16/13; [2013] VSCA 78

SUPREME COURT OF VICTORIA — COURT OF APPEAL

DPP v GREEN and MAGISTRATES' COURT of VICTORIA

Tate and Whelan JJA and Kaye AJA

6 February, 12 April 2013

CONTEMPT OF COURT – PERSON FOUND GUILTY OF CONTEMPT OF COURT AND SENTENCED TO A TERM OF IMPRISONMENT – FAILURE BY MAGISTRATE TO FOLLOW STEPS IN *ZUKANOVIC v MAGISTRATES' COURT OF VICTORIA AT MOORABBIN* [2011] VSC 141; (2011) 32 VR 216 – MAGISTRATE REQUIRED TO SUFFICIENTLY ARTICULATE THE CHARGE OF CONTEMPT, CONDUCT A SEPARATE INQUIRY, AND TAKE A PLEA TO THE CHARGE OF CONTEMPT – PROCEDURE ADOPTED MUST BE CONSISTENT WITH DEMANDS OF NATURAL JUSTICE – JURISDICTIONAL ERROR – PROCEDURAL FAIRNESS – NEED FOR CLEAR ARTICULATION OF THE CHARGE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, SS133, 134(c) and (e).

G. was found guilty of contempt of court when he failed to answer some questions before a Magistrate. The Magistrate ruled that G. had no reasonable grounds for refusing to answer the questions and found him to be in contempt and sentenced him to 14 days' imprisonment. Upon an application for an order in the nature of *certiorari* to quash the Magistrate's order, Pagone J granted the application, set aside the Magistrate's orders and remitted the matter to the Magistrates' Court for directions and re-determination. Upon appeal by the DPP—

HELD: Appeal dismissed.

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

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

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

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

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

TATE JA:

Introduction

1. This appeal raises the question of whether a magistrate, before convicting a person of contempt for refusing to answer questions,[1] should:

(1) sufficiently articulate the charge of contempt;
(2) conduct a separate inquiry;
(3) take a plea to the charge of contempt.

2. The trial judge held that a magistrate should do each of these things.[2] In particular, he held that these three procedural steps, as laid down by J Forrest J in *Zukanovic v Magistrates Court,*[3] in respect of contempt in the face of the court,[4] applied equally to contempt arising from a refusal to answer questions. From this decision the Director of Public Prosecutions ('the DPP') has appealed.

3. I consider that the trial judge was correct in the orders he made and the analysis he adopted. I would dismiss the appeal.

4. I set out my reasons.

The compulsory examination

5. On 25 March 2010 the first respondent, Mr Green ('Green') was convicted of contempt under s134 of the *Magistrates' Court Act* 1989 ('the Act') and a sentence of 14 days' imprisonment was imposed. Section 134 of the Act relevantly provides:

> (1) A person is guilty of contempt of court if—
> (a) having been summoned as a witness ... the person refuses or neglects without sufficient cause to attend or to produce any documents or things required by the summons to be produced; or
>
> (b) having been summoned as a witness and having attended as required, the person refuses to be sworn or to answer any lawful question; or
>
> (c) being examined as a witness or being present in court and required to give evidence, the person refuses to be sworn or to answer any lawful question or, without sufficient excuse, to produce any documents or things that the person has been or is required to produce; or
>
> (d) being present in court and required to give evidence, the person wilfully disobeys an order under section 127;[5] or
>
> (e) in the opinion of the magistrate the person is guilty of wilful prevarication.

6. The orders made by the magistrate arose in the context of a compulsory examination under s56A of the Act in relation to a committal proceeding against Ali Chaouk.[6] That section permitted the Magistrates' Court ('the Court') to make an order requiring a person to attend the Court for the purpose of being examined by or on behalf of the informant (that is, the person who commenced the criminal proceeding in the Court). Green had been required to attend the Court to give evidence in respect of his alleged involvement in the beating of a Mr Aakbari. The beating amounted to what the magistrate later described as 'a serious and severe bashing of the victim by Mr Chaouk and others'. In particular, the line of questioning concerned a phone call that was alleged to have been made to Green's mobile phone by Ali Chaouk.

7. To appreciate the context in which the issue of contempt was raised, it is necessary to refer extensively to the exchange between the magistrate, Mr Rose SC and Green.

8. Mr Rose appeared for the informant. Green affirmed and gave his name, address and occupation. He was then asked:

> Mr Rose: And you're an owner operator, and are you also president of the Hells Angels Nomads chapter?
> Green: I'd seek no comment to that, thank you.
> His Honour: Under s134 of the *Magistrates Court Act* there's provision – it's headed 'Contempt of Court'. So you need to understand as a witness, which is what you are, and you're now being examined as a witness, if you refuse to answer any lawful questions, you may be charged with contempt. Have you sought legal advice in relation to this morning's proceedings?
> Green: Yes.
> His Honour: Yes, Mr Rose.
> Mr Rose: I'll ask the question again. Are you president of the Hells Angels Nomads chapter?
> Green: *No*.[7]
> Mr Rose: Are you a member of the Hells Angels?
> Green: I wish not to comment, thank you.
> Mr Rose: Do you have a mobile telephone apparatus?
> Green: No comment.
> Mr Rose: Is your mobile telephone number [mentions number]?
> Green: No comment.

Mr Rose: Are you going to make the no comment answer to any question I ask?
Green: No comment.

9. At this stage Mr Rose sought to have the court require Green to give evidence, pursuant to s128 of the *Evidence Act*. That section provides for a scheme whereby a witness may object to giving evidence on the ground that the evidence may tend to prove that the witness has committed a criminal offence or is liable to a civil penalty and a court must determine whether there are reasonable grounds for that objection. If the court determines that there are reasonable grounds, the court is to inform the witness that he or she need not give evidence unless required to do so in which case the witness will be given an indemnity certificate. If the court determines that there are not reasonable grounds, a witness can be required to answer a question.

10. The magistrate asked Green why he was refusing to answer the questions. Green responded by indicating that he had no recollection of the events or of the phone call with Ali Chaouk.

11. A lawyer then appeared in the body of the Court, Mr Burns, who said he had come in early to give Green some advice and he asked for the matter to be stood down. The magistrate stood the matter down to give Mr Burns an opportunity to speak to Green and took a short adjournment, the first adjournment.

12. Green was later recalled. Mr Rose began with some preliminary questions.

Mr Rose: Mr Green, have you now had the opportunity to get some advice from Mr Burns of counsel?
Green: I have.
Mr Rose: And you've spoken to Mr Balmer, a solicitor?
Green: I have.
Mr Rose: Are you prepared to answer questions?
Green: *Yes.*
Mr Rose: Well, we'll start again if I may. I've asked you your name and address and you've given that, and I've asked you if you're a member of the Hells Angels. Are you a member of the Hells Angels?
Green: I've no comment to that.
Mr Rose: Are you going to answer each of the questions again no comment?
Green: *No*, but I was here today to be asked about the phone conversation and, as I said, I have no recollection of it.
Mr Rose: You're here today to give evidence under Order 56A of the *Magistrates Court Act* in relation to the matters that the police would wish to ask you [about] *in respect of your involvement in the beating of a Mr Aakbari*. I'm going to ask you some questions about that?
Green: Yep.

13. The reference to the involvement in a beating was argued, on the hearing of the appeal and in the context of the notice of contention,[8] to have potentially founded the context for the claim of privilege against self-incrimination that was later forthcoming from Green and rejected by the magistrate.

14. The questioning continued with Mr Rose repeating some of the questions he had asked before:

Rose: I'm going to ask you some questions again and we'll see how we go. Are you a member of the Hells Angels?
Green: *I answered no*, that I'm not president of the Hells Angels before.
Mr Rose: I've now asked you a second question, are you a member of the Hells Angels?
Green: No audible response.
Mr Rose: Don't keep looking over there. Just look across towards His Honour, all right? Are you a member of the Hells Angels?
Green: I've no comment to that.
Mr Rose: Are you a former president of a chapter of the Hells Angels?
Green: I've no comment to that. I said – actually I said before I've no comment to it.
Mr Rose: Do you have a telephone number [mentions number]?
Green: It's on the record there that there was a conversation taken from me.
Mr Rose: Do you have that telephone number as your telephone number?
Green: No comment.

