25/13; [2013] WASC 66

SUPREME COURT OF WESTERN AUSTRALIA

MANSELL v MIGNACCA-RANDAZZO

Hall J

29 January, 5 March 2013

CRIMINAL LAW – CONTEMPT OF COURT – WHETHER THERE IS A RIGHT OF APPEAL FROM A CONVICTION FOR CONTEMPT IN THE MAGISTRATES' COURT – REFUSAL TO APPEAR BY VIDEO LINK WHEN DIRECTED TO DO SO – WHETHER CONTEMPT 'IN THE FACE OF THE COURT' – WHETHER PROCEEDINGS WERE FAIR – WHETHER APPROPRIATE TO CONVICT IN LIGHT OF APOLOGY – WHETHER SENTENCE OF 1 MONTH'S IMPRISONMENT MANIFESTLY EXCESSIVE.

M. who was a prisoner serving a life sentence, was charged with several counts of theft. The charges were listed for mention and a video link with the prison where M. was detained was established. However, M. refused to come into the video room and claimed that he wished to appear personally before the Magistrate. Later, M. was charged with contempt in the face of the court, found guilty and sentenced to one month's imprisonment. Upon appeal—

HELD: Appeal dismissed.

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

2. A contempt of the type alleged in this case was clearly criminal in nature. This was confirmed by the fact that s16(4) of the *Magistrates' Court Act* 2004 (WA) ('MCA') provides that a person guilty of a contempt under s15 is liable to a fine of not more than $12,000 or imprisonment for not more than 12 months or both. It was unlikely that the legislature intended to exclude such potentially serious matters from the ambit of the *Criminal Appeals Act* 2004 (WA) ('CAA'). This supports a conclusion that the word 'charge' as used in s6(c) of the CAA bears its ordinary meaning; that is, a formal allegation, either orally or in writing, that a person has committed a criminal offence and which carries with it the consequence that the allegation will be dealt with by a court. Whilst contempt is not referred to in the MCA as an offence, it is certainly analogous to one. On this basis, the appellant was convicted on a charge of contempt and had a right of appeal under s7 of the CAA.

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

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

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

6. On 16 December 2011 the matter was stood down to enable the appellant to comply with the direction. His non-compliance was clearly connected to those continuing proceedings and had the effect of interfering with them. The refusal to comply with the direction was proximate to those

proceedings and was, therefore within the meaning of the term 'in the face of the court'.

7. If the appellant was under the mistaken impression that he had both a right to appear personally and a right to refuse to comply with a direction from a magistrate to present himself on video link then he was wrong. Any such mistake was an error of law and could not excuse his non-compliance.

8. Furthermore, whilst it was possible to understand how the appellant may have had an expectation that in light of s77(2) he would be brought before the Magistrates' Court to appear personally on the first appearance, it was more difficult to understand how he could have believed that he was justified in defying a specific direction from a magistrate to appear by video link. There was no doubt on the evidence that the direction to appear by video link was conveyed to the appellant and that he made a deliberate decision to refuse to comply with it. He persisted in that refusal despite receiving legal advice that he must comply.

9. To the extent that the appellant suggested that he was not in contempt because he did not intend to so act, his argument was misconceived. Intention to commit contempt in the face of the court is not an element of the offence under s15(1)(e) of the MCA.

10. An apology by a contemnor is a matter to be taken into account when imposing punishment. An apology necessarily incorporates an acceptance of the wrongfulness of the conduct. An apology, therefore, cannot be a defence to an allegation of contempt: rather it is a matter relevant to penalty.

11. The steps taken by the Magistrate accorded procedural fairness to the appellant.

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

HALL J:

Introduction

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

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

3. Yet there will be occasions where the only appropriate course is to deal with an alleged contempt summarily. In such cases it is important that the judicial officer bear in mind the risks of unfairness or an appearance of bias. Things can be done to mitigate these risks. They include adjournments, affording the alleged contemnor an opportunity to take legal advice, providing the contemnor with a clear articulation of the alleged contempt and an opportunity to answer the allegation by giving or calling evidence and making submissions.

