel might have uttered in the honest discharge of his duty for the purpose of vindicating the interests of his client and preventing the other jurors from being prejudiced or unduly influenced by the opinion of the foreman; and if they had been so uttered, though they were harsh and offensive to the juryman to whom they were applied, that would be within the right and privilege of counsel. But if they were uttered with the intention to insult the juryman, then they were an abuse of the privilege of counsel, and the Judge might treat the uttering of them as a contempt...".

Blackburn J, after referring to the power of Quarter Sessions to punish "an unwarrantable obstruction of the administration of justice in the face of the Court", continued (5 B & S, at p312, 122 ER, at p847):

> "... if counsel under colour of addressing the jury, insults a juryman, or the Court, I cannot doubt that it would be such an obstruction as would be a contempt...".

It follows that 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.

It is with these comments in mind that we turn to the critical part of the appellant's address. It began in this fashion:

> "This trial has been or is going to be just slightly unusual from most trials. Most trials have the situation where there are three very clearly defined roles going on in front of you. There is the defence who are on this side who defend, there is the prosecutor on that side and he prosecutes and obviously this is the arena proper and you have got a judge who judges. You normally think of a judge as being a sort of umpire, ladies and gentlemen, and you expect an umpire to be unbiased. You would be pretty annoyed if, in the middle of a grand final, one of the umpires suddenly started coming out in a Collingwood jumper and started giving decisions one way. That would not be what we think a fair thing in an Australian Sport. It may surprise you to find out that his Honour's role in this trial is quite different. That his Honour does not have to be unbiased at all except on questions of law. On questions of fact, his Honour is quite entitled to form views and very obviously has done so in this trial. His Honour will tell you that any comment that he makes does not bind you. That it stands or falls on its own merits but that instead you must consider those along with all of the other comments and accept or reject them as you see fit. That is different from his direction on the law. I speak of that, Ladies and gentlemen, because as I say his Honour has given some fairly definite views in this case. They have been pretty adverse to the accused Paul and certainly my presentation of the case on behalf of Paul."

The main thrust of the comments 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 submission of Mr Byrne QC, for the respondent is that the wilful insult is to be found in the conduct ascribed to the Collingwood umpire, the statement that it was not "a fair thing",

the implication that he was "biased" and the further implication that the judge was entitled to be "biased" on the facts and indeed was so. In short, counsel for the respondent submits that in this passage the appellant told the jury that the judge was biased and that Paul was not getting a fair trial. No doubt in some settings it would be insulting to say of someone, especially a judge, that he was biased, suggesting thereby that he was pre-determining a case by reason of interest or other pre-existing commitment. Here, however, the appellant seems to have been saying that his Honour's views "have been pretty adverse" to Paul and to the appellant's presentation of the case and that because those views were consistently adverse the judge's reaction to the defence case was unfair in the sense of being "one-sided".

The appellant's address continued with three examples in which it was suggested that the judge had intervened to diminish the effect of points sought to be made by the appellant in his cross-examination of Crown witnesses – his Honour had described one point as "pedantic" – and that he had attempted to rescue witnesses from predicaments presented by their evidence. The evidence on which these criticisms of the judge were based was not before us. Consequently we are unable to determine whether the criticisms were well or ill-founded. The appellant then went on to say that the jury lacked the help and assistance that they might expect to get on the facts and urged the jury to consider whether comments made by the judge on the facts were legitimate. In this respect he said it was necessary for them to decide when the judge made a point –

> "... whether this is an example of a view that he has formed against me, or perhaps my client. We do not know. One method of seeing that is how he deals with the unsworn statement from the dock, ladies and gentlemen. The statement from the dock is a time honoured institution in our society".

Later in his address the appellant said:

> "When his Honour comes to tell you about statements from the dock and deals with a statement, I want you to be very careful to analyse what His Honour says and to consider whether or not the points that he makes are legitimate. If you think they are legitimate, you use them. If he is right and I am wrong, it is your duty to say so, but do it fairly and squarely and openly and honestly and not as a result of being over-borne by what you think his views on the facts are".

Here the appellant returned to the theme that his Honour had formed a view adverse to Paul and suggested that the fairness of his Honour's approach might be tested when he came to deal with the accused's statement from the dock. It will be discerned from this examination of the relevant part of the appellant's address that the remarks which he made fell within a legitimate framework, a framework outlined in the first of the passages which we have quoted from the address, emphasizing the need for the jury to distinguish between the judge's comments on the facts and his directions on the law, and the jury's entitlement to disregard the comments on the facts, as well as renewing the invitation to scrutinize those comments with great caution, more particularly because his Honour's attitude had been consistently adverse to Paul's defence and to the manner in which it had been presented.

We have described this framework as legitimate because it has not been suggested that the elements in it so far mentioned were irrelevant to a proper presentation of the case for Paul. Indeed, and this is to amplify our earlier comment, in the absence of a complete transcript of the proceedings at the trial, we cannot form any judgment as to the relevance and significance of the points which the appellant was making in his address. Nor can we make any judgment as to the impact of the trial judge's observations on the accused's case. We must proceed accordingly on the footing that the making of the points mentioned was a legitimate exercise by the appellant of his right to address the jury.

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 (*Shamdasani* 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.

ORDER: Appeal allowed. Order of King J made 7 May 1982 set aside and in lieu thereof order that the order nisi granted by Crockett J on 22 July 1981 be made absolute. Each party to be at liberty to apply as to costs on seven days notice to the other.

APPEARANCES: Solicitors for the Appellant: Slade & Webb. Solicitors for the Respondent: RJ Lambert, Acting Crown Solicitor, for the State of Victoria.