15. His Honour decided to intervene.

His Honour: Did you have a telephone conversation with Ali Chaouk in relation to the matter of a German person who said he was a member of the German Hells Angels? Did you have a telephone conversation about that issue?
Green. No. It was 4.49 a.m. in the morning and I have no recollection of the conversation.

16. Mr Rose handed Green a copy of the transcript of the telephone call.

Mr Rose: Can you read that please, Mr Green, and tell me whether or not that is a conversation you had with Mr Chaouk on 27 September 2009 at 4:48 in the morning?
Green: *This is the second time I've seen this, apart from the copy I was given. I have no recollection of the conversation as it was early in the morning and I work anywhere between 12 to 18 hours a day. I have no recollection of the conversation.*
…
Mr Rose: Do you recall having any conversations about a person from Germany who claimed to be a member of the Hells Angels from Munich?
Green: *No.*
Mr Rose: Mr Green, do you know Ali Chaouk?
Green: *I do.*
Mr Rose: Is he a member of the Hells Angels?
Green: *No.*
Mr Rose: Is he a prospect of the Hells Angels, or has he been a prospect?
Green: *No.*
…
Mr Rose: Are you a member of the Dallas Gentlemen's Club?
Green: *No.*
…
Mr Rose: Do you know a person named Michael Gerrie, G-e-r-r-i-e?
Green: *No.*
Mr Rose: Have you ever heard of him?
Green: *No.*
Mr Rose: Do you know a person known as Glyn David Dickman …?
Green: *No.*
Mr Rose: Also known as Boris?
Green: *No.*
Mr Rose: A member of the Hell's End chapter of the Hells Angels?
Green: *No.*

17. Mr Rose then played a CD recording of the telephone conversation he had questioned Green about.

Mr Rose: Do you recognise your voice?
Green: Well, no, I don't recognise my voice.
Mr Rose: I'll ask you once again, Mr Green, do you have a phone that has the number [mentions number]?
Green: No comment.

18. Mr Rose then invited the magistrate to determine whether or not Green had a reasonable ground for objecting to answering the questions put to him to initiate the procedure under s128 of the *Evidence Act*. The magistrate then spoke to Green.

His Honour: Section 128 of the *Evidence Act* relates to privilege in respect of self-incrimination in other proceedings. Are you objecting to giving the evidence or answering the question on the basis of self-incrimination?
Green: On the basis of self-incrimination, yes. As I said, I've no recollection of …
…
His Honour: How do you say that answering a question in relation to whether a particular phone number is in fact your phone number, how do you say that answering that question may tend to prove that you have committed an offence?
Green: Well, I can't really answer this. I've just no comment to the question.
…
His Honour: Well, perhaps I need to then rule that given that response from Mr Green, there's no reasonable grounds for the objection he has taken.
Mr Rose: Therefore, we require you to direct him to answer the questions if your Honour would.
His Honour: Mr Green, I direct that you answer the question that has just been put to you by Mr Rose, that question being do you have a phone number [mentions number]?

19. Green then asked to speak to his legal representative and the magistrate granted a short adjournment so that Green could take the opportunity of speaking to his lawyer. This was the second adjournment.

20. On reconvening, the magistrate repeated his direction to Green to answer the question which Green duly did.

> His Honour: Now, Mr Green, I made a finding that there were no reasonable grounds in relation to you objecting to answering that question and then I directed that you answer that question as to whether that number was your phone number. You've sought legal advice. I now direct you again to answer that question. Is the phone number [mentions number] your phone number?
> Green: *It is*.

21. Mr Rose resumed questioning Green about whether he recognised his own voice on the taped conversation or the voice of Mr Chaouk, to which Green responded that he did not recognise his voice and had no recollection of the conversation. When asked if Green had his phone with him at 4.48 in the morning, Green said that his phone would have been beside his bedside table, and 'right beside [his] head' but he had no recollection of the conversation. He also said he did not know a 'Boris' and he did not know a person named 'Dickman' but he did know members of the Hell's End chapter of the Hells Angels. The allegation that Green was a member of the Hells Angels resurfaced.

> Mr Rose: Are you or have you ever been a member of the Hells Angels Nomads chapter?
> Green: No comment.
> Mr Rose (to the magistrate): Again, I'd ask that you direct the witness to answer the question.
> His Honour: I explained to you the provisions of s128 of the *Evidence Act*, Mr Green, in relation to you objecting to give evidence on the basis that it may tend to prove you've committed an offence. Are you saying that to answer that question as to whether you're a member of the Nomad chapter leaves you open to being – self-incriminating yourself?
> Green: I feel that I'm self-incriminating by answering that question, your Honour, as it pertains to this phone call. This is really what I'm here for, so …
> His Honour: But what criminal act do you suggest is likely to have been committed by you answering a question as to whether you're a member of a particular group?
> Green: Well, I don't know. But I'd like to answer no comment to me being a member of the Hells Angels.
> …
> His Honour: I have to determine whether there are reasonable grounds for your objection, and I'm not satisfied there are reasonable grounds so I therefore direct that you answer that question that Mr Rose put to you. Can you put that question again, please, the exact question.
> Mr Rose: Are you a member of the Hells Angels Nomads chapter?
> Green: I have no comment.
> Mr Rose: You've been directed to answer the question and you're refusing to answer the question. Is that right?
> Green: No comment.

22. Mr Rose then applied to have Green declared an unfavourable witness. The magistrate acceded to the application and declared that Green was an unfavourable witness pursuant to s38(1)(b) of the *Evidence Act*[9] with the result that Mr Rose was free to cross-examine Green. Mr Rose then put to Green a number of propositions, including the allegation that he was a member of the Hells Angels Nomads chapter and that he was a former president of that chapter to which he elicited a 'no comment' answer. He then returned to the early morning phone call and led up to a further request for a direction from the magistrate for Green to answer the question.

> Mr Rose: At 4:48 in the morning you were able to answer your phone and identify yourself as Greenie. Is that your nickname?
> Green: No comment.
> Mr Rose: Ali Chaouk identified himself to you as Ali?
> Green: No comment.
> Mr Rose: You had a discussion about a person from Germany?
> Green: I've no recollection of that.
> Mr Rose: You then spoke to a person you know as Boris?
> Green: I've no recollection of that conversation.
> Mr Rose: Do you deny that you spoke to a person named Boris?
> Green: I said I have no recollection of that conversation.
> Mr Rose: But you've heard the conversation played to you and you've also read the transcript of it.

> Do you deny that that was a conversation in which you were involved?
> Green: I said I have no recollection of the questions you're asking. I have no recollection of the conversation. It was 4:48 a.m. in the morning.
> Mr Rose: What, are you like an American battleship: you neither confirm nor deny? (No audible response) Is that the position? You're just going to say 'I've got no memory'?
> Green: I have no recollection of the call.
> Mr Rose: Are you familiar with the Hells Angels clubhouse in Thomastown?
> Green: I've no comment.
> Mr Rose: Well, I'll put it specifically. It's [mentions address], Thomastown. Are you familiar with those premises?
> Green: I have no comment.

23. The order Mr Rose then sought was for the magistrate to direct the witness to answer each of the questions. The magistrate then reminded Green that he could claim privilege against self-incrimination to justify a refusal to answer.

> His Honour: Again, under s128, Mr Green, you're entitled to object to answer on the basis of self-incrimination that giving that evidence would – or may tend to prove that you have committed an offence. What do you say in relation to your reason for answering no comment to those questions that Mr Rose has put to you? What criminal offence do you say you have – or may tend to prove that you've committed?
> Green: This relates to this phone call, *this matter why I'm here today*. That's why I'm here today is a matter to this phone call. I'm not aware of anything else pertaining to what we're talking about today. I'm aware of what the questions I'm being asked but, as I have said, I have no comment. And if I answer anything, I may be incriminating myself.

24. Green persisted with his claim that, although he did not know where the line of questioning was going, he was concerned that he was at risk of incriminating himself. The magistrate found that there were no reasonable grounds for Green's objection and directed him to answer each of the questions put to him by Mr Rose starting with the question 'Are you known as Greenie?' to which Green responded to the magistrate 'No comment'.