4. In this case the appellant's act of contempt was that he did not appear in the Magistrates' Court when ordered to do so. As he was not present in the courtroom he raises the issue of whether his act of refusal could constitute contempt 'in the face of the court'. The appellant also questions the fairness of the proceedings by which he was found guilty of contempt. He further suggests that his acts were not serious enough to constitute contempt or, alternatively, that the magistrate should have exercised his discretion not to record a conviction. For the reasons that follow the appellant's contentions cannot succeed and the appeal is dismissed.

Background

5. The appellant has at all material times been a serving prisoner having been convicted of murder and sentenced to life imprisonment on 8 November 2011. Following his conviction and

imprisonment charges of stealing were preferred against him and these were listed for mention in the Perth Magistrates' Court on 15 December 2011.

6. On 15 December 2011 the stealing charges were called on for mention before Magistrate Hawkins. A video link to Hakea Prison was established but the appellant did not appear. A prison officer then appeared on the link and stated that the appellant was refusing to come into the video room.

7. The appellant was represented in court by a lawyer, Mr King. Mr King told the court that it was his understanding that the appellant was aware that he was to appear via video link, however he, that is Mr King, had not had an opportunity to speak to the appellant on that day. The matter was then adjourned to the following day to enable Mr King to obtain instructions from the appellant. Magistrate Hawkins directed that the appellant was to appear by video link at that adjourned hearing on 16 December 2011.

8. On 16 December 2011 the matter was called on before Magistrate Mignacca-Randazzo at 10.51 am. A video link was again established to Hakea Prison. The appellant did not appear. The superintendent of Hakea Prison, Mr Richard Butcher, then appeared on the link and stated:

> We have Mr Mansell in the waiting area but he is refusing to attend. I have spoken to Mr Mansell personally and I have explained that he's in breach of the order of the court and gave him a direct order to attend but he still refuses to attend, and in these circumstances I am seeking what is the disposition of the court, please? (ts, 16.12.11, page 2)

9. The appellant was again represented by Mr King on 16 December 2011. The magistrate asked Mr King whether he had had any contact with the appellant. Mr King then stated:

> MR KING: Yes, I spoke to Mr Mansell yesterday after this happened then and explained to him that he needed to appear and Mr Mansell instructed me that he would continue to refuse to appear, that he wished to be brought up in person and that he would continue to refuse to appear. I informed him that it was not the practice of the court to bring people up for mentions like this and he continued to insist with me so I tried to convince him. However, I have been unsuccessful, obviously, your Honour.
>
> HIS HONOUR: Mr King, has any reason been advised to you by your client as to why he refuses and is taking this position. Is he unwell? Is he apprehensive? Is there some problem?
>
> MR KING: My understanding, as explained by him, your Honour, is that he simply takes the matters very seriously and wishes to be actually present in person. He gave no other reason (ts, 16.12.11, page 3).

10. In response to a further question from the magistrate, the superintendent said that the resources were available at the prison to use force to bring the appellant into the video room if that was required. The magistrate decided not to take that course, but rather to give the appellant a further opportunity to appear by video link later in the day.

11. Magistrate Mignacca-Randazzo then made a formal direction in the following terms:

> I direct that Cameron James Mansell appear before me and that he be brought to the videolink room there at Hakea Prison in order for the accused Cameron James Mansell to appear before this court on a large number of charges, 48 charges (ts 16.12.11, page 5).

12. That direction appears to be directed both to Mr Mansell and the prison authorities. As regards Mr Mansell, his Honour then clarified the nature of the direction to him as follows:

> My direction is that I direct that Mr Cameron James Mansell physically attend and present himself in the video link room at Hakea Prison at the time that the court establishes a video link from the Perth Central Law Courts to Hakea Prison on 16 December 2011 at not before 11.30 am (ts 16.12.11, page 5).

13. Before adjourning the proceedings the Magistrate asked that Mr King be given an opportunity to speak to the appellant. The clear purpose of this was to ensure that the appellant understood his legal obligation to appear and could obtain any advice he wished to from his lawyer in that regard.

14. The matter was recalled shortly after 11.30 am. The link to Hakea Prison was re-established. The appellant did not appear. A prison officer stated that the appellant had declined to come to the video link room. The superintendent then appeared and said:

> MR BUTCHER: I've provided your direction to Mr Mansell that he present himself in person in court. He has been given an opportunity to speak with his legal adviser. Following that briefing I have seen Mr Mansell and he continues to refuse to present himself to court, sir.
>
> HIS HONOUR: Did he appear to understand the direction that you conveyed to him.
>
> MR BUTCHER: Yes he did (ts 16.12.11, page 7).