The finding of contempt

25. The following brief exchange took place which led up to the invitation from Mr Rose to the magistrate to hold Green in contempt.

> Mr Rose: Are you proposing when I ask each of those questions to answer again 'No comment'?
> Green: No comment.
> Mr Rose: In that case, your Honour, we've got to the state where pursuant to s134(1) of the *Magistrates Court Act*, particularly subparagraphs (c) and (d), I would ask that this witness be held in contempt of court.
> His Honour: Mr Green, the provision that Mr Rose is referring to ... it's headed 'Contempt of Court' and a person is guilty of contempt of court if, under paragraph (c) of sub-s.(1), being examined as a witness refuses to answer any lawful question. That's paraphrasing paragraph (c). And under paragraph (d) ...

26. There was discussion as to which additional paragraph of s134 Mr Rose was relying on until he settled on paragraph (e) of s134(1), whereupon the magistrate entertained the application to find Green in contempt.

> His Honour: And paragraph (e) of s134(1), a person is guilty of contempt of court if in the opinion of the magistrate the person is guilty of wilful prevarication. I'm satisfied with the proceedings as they have gone this morning that those two paragraphs of s134(1), (c) and (e), are made out and *that you are a person who is guilty of contempt and I so inform you of that.*

27. It was conceded by the DPP on the appeal, quite properly in my view, that these statements by the magistrate, expressed as they were in conclusionary language, amounted to a finding by the magistrate that Green was in contempt under s134(1)(c) (refusal to answer questions) and s134(1)(e) (wilful prevarication). While some indication had been given earlier by the magistrate to Green that a refusal to answer a question might amount to contempt, under paragraph (c) of s134(1), there had been no mention in the hearing up until this point that paragraph (e) of s134(1) might also be relied on. Nor was there any explanation given to Green before the finding of contempt was made that s134(1)(e) involved wilful prevarication. Most importantly, there was no articulation of the charge of contempt because there was no identification of which particular questions had elicited a response found to be contemptuous; nor was there an articulation of which of Green's

responses amounted to a refusal to answer and which amounted to wilful prevarication. This was despite the fact that the immediately preceding sequence of questions starting with words to the effect, 'Are you known as Greenie?', elicited a variety of responses, including an absence of recollection as well as 'no comment'. Furthermore, this was in the context of an earlier series of questions and answers where many of the answers were substantive and responsive, as indicated by the emphasis I have placed upon particular answers above.

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

29. Having made the finding that Green was in contempt, the magistrate then queried whether a formal charge should be laid.

> His Honour: Mr Rose, the next step in the proceedings then would be for a formal charge to be laid. Is that correct?
> Mr Rose: No, you can make an order pursuant to sub-s (3) [of s134] straight away.

30. Sub-sections (2) and (3) of s134 provide:

> (2) In the case of a contempt referred to in subsection (1), the Court may direct the arrest of the person and, on the person being brought before the Court, the Court must cause him or her to be informed of the contempt with which he or she is charged and adopt any procedure that the Court thinks fit.
>
> (3) If the Court finds that the person is guilty of a contempt referred to in subsection (1), it may order—
> (a) that the person be sentenced to a term of imprisonment of not more than 1 month; or
>
> (b) that the person be fined not more than 5 penalty units and that in default of payment of the fine within a specified time the person be imprisoned for a term of not more than 1 month.

31. Mr Rose submitted to the magistrate that Green be given an opportunity to purge his contempt. The magistrate agreed.

> Mr Rose: I think what should happen is that he [Green] should be made aware of the penalties for contempt and we give him the opportunity to purge his contempt, Your Honour, by answering the questions. Then if he doesn't do that forthwith, then we might proceed to the issue of what should happen to him.
> His Honour: The penalty provisions for a charge of contempt of court, Mr Green, are that if you are found guilty, the court may order that you be sentenced to a term of imprisonment of not more than one month, or that you be fined not more than five penalty units and that in default of payment of the fine within a specified time, you be imprisoned for a term of imprisonment of not more than one month. Do you understand the position that you are now in?
> Green: I do your Honour.
> His Honour: Do you wish to seek legal advice?
> Green: I do.
> His Honour: I'll excuse you from the witness box and allow you to speak to Mr Burns in relation to *the next step in this process*. Then I'll resume the hearing in relation to the charge of contempt.

32. The Court took a short adjournment, the third adjournment. Mr Burns then appeared on behalf of Green and submitted that a distinction was to be drawn between, on the one hand, the answers Green had given to the questions about the phone call and what he remembered of it, and of people named in the phone call, and, on the other hand, the questions specifically about his membership of the Hells Angels which he was failing to answer. He submitted that 'his contempt is at the lower end of the scale because he has cooperated with the material questions'. He also submitted, in mitigation, that Green had no prior convictions.

33. Mr Rose submitted that there was a need for a serious penalty to be imposed. In doing so he commenced to articulate the basis on which the charge of refusal to answer questions and the charge of wilful prevarication could have been made:

> Mr Rose: The contempt that your Honour has found is that he's refused to answer lawful questions without sufficient excuse. You have directed him a number of times to answer questions and he's refused to do so, and that he's guilty of wilful prevarication. Now, this goes to the core … of the justice system in that we need to be able to get these witnesses to give evidence. … He's in a position where he's failing to identify people who are major players in this … and in failing to identify Ali Chaouk. … That failing to identify him when the evidence all points that way we say is deliberate prevarication. He hasn't with any lawful justification answered your questions, even to the extent of saying 'No comment' when we ask him if his nickname is Greenie … We say it calls for a serious penalty within the range of penalties to you there … And we would say that include incarceration.

34. The magistrate then stood the matter down to consider the appropriate penalty he should impose. This was the fourth adjournment.

35. When the magistrate returned to the bench, he gave brief oral reasons describing the course of the hearing and referring to his earlier ruling that there were no reasonable grounds for Green's objecting to answer the questions put by Mr Rose, he said, 'I found Mr Green guilty of contempt under s134(1)(c) and (e) of the *Magistrates' Court Act*, being satisfied that he had refused to answer lawful questions and been guilty of prevarication. I granted Mr Burns leave to appear on behalf of Mr Green to make submissions'.[10] He then indicated that he considered that Green's refusal 'to give evidence … lacks objective justification. There is no evidence that he acted under duress or out of necessity'. He then asked Green to stand up and said:

> Mr Green, you are guilty of an interference with the administration of justice. In those circumstances, imprisonment is the appropriate punishment, unless exceptional circumstances are made out. There are no such circumstances. You are convicted and sentenced to 14 days' imprisonment.

36. Green was bailed pending an appeal to the County Court.[11] He later appeared before the magistrate and purged his contempt by answering the questions he had previously not answered. Although he had not served any part of the sentence imposed, the finding of contempt and the sentence were not vacated.

The judicial review proceeding

37. Green brought a proceeding for judicial review under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 seeking an order in the nature of *certiorari* quashing the orders made by the magistrate on 25 March 2010 finding Green in contempt of court and imposing the sentence of imprisonment for 14 days.[12] The grounds relied on were three-fold:

> (1) Error of law on the face of the record;
>
> (2) Jurisdictional error;
>
> (3) Denial of natural justice.[13]

38. The judge upheld all three grounds which somewhat overlapped.

39. The errors of law were identified as being (a) that the magistrate erred in the process by which he found Green guilty of contempt; (b) that the magistrate had erroneously rejected Green's claim for privilege against self-incrimination; and (c) that the magistrate erred in considering that imprisonment was an appropriate sentence unless exceptional circumstances were made out.

40. The judge identified the 'record' for these purposes as including the reasons for decision delivered orally by the magistrate[14] and such other matters in the transcript of the hearing to the extent necessary to enable understanding of the reasons.[15] The first and primary error was argued to lie in the failure of the magistrate to adopt the procedural steps identified in *Zukanovic* which I outlined at the outset of these reasons[16] and which I discuss further below. The judge observed that the hearing at which Green was held in contempt occurred before judgment was delivered in *Zukanovic* and thus the magistrate was deprived of the benefit of the reasoning of J Forrest J about the need to set out the charge sufficiently for an alleged contemnor to understand it, and to give the alleged contemnor an opportunity to consider the charge and to state whether he or she pleaded guilty to it. However, he held that:[17]

> [A] fair hearing of the contempt charge required the learned Magistrate to articulate the charge as a separate step in the proceeding and to do so with sufficient precision to have enabled the plaintiff [Green] to address submissions on the charge as formulated.

41. He eschewed the notion that it might have seemed obvious and inevitable to all present that Green would be found in contempt as only minutes before he had ruled that Green was not entitled to rely upon the privilege against self-incrimination in refusing to answer questions because, as he put it, 'a finding of contempt was not an automatic consequence of the ruling'.[18] In so concluding, he referred to the salutary observation of Megarry J in *John v Rees*:[19]

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

42. The judge held that the failure to follow the steps articulated in *Zukanovic* was a jurisdictional error because it 'constituted a misconception of the nature of the function which the learned Magistrate was performing',[20] and a misapprehension by an inferior court of the limits of its functions or powers in circumstances in which it has jurisdiction over a matter is a jurisdictional error.[21] The power to find someone in contempt was a power limited by the requirement to articulate a separate charge of contempt, conduct a separate inquiry and take a plea. The failure to observe that requirement was thus a misapprehension by the magistrate of the limits of his powers and accordingly a jurisdictional error.

43. In those circumstances the judge considered it unnecessary to express a concluded view on whether the magistrate had erred in concluding that the claim for privilege against self-incrimination had not been made out or had made other jurisdictional errors. He also found it unnecessary to decide whether the magistrate erred in holding that a contemnor was to be imprisoned unless exceptional circumstances could be shown, noting only that s134 does not depend upon, or use the words, 'exceptional circumstances' as a factor in the finding of contempt or in imposing a penalty.

44. With respect to the denial of natural justice, the judge found that Green had been denied an opportunity of answering a specific charge laid against him because there was no clear articulation of the charge and the duty was not discharged by an earlier warning of the risks of a failure to answer questions.

45. He ordered that the decision of the magistrate be quashed and the matter remitted to the Court for re-determination.[22]

The appeal

46. The primary focus of the appeal was on whether the judge was correct in concluding that the procedural steps laid down in *Zukanovic* applied to a finding of contempt under s134 of the Act, the DPP arguing that he was in error in so concluding (Ground 1).[23] A secondary focus of the appeal was on whether the judge had erred in holding that the magistrate had failed to accord procedural fairness and thereby committed a jurisdictional error (Ground 2).[24]

Grounds of appeal

Ground 1: Did *Zukanovic* apply?

47. In support of Ground 1, the DPP submitted that the procedural steps identified in *Zukanovic* were confined to the context in which they arose, namely, contempt in the face of the court, provided for under s133 of the Act, and did not extend to other forms of contempt such as those recognised under s134. The DPP also argued that the magistrate had indeed properly articulated the charge to Green and there was no need for the magistrate to conduct any separate inquiry as to whether the charge was made out.

(1) The principles and procedural steps identified in *Zukanovic*

48. In *Zukanovic* the accused blew and popped bubblegum in the presence of the magistrate when his solicitor was applying in the Magistrates' Court at Moorabbin for an unopposed routine adjournment of a charge of assault that had been laid against him. The magistrate saw the incident and considered it a gross contempt in the face of the court. After ascertaining the accused's name, the magistrate said:[25]

> Well yes you're charged with contempt in the face of the court for blowing deliberately and popping it. As I say it's a gross contempt of 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.

49. Notwithstanding that, by this statement, the magistrate appeared to have already found the accused guilty of contempt in the face of the court, beyond reasonable doubt, he then had a written charge drawn up which was said to be laid under s133 of the Act and called a short adjournment.

50. Section 133 of the Act is concerned with contempt in the face of the court, by contrast with s134 which, as demonstrated above, is concerned with contempt by reason of such conduct as refusing to answer questions or wilful prevarication. Section 133 relevantly provides:

> (1) If it is alleged or appears to the Court that a person is guilty of contempt 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) …
> (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 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) …

51. On reconvening, Zukanovic's solicitor made a plea in mitigation on behalf of her client, submitting that Zukanovic felt remorse for his actions, understood and acknowledged that it was the wrong thing to do and that he had been ignorant and incredibly rude and 'in contempt of court'.[26] The magistrate characterised the conduct as a 'deliberate and calculated attempt to challenge the authority of the court and scandalise the court'.[27] He imposed a sentence of one month's imprisonment that was 'not susceptible of a fine because of the gravity of the offence'.[28]

52. On the proceeding for judicial review in the Supreme Court, J Forrest J examined the principles supporting the obligation to afford procedural fairness in a summary trial for contempt and the measures that are necessary to ensure the obligation is discharged. In particular, he looked to the following features of summary procedures for contempt:[29]

> (1) the recognition that a summary trial for contempt should be 'extremely rare';[30] 'extraordinary';[31] only adopted in 'serious cases';[32] 'when the case is clear and beyond reasonable doubt';[33] the contempt power being one to be 'exercised with scrupulous care';[34]
>
> (2) the unusual position that the 'judge may be, at once, the witness, possibly even the victim, of the contempt'[35] – as witness, the judge may be the 'repository of the knowledge of the relevant events as the personification … of the court in whose face the contempt has occurred';[36]
>
> (3) in addition, the judge may be placed in 'an unusual concatenation of roles'[37] of initiating the formal curial proceedings to bring the contemnor before the court; deciding the issues of fact; determining the charge; and making orders for punishment or dismissal – such features of the summary procedure for contempt impose on the judge a 'special obligation to ensure that he has not made up his mind

> until everything that can reasonably be put on the scale is allowed to be put there';[38]
>
> (4) a contempt in the face of the court will demand an immediate response from the court – such immediacy will authorise the use of special procedures, including the admission of hearsay and restrictions on the right to cross-examine, but such special procedures should be exceptional and only used where the circumstances demand it.[39]

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

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

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

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

55. Relying on the primary authorities, J Forrest J emphasised that there were two important propositions, the first was that contempt of court is a criminal offence which has the potential to result in a period of imprisonment and, as such, it is 'essential that the magistrate ensured that the rights of the alleged contemnor to a fair hearing were preserved',[44] and the second was that the magistrate needed to exercise great caution 'because of the position he was in – namely, witness, prosecutor and judge'.[45] On the basis of the statements of principle to be found in the authorities, J Forrest J identified the following steps as necessary to ensure that a fair hearing was given to Mr Zukanovic before the determination of the charge:[46]

> First, to set out the charge. This could be done either orally or in writing. What was essential was that Mr Zukanovic understood the charge the magistrate was laying.
>
> Second, to afford Mr Zukanovic the opportunity to consider the charge and, if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.
>
> Third, to give Mr Zukanovic the opportunity to state whether he pleaded guilty or not guilty to the charge.
>
> Fourth, in the event that Mr Zukanovic pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.

56. Had the magistrate followed those steps, he would have needed to have been satisfied beyond reasonable doubt that Mr Zukanovic was guilty of the charge and to have kept at the forefront of his mind the unusual role he was undertaking in the process. In fact, the magistrate had observed none of these essential aspects of procedural fairness, aside from the laying of a charge, which he did after he had already determined the charge proved, by which time it could not assist with the fundamental unfairness of the manner in which the charge was determined, even if it could assist with the opportunity afforded to be heard on the appropriate sentence to be imposed.

57. J Forrest J made an order in the nature of *certiorari* and quashed the magistrate's decision.

(2) Is there a significant difference between s133 and s134?

58. The DPP sought to draw a sharp distinction between the statutory regime under s133 intended to deal with contempt in the face of the court and that provided for under s134. It was submitted that because of the infinite variety of forms of conduct that might constitute contempt

in the face of the court (refusals to stand up or sit when ordered to do so, swearing in court, insolent gestures, interrupting proceedings and so on), there is a need for the magistrate to set out precisely what conduct is alleged to constitute the contempt, whereas s134 itself provides the particularisation within the statutory scheme. The argument was that, as far as s134 is concerned, there is no need to identify further the conduct alleged to constitute contempt other than by reference to one or other of the alternative paragraphs of s134(1), as to which there is no equivalence in s133; the paragraphs of s134(1) 'bespeak the charge'. The first of the steps identified in *Zukanovic* was thus submitted to be inapplicable.