15. Magistrate Mignacca-Randazzo then asked Mr King whether he had had an opportunity to speak to the appellant. Mr King said:

> MR KING: I explained to him the direction that you had given and he informed me that he doesn't mean to show contempt for the court; quite the opposite, he considers the matters very serious which is why he wishes to be here. He, as your Honour may be aware, was recently convicted of matters in the Supreme Court, and following on from that obviously takes any court matters very seriously and wishes to be present in order that he can speak to his lawyer and properly observe what's actually going on in the court and that, as I understand it, is the full basis of his ...HIS HONOUR: Do I understand you to be telling me that he has understood the direction that I have given?
>
> MR KING: Yes sir.
>
> HIS HONOUR: You tell me that he is not intending any disrespect. Is that what you are saying?
>
> MR KING: Yes sir.
>
> HIS HONOUR: You have given him advice in relation to what I have directed?
>
> MR KING: Yes sir (ts 16.12.11, page 8).

16. Magistrate Mignacca-Randazzo then stated that a notice would be prepared calling upon the appellant to show cause why he should not be dealt with for contempt. The hearing of that matter was then listed for 22 December 2011. An order for the appellant to be brought up from prison on that day was made. The stealing charges were also adjourned for mention on that day.

17. A notice was prepared and served on the appellant. It states that the alleged contempt is that on 16 December 2011 the appellant did not comply with a lawful direction, namely to physically attend and present himself to the video link room at Hakea Prison and appear by video link before the court. It states that this failure occurred 'in the face of the court' and refers to s15(1)(e) of the *Magistrates' Court Act* 2004 (WA) (MCA). The notice also states that the alleged contempt would be dealt with summarily at 9.30 am on 22 December 2011 and that the appellant would be called on to show cause at that time as to why he should not be found guilty of contempt. The notice states that if found guilty the appellant would be liable to the penalties set out in s16(4) of the MCA, being a maximum fine of not more than $12,000 or imprisonment for not more that 12 months, or both.

18. On 22 December 2011 the appellant appeared in person. He was again represented by Mr King. After adjourning the stealing charges, Magistrate Mignacca-Randazzo turned to the issue of the alleged contempt. He confirmed that a notice had been prepared on 16 December 2011 and sent both to the appellant and his solicitor. The allegation contained in that notice was then read to the appellant and he entered a plea of not guilty to it.

19. A certified copy of the transcript of the proceedings of 16 December 2011 was received into evidence without objection. The appellant then gave evidence in his defence. That evidence was brief. His evidence-in-chief consisted of the following:

> MR KING: Mr Mansell, on the date referred to, 16 December last week, can you please inform the court what your reasons were for the behaviour that you exhibited.
>
> MR MANSELL: I applied to the court directly, and indirectly through my solicitors, to appear in

> person which I always have insisted on doing in any matters that are before the court. I have several reasons for that request. Firstly, any appearance before the court is a very important one, and I feel I should be there. I should have the opportunity to be there in person. It gives me an opportunity to speak with my lawyers, and fully understand exactly what's happening in the matters before the court. It's very difficult via video-link. You don't get to obviously talk to your lawyers directly and take in exactly what's going on. From custody, it's very difficult to sometimes catch your lawyers because they are often in court by phone and when you write to them the mail process, it can take two weeks to get a written response so I feel it's a good way to communicate with the lawyers, and it gives you an immediate understanding of what's occurring in the court. So that's why I wrote to the court independently and insisted on being there in person. This is something that was before the courts over 12 months ago so it's just not new before the court (ts 22.12.11, page 8).

20. The cross-examination was similarly brief. The appellant was asked, and confirmed, that there was no physical impediment, illness or duress that prevented him from attending on the video link on 16 December 2011.

21. The appellant also tendered three letters that he had written to the court. The first was dated 6 December 2011 and was addressed to the registrar of the Magistrates' Court and was a request that he be brought up from prison for his appearance on 15 December 2011. The other two letters were dated 20 December 2011 and were described as letters of apology. They were addressed to Magistrate Hawkins and Magistrate Mignacca-Randazzo respectively. In the letter to Magistrate Mignacca-Randazzo the appellant stated:

> I write this letter with the intent to offer a sensible explanation for not appearing before you as directed, it is not a letter intended to soften any consequences that I may suffer **if** your Honour finds I was in contempt, I am respectfully in the hands of the court. [emphasis in original]

22. The appellant went on in the letter to express the view that a person in custody should have a right to choose to appear in person before the court. He expressed a view that to appear via video link in prison clothes would be prejudicial to how he was perceived. He also expressed a view that the stealing charges were an abuse of process.

23. Mr King provided written submissions to the magistrate. Those submissions include the following paragraphs:

> A direction was subsequently given indirectly to the accused by his Honour Magistrate Randazzo (his Honour) that the accused present himself via video link to the court. This direction was conferred [sic] and explained to the accused via his legal representative (who as an officer of the court encouraged the accused's compliance) and the superintendent in a brief recess.
>
> Following the recess, the accused continued to refuse to appear via video link on the basis, as explained to his legal representative, that:
>
> (1) it was not the accused's intention to show any contempt or disrespect for the court;
>
> (2) he considered the allegations against him to be extremely serious;
>
> (3) that he had previously requested to be brought before the court in person for reasons previously enunciated, which request had been refused; and
>
> (4) he wished to be brought before the court in person.

24. The balance of the written submissions were almost entirely addressed to the question of penalty. The only suggestion that the appellant may not be liable for contempt was a submission that there may be doubt as to whether the failure to comply in this case occurred 'in the face of the court' given that the appellant was not present before the court at the relevant time.

The Magistrate's decision

25. Magistrate Mignacca-Randazzo gave detailed oral reasons for his decision. He concluded that contempt of court had been proven beyond reasonable doubt on the evidence before him. He stated that the reasons advanced in the appellant's evidence did not disclose any recognisable defence.

26. His Honour then dealt with the issue of whether the contempt was committed in the face of the court. He noted that that phrase was not defined in the MCA but that it had been considered in a common law context in *Balogh v The Crown Court at St Albans* [1975] QB 73; (1974) 3 All ER 283. His Honour adopted the finding made in that case that a contempt 'in the face of the court' could be committed even though the judge does not see it and it is simply reported to him by officers of the court.

27. His Honour then said:

> In this instance Superintendent Butcher reported to me that you had refused to comply with my direction and in your evidence before me today there is no suggestion that you did not understand that direction or that there was anything other than a refusal to comply with my direction. It is a plain contempt in the face of the court. It unveiled itself before my very own eyes and there was no reason for me to doubt what Superintendent Butcher has reported to me and made clear in the transcript (ts 22.12.11, page 13).

28. His Honour went on to note that the purpose of contempt laws is to protect the administration of justice. He noted that the power to summarily convict and punish for contempt is a power that should be used sparingly and with restraint.

29. As regards the appellant's apology, his Honour said:

> In my view there was more than a discourtesy. I reject the contention that is effectively implicit in some of the submissions that this was not disrespectful. I know that you have written in terms suggesting that you are apologetic and that you were not intending any disrespect and that you were not intending to commit a contempt. In my view, that is all sugarcoating on your underlying defiance of the court authority.
>
> In my view, you had a wrongheaded view as to whether you ought to appear in person in a courtroom as opposed to complying with directions given by Magistrate Hawkins in the first appearance that the matter be listed and that you were to appear via video link but, moreover, given my direction clearly given to you that you were to present and physically appear via video link to the court.
>
> In effect, Mr Mansell, what this has really amounted to is that despite the directions given to you, you have for your reasons, in my view in a wrongheaded way, effectively said to the court that you will determine how you will appear before the court. The provisions of the *Criminal Procedure Act* are law of this State. Parliament has recognised that and appearance by video link is the same as appearing in person in court.
>
> It is not for you, Mr Mansell, or any other litigant to determine how you shall appear before the court. Although the practical result has been, Mr Mansell, that you in the end have appeared in person in court and that is, as I repeat, because I did not insist that the prison officers use such force as was reasonably necessary and potentially place themselves in any harms way should you have offered any resistance. That you ultimately come to this court in person and, in addition, to answer the charge of contempt.
>
> The practical effect of any penalty that I impose at this time, I fully realise, is notional. I realise that you are a sentenced prisoner, serving life imprisonment for murder with a non-parole period of 18 years (ts 22.12.11, page 14).