59. The DPP sought to bolster this submission by pointing to the recognition in the Act that a charge under s133 is more serious than a charge under s134, as is apparent because the penalties are heavier in the case of the former (up to six months' imprisonment[47]) than that of the latter (up to one month's imprisonment[48]). Reliance was also placed on the distinction J Forrest J drew between s133 and s134:[49]

> 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 while 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.[50]

60. The flaw in the DPP's submission is that, while there are differences between s133 and s134, there are also significant similarities in the regimes provided for under s133 and s134:

> (1) First, both s133 and s134 contain measures to control the Court, most particularly by conferring a power on the Court to direct the arrest of the alleged contemnor[51] – such a power enables the Court to reaffirm its authority with immediacy before embarking upon the process of specifying the charge of contempt or proceeding to determine it; the procedural steps in *Zukanovic* thus do not interfere with the Court's capacity to reaffirm its authority – indeed, the need for an immediate reaffirmation of authority is more likely to be present under s133 than s134 (the differences in the two sections in this regard thus do not derogate from the application of the *Zukanovic* steps to s134 but rather support it);
> (2) Both s133 and s134 expose an alleged contemnor to a conviction for a criminal offence: *Witham v Holloway*;[52] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*;[53] *Rich v Attorney-General (Vic)*;[54]
> (3) Both s133 and s134 carry a risk for a contemnor of a period of imprisonment – while s133 carries a maximum which is greater than that provided for in relation to the particular offending conduct identified under s134, this cannot alter the general procedural steps required to observe procedural fairness given that s133, being non-specific, is intended to capture a range of conduct some of which may warrant a lesser punishment than that warranted by conduct under s134;
> (4) Neither s133 nor s134 descend to a level of detail about the particular procedural steps to be taken before the Court can find a person guilty of contempt – they each provide only that the Court is to 'adopt any procedure that the Court thinks fit',[55] and that is only expressly provided for where the person has been arrested and is brought before the Court;
> (5) While s134 is unlike s133 in that it descends to particularisation of the offending conduct, it remains the case that where (as here) more than one paragraph is relied upon, describing the conduct as involving, for example, s134(c) and s134(e) does not 'bespeak the charge' because an alleged contemnor, such as Green, cannot tell, without more, which answers are alleged to have amounted to a 'refusal' and which are alleged to have amounted to a 'wilful prevarication';[56]
> (6) Moreover, even where only one paragraph of s134 is relied upon, for example s134(1)(c), reference to the paragraph does not itself provide the full particularisation because s134(1)(c) identifies three separate forms of conduct (refusing to be sworn, refusing to answer any lawful question, refusing to produce documents), and even where the context disambiguates there is a need to identify which answers amount to a refusal especially where, as here, many of the answers (including those given to the series of questions beginning with 'Are you known as Greenie?') indicated an inability to recollect rather than a statement of 'no comment';
> (7) Both s133 and s134 relate to conduct committed in court and thus both potentially raise the difficulties associated with the magistrate occupying an 'unusual concatenation of roles'[57] of being a witness, laying the charge, deciding the issues of fact, determining whether the charge is proved, and sentencing the offender – it is this unusual concatenation that gives rise to the 'special obligation'[58] on the magistrate to ensure that the obligation to accord procedural fairness is met and that it is apparent that it is met, both to the accused and the world at large;
> (8) Importantly, the types of conduct identified in s134 are each a species of conduct committed in the face of the court[59] singled out for special mention (by contrast with other forms of contempt, for example, that consisting in publication of prior convictions before trial,[60] improper pressure exerted on a witness out of court;[61] or subsequent breach of a court order[62]) – this is especially so for the

conduct described in s134(1)(c) and (e), a refusal to answer questions or prevarication being the very form of contempt in the face of the court at issue in *Coward v Stapleton*.[63] Thus the authorities relied on in *Zukanovic* in support of the procedural steps necessary to observe natural justice are directly and equally applicable to s134, including the unequivocal principle laid down by the High Court in *Coward v Stapleton* that 'no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him'.[64]

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

(3) Did the Magistrate do all that was necessary?[67]

62. The DPP submitted that the magistrate did all that was necessary for him to do in the circumstances. It was argued that it was not the intention of J Forrest J in *Zukanovic* to lay down with rigidity a set of prescriptive rules or to dictate what the content of procedural fairness must be for every instance of contempt in the face of the court, let alone other forms of contempt. One would not wish to impose 'a degree of procedural punctiliousness [on the Court] which some Magistrates have not hitherto thought to be required and may not even now consider to be desirable'.[68]

63. The DPP maintained that the magistrate was quick to provide Green with a warning at the outset of the hearing that if he refused to answer any lawful questions he might be charged with contempt. The warning included mention of s134 of the Act. He also asked Green if he had sought legal advice with respect to the hearing. He then took three short adjournments, each taken to ensure that Green had had an opportunity to receive legal advice, especially with respect to s128 of the *Evidence Act* and the effect of a ruling by the magistrate that there were no reasonable grounds for the claim of privilege against self-incrimination.

64. It was submitted that there had been a proper articulation of the charge because the magistrate was careful to tell Green that he 'needed to understand as a witness ... [that if he] refused to answer any lawful questions you may be charged with contempt' under s134 of the Act headed 'Contempt of Court'. The circumstances made it plain, it was argued, that Green well knew that his persistent refusal to answer questions, when directed to do so, was the substance of the charge, being precisely the form of conduct which falls under s134(1)(c), which the Magistrate sought to explain. Moreover, as the contemptuous conduct occurred in front of the magistrate and unfolded during the course of the hearing there was no need for a separate inquiry into the contempt, as the trial judge found was necessary. It was further argued that there was no need to take a plea given that the necessity to take a plea is not articulated in s134(2).

65. The DPP also submitted that, given that Green was legally represented, there was an obligation on his legal representative to make whatever submissions he considered necessary. This could have extended to inviting the magistrate more formally to articulate the charge, or to reconsider any of his rulings, or to seek that another magistrate deal with the issue of contempt. The magistrate did not indicate that Mr Burns was limited to making submissions on penalty and he could have presented a full defence of Green's conduct.

66. In my opinion, it is clear that the magistrate was endeavouring to ensure that Green was treated fairly and that his evidence, while given pursuant to a compulsory examination, was provided within the context of procedural safeguards. The magistrate was careful to make Green aware from the outset of the questioning that a refusal to answer questions carried with it potentially grave consequences and that he had the right to claim privilege against self-incrimination if he thought fit. The magistrate was clearly concerned to ensure that Green had a full opportunity to obtain legal advice and was not left unprotected.

67. The difficulties that arose, in my view, came about from a failure to be alert to the order in which the events were taking place. Here no charge was laid, although there was a discussion as to whether it should be laid but this occurred after the finding of contempt was made. It is

to state the obvious to say that the laying of a charge is of little assistance to an accused if it is articulated after a finding that the charge has been made out. There can be no opportunity for evidence to be led, or submissions made in defence to a charge, as required by *Coward v Stapleton*, if a finding of contempt has already been made. This is what happened here.

68. When the magistrate said 'I'm satisfied with the proceedings as they have gone this morning that those two paragraphs of s134(1)(c) and (e) are made out and that you are a person who is guilty of contempt of court and I so inform you of that' the magistrate was expressing his determination, in the language of conclusion, that he had found Green guilty of contempt. Indeed, as mentioned above, this was conceded by the DPP on the appeal. Thus, the finding of contempt was made before there was a discussion as to whether any charge should be laid. Indeed, the magistrate considered that the formal laying of a charge ought to be the next step in the proceeding before Mr Rose suggested that Green should be made aware of the penalties for contempt and given an opportunity to purge his contempt.

69. The finding of contempt was thus made, as mentioned above, without any identification to Green of which of his answers amounted to refusals under s134(1)(c) and which amounted to wilful prevarication under s134(1)(e). Indeed, the finding was made before there was any explanation given to Green of what conduct fell under s134(1)(e). But the problems went deeper than that.