30. His Honour noted that the *Sentencing Act* 1995 (WA) does not apply to any punishment for contempt of court: s3(3) *Sentencing Act*. He made reference to the relevant considerations in respect of sentencing for contempt referred to by the Chief Justice in *Corruption and Crime Commission v Allbeury (No 2)* [2011] WASC 26; (2011) 205 A Crim R 386 and to the factors referred to by Dunford J in *Wood v Staunton (No 5)* (1995) 86 A Crim R 183, 185. He then sentenced the appellant to imprisonment for 1 month. It was not stated to be concurrent, but that was implied and given that the appellant was serving a life sentence any further term necessarily had to be served concurrently: s88(5) *Sentencing Act*.

Can an appeal be brought from a contempt conviction in the Magistrates' Court?

31. The Attorney General, who appears by counsel as *Amicus Curiae*, has raised an issue as to whether the appeal is competent. There have been other appeals from convictions for contempt in the Magistrates' Court, but this issue has not been raised: See, for example, *Beasley v Lane* [2011] WASC 98.

32. A right of appeal is entirely a creature of statute: *Davern v Messel* [1984] HCA 34; (1984) 155 CLR 21, 47; 53 ALR 1; 58 ALJR 321. A court does not have jurisdiction to hear and determine an appeal unless a statute so provides. This is confirmed by s20 *Supreme Court Act* 1935 (WA). Whether a statute provides for an appeal in this case depends upon construction of the statute under which this appeal purports to be brought.

33. Section 7 of the *Criminal Appeals Act* 2004 (WA) (CAA) provides that a person who is aggrieved by a decision of a court of summary jurisdiction may appeal to the Supreme Court. The word 'decision' is defined in s6 of the CAA to mean any of the following:

> (a) a judgment entered under the *Criminal Procedure Act* 2004 section 128(2) or (3);
> (b) a decision ordering a permanent stay of a prosecution;
> (c) a decision to convict an accused of a charge, whether after a plea of guilty or after a trial;
> (d) a decision to acquit an accused of a charge;
> (e) a decision to acquit an accused of a charge on account of unsoundness of mind;
> (f) a sentence imposed, or order made, as a result of a conviction or acquittal;
> (g) a refusal to make an order that might be made as a result of a conviction or acquittal;
> (h) a decision as to costs;(i) a decision made under the *Criminal Investigation Act* 2006 section 151;

34. The only category into which the decision in this case could fall is (c). The application of that subsection depends upon whether the appellant was convicted of 'a charge'.

35. The term 'charge' is not defined in the CAA. However, s3 provides that that Act is to be read with the *Criminal Procedure Act* 2004 (WA) (CPA). Section 3 of the CPA provides that the word 'charge' means 'a written allegation in a prosecution notice or indictment that a person has committed an offence'. A 'prosecution notice' is defined in the same section as a document that contains one or more charges, complies with s23(2) and is lodged with a court of summary jurisdiction. Section 23 sets out the formal requirements of a prosecution notice, including that it be in writing and be in a prescribed form. Regulation 8 of the *Criminal Procedure Regulations* 2005 (WA) (CPR) provides that a prosecution notice must be in the form of form 3 of sch 1 to those regulations.

36. Section 16 of the MCA provides for the procedure to be followed in respect of contempts of the Magistrates' Court. Where a contempt is alleged to have been committed in the face of the court, as here, s16(2) provides that the presiding court officer may orally, or by issuing a warrant, order the person to be arrested and brought before the court or may issue a summons that requires the person to appear before the court to be dealt with for the contempt.

37. Section 16(3) provides that rules of court may provide for the procedure for dealing with a person who is alleged to have committed contempt. Part 4 of the *Magistrates' Court (General) Rules* 2005 (WA) (MCGR) make such provision. Rule 30 specifies that warrants or summonses issued under s 16 are to be in the prescribed forms contained in the CPR sch 1. Relevantly these are form 1 (arrest warrant) and form 4 (summons).