70. The finding of contempt was made after only one question was answered following the magistrate's direction to Green to answer each of the questions that Mr Rose put starting with the question 'Are you known as Greenie?' To this direction Green immediately gave the response 'No comment' whereupon Mr Rose, before inviting the magistrate to hold Green in contempt, asked only one question, namely, 'Are you proposing when I ask each of the questions to answer again "No comment"?' to which Green's response was 'No comment'. This left uncertain whether Green was found guilty of contempt by reason of his refusal to answer (or wilfully prevaricating in his answer) the one question put by Mr Rose after the relevant direction from the magistrate; or, as a second option, whether the answers Green had given earlier to the sequence of questions beginning with 'Are you known as Greenie?' were incorporated by reference; or, as a third option, whether he was found guilty of contempt by reason of all of his answers in the 'proceedings as they have gone on this morning'. The failure to lay a charge left uncertain what conduct Green had engaged in that had the consequence that he was found guilty of contempt.

71. The effect of the submissions of the DPP is that a failure to lay a charge can be remedied by the giving of a warning in advance (for example, that a refusal to answer carries a risk of contempt) so that if the conduct against which the warning has been given occurs, or is repeated, the laying of a charge is redundant and need not occur at all or only as a preliminary step before determining an appropriate penalty. On the DPP's approach, a warning is to be treated as tantamount to a charge depending on the circumstances.

72. What this approach ignores is that without a formal charge there is a real risk of uncertainty attaching to the process, an uncertainty that taints the proceeding and the administration of criminal justice more generally. Thus, the uncertainty created here would have created difficulties even if Green had been permitted to offer a defence. Could he have pointed to the number of substantive answers given to many of the questions asked in the sequence beginning with 'Are you known as Greenie?' or the number of substantive answers given in the course of the morning and argued that they were genuine answers? What would the uncertainty have meant for any appeal?[69]

73. Similar considerations underlie the need for an opportunity to be afforded to an accused to proffer a defence before a finding of contempt is made. There is a world of difference between being given an opportunity to be heard in defence in response to a charge before a finding of guilt is made, and being permitted to make submissions on the question of penalty, as happened here. While the latter is important, especially if it includes an opportunity to an alleged contemnor to purge his or her contempt, it is the former that is essential if compliance with the principle in *Coward v Stapleton* is to be observed. As the High Court said:[70]

> 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. Not only does the charge place the liberty of the individual in jeopardy in proceedings of a summary character which do not surround him with all the safeguards of a jury trial; but 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.

74. Insofar as the requirement to consider the charge and withhold judgment until any defence has been presented entails a separate inquiry, it is simply an acknowledgment that it is necessary for the Court to focus upon the need to determine whether a contempt has been committed before returning, if relevant, to the principal proceedings. Given that a finding of contempt carries a real risk of imprisonment, this requirement is unsurprising.

75. Nor can the special obligation imposed on a court when adopting a summary procedure for contempt be shifted to a legal representative. It is not the legal representative who carries out the variety of roles arising from the extraordinary nature of summary contempt powers nor is it the legal representative who is under the special obligation created by the need to perform those roles. The legal representative of an alleged contemnor can do only what he or she has been given an opportunity to do by the court. Here, Mr Burns could hardly have requested the laying of a charge when the charge had already been determined against his client; nor is it clear what jurisdiction he could have sought to invoke if he had invited the magistrate to reconsider his ruling; nor could he have sought for another magistrate to determine the charge when it was already determined. He was confined to making submissions on penalty and sought to do the best he could in the circumstances. Being so restricted is incompatible with the principle in *Coward v Stapleton*.

76. No doubt J Forrest J did not intend that the procedural steps he identified in *Zukanovic* were to be treated as a set of rigid prescriptive rules that bore no capacity to adapt to the circumstances of a proceeding. I have already indicated that I consider the steps to be no more than an expression of the principle in *Coward v Stapleton* that 'no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him'.[71]

77. The advantage conveyed by the setting out of separate procedural steps, in the way J Forrest J has done, is to emphasise that the order in which these steps take place is of critical importance. In particular, the laying of the charge must come at the commencement of the summary procedure for contempt, not at some later stage. As his Honour said, this can be done orally or in writing – all that matters is that the alleged contemnor understands what he or she is charged with. Extending an opportunity to plead guilty or not guilty to the charge, before the charge is determined, is simply a component part of affording an opportunity to be heard. It may well incorporate, expressly or implicitly, an opportunity to consider the charge, and request an adjournment, legal assistance, or further particulars of the charge. Such matters are clearly contingent on the circumstances of a particular proceeding and may be as compressed or as extensive as the circumstances permit. The obligation then to allow an alleged contemnor to raise a defence lies at the heart of procedural fairness in this context, to provide an opportunity of answering the charge so that the court can defer its determination until it has 'considered everything which the [alleged contemnor] may fairly wish to urge in his defence'.[72]

78. I reject Ground 1 of the grounds of appeal.

Ground 2: Did the magistrate breach natural justice?

79. It is apparent that Grounds of appeal 1 and 2 overlap. As Green submitted, the basis on which J Forrest J found that certain procedural steps should be adopted for a summary trial of contempt in the face of the court was that those steps were 'essential' to observe procedural fairness. It is the fundamental considerations of natural justice, most particularly the affording to a person of an opportunity to be heard in response to an allegation made against him or her,[73] reaffirmed in this context in *Coward v Stapleton*, that underlie the principles identified in *Zukanovic* and which I consider apply here in the context of the powers conferred by s134 of the Act.

80. The DPP submitted that there was here no denial of procedural fairness because procedural

fairness is a fluid concept which is capable of being modified, and even entirely excluded, by statutory implication. It was submitted that, in light of the express statutory procedure provided for in relation to s134, common law principles of fairness must, necessarily, have been intended by the legislature to be restricted. Rather, the legislative scheme of s134 was argued to allow a magistrate to deal very swiftly with a contempt charge arising in the very specific and limited circumstances contemplated by s134, without being impeded by the ordinary notions of procedural fairness that the law would otherwise require.

81. At the hearing of the appeal, the DPP clarified that the submission was not that s134 excluded the application of the ordinary common law notions of procedural fairness, but rather that s134 identified the procedure that was required to meet the demands of procedural fairness in the limited range of circumstances to which it applied, the 'baseline requirements of procedural fairness' being relative to context. It was not argued that the power of the Court to 'adopt any procedure that [it] thinks fit' in s134(2) wholly excluded the duty to accord natural justice but rather that it permitted variations in process.

82. In particular, the DPP submitted, in reliance on *R v Perkins*,[74] that s134(2) should be read as excluding any obligation to lay a charge. *Perkins* was concerned with sub-ss (2) and (3) of s137 of the *Victorian Civil and Administrative Tribunal Act* 1998 which echo sub-ss (1) and (2) of s133 of the Act. As set out above, sub-s (2) of s133, like s134(2), also provides that the Court may 'adopt any procedure that [it] thinks fit'. The DPP relied on a passage from Vincent JA[75] who, after noting that the Victorian Civil and Administrative Tribunal is not a court, has no inherent power to punish for contempt, and which exercises a contempt jurisdiction wholly statutory in origin, namely s137, said that:[76]

> 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.

83. However, a fair reading of *Perkins* suggests that the emphasis was on the lack of any formal requirements as to how a charge is laid which is consistent with, and reflects the tenor of, the statement in *Zukanovic* that a charge can be set out 'either orally or in writing'. The observation of Vincent JA does not support the proposition that that there is no need for any charge to be laid. Nor does it support the view that the statutory authorisation of 'any procedure that [the Court or Tribunal] thinks fit' is implicitly an acceptance that there is no need to observe procedural fairness or that procedural fairness can be severely abated. Rather, his remarks support the view that any procedure that is adopted must be one that is consistent with the demands of natural justice. This is evident from the following observation:[77]

> 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.*

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

85. Furthermore, the DPP quite properly conceded that a denial of procedural fairness may constitute jurisdictional error.[78] Nevertheless, it was submitted that, as a magistrates' court is an inferior court, the more limited range of jurisdictional error applicable to an inferior court (as opposed to a Tribunal) should apply, as recognised in *Craig v The State of South Australia*,[79] and endorsed in *Kirk v Industrial Court of New South Wales*,[80] in particular the unavailability of the ground of ignoring relevant considerations as a form of jurisdictional error. However, the DPP's submission faces the difficulty that if the ground of procedural fairness is made out, as I consider it is here, there is no need to consider any additional ground of jurisdictional error, especially one that has not been alleged.