38. There is no requirement that an allegation of contempt under s 15 of the MCA be in writing or be contained in a prosecution notice. This reflects the fact that in some circumstances an alleged contempt may be dealt with immediately. Where a magistrate or justice of the peace decides to deal with an alleged contempt summarily, he or she must, if practicable, orally inform the defendant of the nature and particulars of the alleged contempt: r31(2) MCGR.

39. The importance of the allegation of contempt being precisely formulated was referred to by the High Court in *Macgroarty v Clauson* [1989] HCA 34; (1989) 167 CLR 251 [255] [256]; 86 ALR 167; 63 ALJR 514. That is particularly so where the contempt is said to constitute a statutory offence. The need to deal with some alleged contempts promptly is not inconsistent with the 'fundamental requirement' that 'a person should not be punished for a statutory offence of contempt of court unless the particular offence charged has been distinctly identified and he has been given an adequate opportunity of answering the charge': *Macgroarty* [256], *Lewis v Judge Ogden* [1984] HCA 28; (1984) 153 CLR 682, 693; 53 ALR 53; 58 ALJR 342 and *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.

40. In this case, the magistrate decided that it was appropriate to deal with the alleged

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

41. The notice is similar to a form 3 in layout and content, but it is not strictly a prosecution notice. That raises the question of whether the allegation in the notice can be a 'charge' within the meaning of that word in the CPA and the CAA. If not then how can an appeal lie under pt 2 of the CAA?

42. If appeals against convictions in the Magistrates' Court are only available in respect of charges contained in prosecution notices then an appeal would not be open in this case. Indeed, it would not be open in any case where a charge of contempt is dealt with summarily by the Magistrates' Court. Given the significance of the potential consequences for those dealt with for contempt, the absence of appeal rights would be both surprising and, frankly, undesirable. For the reasons that follow, I have concluded that a convicted contemnor does have a right of appeal under pt 2 of the CAA and that this appeal is competent.

43. The requirement that the CAA be read with the CPA raises a presumption that words used in the two Acts will be used consistently and have the same meaning. That rule of construction applies where the same word is used in different parts of a statute: *Registrar of Titles v Franzon* [1975] HCA 41; (1975) 132 CLR 611, 618; 7 ALR 383; (1976) 50 ALJR 4 (Mason J). However, that presumption will not apply if the context in which a word appears in one place as compared to another compels a conclusion that a different meaning is intended.

44. The purpose of the CAA is to make provision for appeals in criminal matters and, in particular, where a person is convicted of a criminal offence. A contempt of the type alleged in this case is clearly criminal in nature. This is confirmed by the fact that s16(4) of the MCA provides that a person guilty of a contempt under s15 is liable to a fine of not more than $12,000 or imprisonment for not more than 12 months or both. It is unlikely that the legislature intended to exclude such potentially serious matters from the ambit of the CAA. This supports a conclusion that the word 'charge' as used in s6(c) of the CAA bears its ordinary meaning; that is, a formal allegation, either orally or in writing, that a person has committed a criminal offence and which carries with it the consequence that the allegation will be dealt with by a court. Whilst contempt is not referred to in the MCA as an offence, it is certainly analogous to one. On this basis, the appellant was convicted on a charge of contempt and has a right of appeal under s7 of the CAA.

45. There are other reasons that support this conclusion. The requirements of the CPA are, in many cases, not apposite in the case of an allegation of contempt. For example, requirements as to disclosure and to who is authorised to sign or issue a prosecution notice are inapplicable in the case of contempt. This is why the procedure for dealing with alleged contempts is separately provided for in the MCA and the MCGR. The fact that different procedures apply to contempt is acknowledged in s183 of the CPA. That section provides that the CPA does not affect the authority of a court to deal with and punish a person summarily for an act or omission that is a contempt of court. It is improbable that it was intended to exclude from the ambit of the CAA convictions for contempt merely because of differences in the way in which proceedings are commenced in the courts. If the object of s183 was to ensure that the CPA was not read as excluding the existing procedure for dealing with contempt it would seem inconsistent if that same procedure acted to exclude contempt convictions from the ambit of the CAA.