86. I reject Ground 2.

87. I would dismiss the appeal.

88. However, it is important to emphasise that the requirements which I have described ought not to impose rigidity on proceedings dealing with contempt or prevent a court from asserting its authority effectively when it is necessary to do so. As I indicated earlier, the power to direct the arrest of the alleged contemnor ought to be sufficient to meet the need for immediate action where that is warranted.

Notice of Contention

89. In addition, Green had filed a Notice of Contention which sought to affirm the judgment and orders of the judge on two additional bases:

> Ground 1: The learned Magistrate erred in failing to uphold the first respondent's [Green's] claim of privilege against self-incrimination.
>
> Ground 2: The learned Magistrate erred in considering that imprisonment was appropriate unless exceptional circumstances were made out.

90. It was indicated at the hearing of the appeal that Green did not seek to have the Notice of Contention determined in the event that the appeal was dismissed. As I have rejected both grounds of appeal, I consider that the appeal should be dismissed. However, I make some observations about each of the two grounds in the

Notice of Contention.

Ground 1: Privilege against self-incrimination

91. It was submitted on behalf of Green that a claim for privilege against self-incrimination was always a live issue during the course of the compulsory examination. So much stemmed from the reason for Green's attendance, as indicated above, to answer questions in relation to his alleged involvement in the beating of Mr Aakbari. Thus, it was submitted, all the questioning took place against the background of a suspicion by the police that he participated, at some level, in that beating. If the claim for privilege had been valid, it could have provided a proper defence to a charge of refusing to answer questions under s134(1)(c).

92. As indicated above, Green has since returned to the Court and answered all relevant questions thereby purging his contempt (had the finding of contempt been lawful). I consider there is no utility in remitting this matter to the Court and it is thus unnecessary to consider further whether the magistrate was wrong in rejecting Green's claim for privilege. Moreover, although the Director acknowledged that there may have been some foundation in Green's claim for privilege, it was argued that as the trial judge made no determination on this issue there is no utility in this Court further considering this ground.

Ground 2: Imprisonment unless exceptional circumstances

93. When the magistrate sentenced Green to 14 days' imprisonment, he said that 'imprisonment is the appropriate punishment, unless exceptional circumstances are made out'. The Director conceded at the hearing of the appeal that there was no authority to support the proposition relied on by the magistrate and the requirement for exceptional circumstances was not consistent with sentencing practice.

Conclusion

94. The appeal is dismissed.

95. It is unnecessary to make any formal determination with respect to the Notice of Contention.

96. When leave to appeal was granted, it was granted on the condition that the Crown should bear all the costs of the appeal by reason of the broader public interest considerations that attend the appeal. The Crown undertook to pay its own costs of the appeal and to pay Green's costs of the appeal on a solicitor and own client basis. The orders of the Court will reflect this.

WHELAN JA:

97. I agree with Tate JA. I only wish to add two matters.

98. First, this case and *Zukanovic* concern contempts governed by statutory provisions. The exercise of inherent jurisdiction to summarily deal with contempt may not necessarily be subject to the same requirements in every conceivable case.[81]

99. Second, Tate JA refers to the fact that compliance with the requirements described ought not to impose rigidity on proceedings dealing with contempt or prevent a court from asserting its authority effectively when it is necessary to do so. She refers to the power to direct an arrest. In that respect, I refer to *Wilkinson v S*.[82] In that case, a trial judge had ordered the arrest of a party who had become violent, threatening and abusive whilst a judgment was being delivered, and had ordered him to be remanded in custody. The English Court of Appeal had no criticism of that aspect of what had occurred and made some observations as to the possible salutary effect of 'a short period of reflection.'[83] The Court went on to describe the steps which should then have been taken.[84]

KAYE AJA:

100. For the reasons given by Tate JA, I agree that the appeal should be dismissed.

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[1] Pursuant to s134 of the *Magistrates' Court Act* 1989. See further below.
[2] *Green v Magistrates' Court of Victoria* [2011] VSC 584 ('*Reasons*').
[3] [2011] VSC 141; (2011) 32 VR 216 ('*Zukanovic*').
[4] Section 133 of the *Magistrates' Court Act*.
[5] Section 127 provides that the Court may order witnesses out of Court and to remain outside and beyond the hearing of the Court until required to give evidence.
[6] Section 56A of the Act has since been repealed and re-enacted as s104 of the *Criminal Procedure Act* 2009.
[7] Emphasis added. (All answers in italics have emphasis added.)
[8] See [89] below.
[9] This provides: '(1) A party who called a witness may, with the leave of the court, question the witness, as though the party were cross-examining the witness, about—... (b) a matter of which the witness may reasonably be supposed to have knowledge and about which it appears to the court the witness is not, in examination in chief, making a genuine attempt to give evidence'.
[10] Emphasis added.
[11] Green initially filed a notice of appeal to the County Court under s254 of the *Criminal Procedure Act*. The DPP objected to the jurisdiction of the County Court to entertain the appeal and on 11 October 2010 Judge Rizkalla heard argument on whether the appeal was within the County Court's jurisdiction. The judge held that the Court did not have jurisdiction to entertain the appeal and adjourned the proceeding for two months to allow Green to obtain advice and consider his options. The County Court proceeding was further adjourned to February 2011 after counsel for Green gave the County Court an undertaking to issue proceedings in the Supreme Court to challenge the magistrate's order and sentence.
[12] The Originating Motion named the Magistrates' Court of Victoria as the first defendant and the DPP as the second defendant. There was no appearance for the first defendant. So too on the appeal there was no appearance for the Magistrates' Court (by then the second respondent) which had indicated that it sought to take the approach set out in *Re Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; (1980) 144 CLR 13; 29 ALR 289; (1980) 54 ALJR 314, and would abide by any order made.
[13] Or that aspect of natural justice known as procedural fairness which 'requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it': *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597, 611 [40]; (2002) 187 ALR 117; 67 ALD 615; (2002) 76 ALJR 598; (2002) 23 Leg Rep 16 (Gaudron and Gummow JJ).
[14] Pursuant to s10 of the *Administrative Law Act* 1978.
[15] *Easwaralingam v Director of Public Prosecutions* [2010] VSCA 353; (2010) 208 A Crim R 122, 127 [22].
[16] At [1].
[17] *Reasons*, [14].
[18] Ibid.
[19] [1970] 1 Ch 345, 402; [1969] 2 All ER 274; [1969] 2 WLR 1294.
[20] *Reasons*, [15], [20].
[21] *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531, 573-4 [72]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437. Although it is not necessary for an error of law on the face of the record to be jurisdictional, it appears that the judge concluded that the nature of the error was jurisdictional (a misapprehension by the magistrate of his statutory functions) and that the error was apparent on the face of the record.
[22] He also held that an appeal against a finding made under s134 of the Act could be brought under s272 of the *Criminal Procedure Act* even though it could not be brought under s254 of that Act because s254 is confined to appeals from a proceeding 'conducted in accordance with Part 3.3'. Section 272 (which is restricted to appeals on a question of law) extends to 'a criminal proceeding' that encompasses proceedings for contempt. He rejected the DPP's submissions that the availability of a statutory right of appeal here

formed a basis for denying relief by way of judicial review (*Reasons*, [5]). Given his intended disposition of the matter, it also became unnecessary for him to determine whether to grant an application by Green, after the hearing of the proceeding, for leave to re-open the hearing to lead evidence and make submissions on whether Green had a right of appeal under s272.

[23] In terms, Ground 1 of the Amended Notice of Appeal, dated 23 April 2012, was as follows: 'The learned judge erred in law in holding that:

1. The Magistrate was bound under s134 of the *Magistrates Court Act* 1989 (Vic) to follow the procedural steps laid down in *Zukanovic v Magistrates Court* [2011] VSC 141; (2011) 32 VR 216 in relation to a finding of contempt of court under s133 of the *Magistrates Court Act* 1989 (Vic.). In particular, the magistrate erred in law in failing to: a) sufficiently articulate the charge of contempt; b) conduct a separate inquiry; and c) take a plea to the charge of contempt, before finding that the contempt was proved.'

[24] Ground 2 of the Amended Notice of Appeal was that: 'The learned judge erred in law in holding that:

2. The Magistrate's errors amounted to a failure to accord procedural fairness and were of a kind which can amount to jurisdictional error or were otherwise such as to enliven the prerogative jurisdiction of the Supreme Court'.

[25] *Zukanovic* [2011] VSC 141; (2011) 32 VR 216, 219 [12].

[26] Ibid [19].

[27] Ibid [21].

[28] Ibid [21]. Mr Zukanovic was taken into custody and later transferred to the Melbourne Custody Centre. During the course of the late afternoon and evening, an application was made to the Supreme Court to have him released on bail. That application was granted by Hargrave J and Mr Zukanovic was released from custody and remained on bail by the time the judicial review application came on and was determined in his favour.

[29] Ibid [32]-[40].

[30] *Keeley v The Honourable Mr Justice Brooking* [1979] HCA 28; (1979) 143 CLR 162, 170-1, 186; 25 ALR 45; 40 ALT 139.

[31] *Fraser v R* [1984] 3 NSWLR 212, 224-5; 15 A Crim R 58 ('*Fraser*').

[32] *Lewis v His Honour Judge Ogden* [1984] HCA 28; (1984) 153 CLR 682, 693; 53 ALR 53; 58 ALJR 342.

[33] *Balogh v St Albans Crown Court* [1975] QB 73, 85; [1974] 3 All ER 283.

[34] Ibid 85.

[35] *Fraser* [1984] 3 NSWLR 212, 224; 15 A Crim R 58.

[36] *Clampett v Attorney-General (Cth)* [2009] FCAFC 151; (2009) 181 FCR 473, 507-8 [158]; (2009) 260 ALR 462.

[37] *Fraser* [1984] 3 NSWLR 212, 224; 15 A Crim R 58.

[38] Ibid 225.

[39] *Kift v R* [1993] VicRp 51; [1993] 1 VR 703, 707 ('*Kift*').

[40] *Rich v Attorney-General (Vic)* [1999] VSCA 14; (1999) 103 A Crim R 261.

[41] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.

[42] Ibid 580.

[43] *Kift* [1993] VicRp 51; [1993] 1 VR 703, 709.

[44] *Zukanovic* [2011] VSC 141; (2011) 32 VR 216, 224 [37].

[45] Ibid 224 [37].

[46] Ibid 225 [41].

[47] Section 133(4).

[48] Section 134(3).

[49] *Zukanovic* [2011] VSC 141; (2011) 32 VR 216, 228 [54]. This statement was made in the context of considering whether arrest (or the issuing of a warrant authorising arrest) was an essential precondition to the jurisdiction to deal with an alleged contemnor under s133(2).

[50] In any event he rejected the argument as to the essential pre-condition in relation to s134(2)(a), which he considered, like s133(1), to be facilitative and designed to confer a discretionary power to have a contemnor arrested in circumstances in which the respective sub-sections applied. The power to deal with the different forms of contempt were not dependent upon the power to arrest first being exercised: see *R v Perkins* [2002] VSCA 132.

[51] Section 133(1) and s134(2).

[52] [1995] HCA 3; (1995) 183 CLR 525; (1995) 131 ALR 401; (1995) 69 ALJR 847; 83 A Crim R 472.

[53] [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694, 697 [5].

[54] [1999] VSCA 14; (1999) 103 A Crim R 261.

[55] Section 133(2) and s134(2) respectively.

[56] Cf *Corruption and Crime Commission v Wallace* [2010] WASC 390.

[57] *Fraser* [1984] 3 NSWLR 212, 224; 15 A Crim R 58 (Kirby P and McHugh JA).

[58] Ibid 225.

[59] Perhaps with the exception of the refusal to attend court under s134(1)(a).

[60] *Hinch v Attorney-General (Vic)* [1987] HCA 56; (1987) 164 CLR 15; 74 ALR 353; 28 A Crim R 155; 61 ALJR 556.

[61] *R v McLachlan* [1998] 2 VR 55; (1997) 93 A Crim R 557.

[62] *La Trobe University v Robinson and Pola* [1972] VicRp 104; [1972] VR 883; *Deputy Commissioner of Taxation v Barry James Rumpf* (Unreported, Supreme Court of Victoria, Southwell J, 30 June 1987); *Re Barry James Rumpf; ex parte Official Trustee* [1991] FCA 543.

[63] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128, where answers given by a bankrupt

indicated that he had no intention of giving real answers. The answers were treated as amounting to contempt. The High Court held that before a finding of contempt could be made the specific charge should have been distinctly stated and a reasonable opportunity given to the bankrupt to be heard in his own defence. So too the refusal of a witness to be sworn is a form of contempt in the face of the court: *R v Razzak* [2006] NSWSC 1366; (2006) 166 A Crim R 132, as is a refusal to give evidence: *Allen v The Queen* [2013] VSCA 44.

[64] [1953] HCA 48; (1953) 90 CLR 573, 579-80; [1953] ALR 743; 17 ABC 128.

[65] *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, 162 [32]; (2006) 231 ALR 592; (2006) 93 ALD 300; (2006) 81 ALJR 515, ('*SZBEL*') the Court referring to the judgment of the Full Federal Court in *Commissioner for Australian Capital Territory Revenue v Alphaone* [1994] FCA 1074; (1994) 49 FCR 576, 590-1; (1994) 127 ALR 699; (1994) 34 ALD 324.

[66] *SZBEL* [2006] HCA 63; (2006) 228 CLR 152, 165 [44]; (2006) 231 ALR 592; (2006) 93 ALD 300; (2006) 81 ALJR 515.

[67] These submissions were made under the heading of Ground 1 of the grounds of appeal. They could equally have been made under Ground 2 but this is because the two grounds significantly overlap.

[68] The DPP relied on remarks of Nettle JA made when granting leave to appeal in this matter: *Director of Public Prosecutions v Peter Green* (24 February 2012), [12], (Kyrou AJA agreeing)).

[69] Under s272 of the *Criminal Procedure Act.*

[70] *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573, 580; [1953] ALR 743; 17 ABC 128.

[71] Ibid 579-80.

[72] Ibid 580.

[73] See *Cameron v Cole* [1944] HCA 5; (1944) 68 CLR 571, 589; [1944] ALR 130; 13 ABC 141; (1944) 17 ALJR 397; *Condon v Pompano* [2013] HCA 7, [184], [188], [192] (Gageler J).

[74] [2002] VSCA 132 ('*Perkins*').

[75] With whom Phillips CJ and Chernov JA agreed.

[76] *Perkins* [2002] VSCA 132, [16].

[77] Ibid [16] (emphasis added).

[78] *Re Refugee Review Tribunal; ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82, 101 [41]; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6.

[79] [1995] HCA 58; (1995) 184 CLR 163, 178-80; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.

[80] [2010] HCA 1; (2010) 239 CLR 531, 573-4; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.

[81] Whilst the very robust approach approved of by the English Court of Appeal in *Morris v Crown Office* [1970] 2 QB 114 might now be seen as a product of its time, the most recent edition of *Borrie & Lowe: The Law of Contempt* (4th Ed, 2010, 12.43) quotes with apparent approval the judgment of Lamer CJC in the Canadian Supreme Court in *R v K (B)* (1995) 129 DLR (4th) 500, [15]-[16] where, after setting out the 'usual steps', he added that '... there may be some exceptional cases, involving misbehaviour in court, where the failure to take one or all of the steps I have outlined above will be justified.' The relevant passage in *Borrie & Lowe* is confusing. Paragraph [15] of *R v K (B)* is quoted and indented but [16] appears as if it were part of the commentary.

[82] [2003] EWCA Civ 95; [2003] All ER (D) 23; [2003] 2 All ER (Comm) 1054; [2003] 1 WLR 1254.

[83] Ibid 1262.

[84] Ibid 1262-3.

APPEARANCES: For the DPP: Dr SB McNicol SC, counsel. Mr C Hyland, Solicitor for Public Prosecutions. For the first respondent Green: Mr D Grace QC, counsel. Balmer and Associates, solicitors. No appearance for the second respondent Magistrates' Court of Victoria.