46. Further, the word 'charge' is not incorporated into all aspects of the definition of 'decision' in s6 of the CAA. For example, s6(f) provides that 'decision' can also mean 'a sentence imposed, or order made, as a result of a conviction or acquittal'. On the face of it that aspect of the definition is broad enough to include a sentence imposed as a result of a conviction for contempt. It would be odd if sentences and other orders following a contempt conviction were amenable to appeal but the conviction itself was not.

47. It is also noteworthy that in those cases where an alleged contempt is not dealt with summarily but referred to the Attorney General, the proceedings are commenced by lodging 'a written charge against the defendant that sets out the details of the act or omission that constitute the alleged contempt': MCGR r33(2). The use of the word 'charge' in this context indicates that an allegation of contempt is to be treated as a 'charge' in the general meaning of that word. Whilst the MCGR cannot be used as an aid to interpreting the CAA, the wording of r33 (and r34) does show that the terminology of a 'charge' is appropriate for describing an allegation of contempt. A distinction between an oral and a written allegation would not be sensible as this would mean an appeal would lie from a conviction for contempt when the proceedings were initiated by the Attorney General but not where dealt with summarily.

48. Rule 35 of the MCGR provides that the procedure for dealing with an alleged contempt, whether summarily or otherwise, is to be the same, so far as is practicable as that followed by the Supreme Court, except so far as the MCGR provide otherwise. Order 55 rule 3 of the *Supreme Court Rules* provides for the procedure in respect of contempt in the face of the court. That procedure includes a requirement that the person be informed of the contempt with which he is 'charged' and that the person be required to make his defence to 'the charge'. The word 'charge' is also used in that rule in the context of referring to hearing and disposition by the court. This confirms that the word 'charge' is properly used to describe an allegation of contempt dealt with summarily by the Magistrates' Court. It is the word commonly used to describe allegations of both common law and statutory contempt: see *Macgroarty*.

49. For these reasons I have concluded that the word 'charge' as used in s6 of the CAA is intended to have its ordinary meaning and is not confined by the definition in the CPA. Accordingly, a decision under s6 includes a conviction following an allegation of contempt dealt with summarily in the Magistrates' Court, as in this case.

50. In coming to this conclusion I have borne in mind that in *Cullen v The Queen* (unreported, WASCA, Library No 6450, 25 September 1986) it was held that whilst a finding of guilt of contempt was a criminal conviction, this did not mean that a convicted person fell within the terms of the statute providing for appeals. In that case, however, the statute in question referred to appeals by persons 'convicted on indictment'. The word 'indictment' is less amenable to being interpreted as including any oral or written allegation of contempt than is the word 'charge'. I also note the reasoning in *Allbeury v Corruption and Crime Commission* [2012] WASCA 84 [2] [24] (McLure P) and [198] [201] (Buss JA). In that case the jurisdiction of the Court of Appeal as set out in s58 of the *Supreme Court Act* was of critical importance. That section is of no assistance in this case.

51. If I am wrong and an appeal of this type cannot be brought under the CAA then the decision to convict the appellant of contempt could be made the subject of a review order under s36 of the MCA. When dealing with proceedings commenced under the CAA this court may make a review order: s14(1)(f) CAA. Though the basis for a review order is, generally, that there is jurisdictional error, it is accepted on behalf of the Attorney General that at least some of the issues raised by the appellant could be considered as alleging errors going to jurisdiction. Accordingly, whether this appeal has been validly brought under the CAA or could be subject to a review order under s36, the merits of the appeal must be considered.

Extension of time to appeal

52. The appellant was convicted on 22 December 2011 and his first appeal notice was filed on 24 January 2012. If the appellant was entitled to appeal under the CAA then any appeal had to be commenced no later than 28 days after the decision unless an extension is granted: s10(3) CAA.

53. The court may, however, in its discretion grant an extension of time. The discretion to extend time is given to ensure those rules which fix times for doing acts do not become instruments of injustice. Bearing in mind that the delay was only five days, that the appellant has at all times been in custody and that he has been self-represented in respect of this appeal, an extension of time should be granted.

Failure to comply with procedural orders

54. By order dated 30 August 2012 the appellant was ordered to file amended grounds of

appeal and other documents including a transcript of the proceedings in the Magistrates' Court within a specified time. The appellant filed an affidavit on 17 September 2012 annexed to which was an appeal notice containing three grounds of appeal. On 8 October 2012 the appellant filed a further affidavit which annexed a document entitled 'Grounds of Appeal'. These grounds were different to those contained in the 17 September 2012 document, though they covered some of the same issues.

55. On the hearing of the appeal the question was raised as to whether the appeal notice annexed to the affidavit filed on 17 September 2012 satisfied the requirements of the order made on 30 August 2012. If it did not, then there was a question of whether the appeal had been dismissed for failure to comply as a result of a self-executing order to that effect made on 30 August 2012.

56. The notice of appeal filed on 17 September 2012 arguably did not comply with the orders in that the appellant did not file amended grounds of appeal that met the requirements of s8 of the CAA and r65(2) of the CPR within the 14 day period prescribed. That is, not all of the grounds clearly identified the error or miscarriage of justice alleged by the appellant to have occurred.

57. However, pursuant to O3 r5 of the *Rules of the Supreme Court* 1971 (WA), which applies by virtue of s40(1)(l) of the CAA, the court may, on such terms as it thinks just, extend the period of time within which the appellant is required to comply with the order of 30 August 2012. This is so even if the order was self-executing and the time has expired for the appellant to comply: *Chisholm v Norgard* (1991) 4 WAR 202, 204.

58. For the same reasons that I have referred to in respect of the extension of time to appeal, I consider it appropriate to grant the appellant an extension of time in which to comply with the orders of 30 August 2012. I will treat both sets of grounds of appeal as having been properly filed and will deal with them on the merits.

Grounds of appeal

59. The grounds, as contained in the appeal notice filed on 17 September 2012, are as follows:

> The conviction should be set aside as the Appellant was not in Court or in the 'face of the Court' at all, so therefore could not have shown contempt in the 'face of the Court' as he did not appear.
>
> The Appellant is now self-represented and had made several written requests to appear in person which is his right and legitimate expectation.
>
> The Appellant gave a written apology to the Court which included a detailed explanation on why he could not appear when required, which in view of all the circumstances should have been accepted by His Honour.

60. The grounds, as annexed to the affidavit filed on 8 October 2012 are as follows:

> **First Ground** The verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be lawfully supported.
> **Particulars**
> The conviction of contempt was made hastily and without adequate factual foundation.
> The conviction of contempt was made without proper consideration to the facts advanced by the defence.
> There were mitigating factors within the evidence that were ignored by His Honour.
> **Second Ground** The verdict of guilty on which the conviction is based should be set aside because, an accused has a right to fair trial which was not afforded to him.
> **Particulars**
> The Appellant was denied due process and procedural fairness because he was tried by his accuser.
> The Prosecution made no complaint about the Appellant's actions.
> The Magistrate took a draconian approach, somewhat personally affronted by the Appellant's actions.
> The Magistrate descended into the arena and forfeited an impartial vantage point resulting in bias to the Appellant.
> The result was a trial which was unfair.
> **Third Ground of Appeal** The verdict of guilty on which the conviction is based should be set aside because, His Honour made several errors at law in his ***discretion*** on the way in which the trial was conducted.
> **Particulars**
> The alleged contempt was in fact a failure to appear and to obey a direction order by the Court.
> The Appellant did not, in the face of the Court show contempt, as he did not appear.

Non-appearance is not contempt in the fact of the Court.
The Appellant did fail to comply with a Court order but gave good reason.
Fourth Ground of Appeal The verdict of guilty on which the conviction is based should be set aside because, there is not sufficient criminal elements to support the charge.
Particulars
The actions taken by the Appellant were not serious enough to be contempt.
There was a genuine expression of contrition by the Appellant by way of a written apology.
There are many mitigating circumstances surrounding the actions taken by the Appellant which require further examination.
An accused person has the right to appear in Court in person, it is a legitimate expectation reasonably held by the Appellant.
The Appellant held the belief it was his right to appear in person.
At its highest the accusation stems from a honest and reasonable belief held by the Appellant, there is no intent to offend.
Fifth Ground of Appeal The verdict of guilty on which the conviction is based should be set aside because, the irregular nature of the charge and the trial is unreliable, and in view of all the circumstances the conviction should be quashed.
Particulars
The Appellant has given several grounds of appeal all of which require and deserve due consideration.
Either a single ground or an aggregate of grounds may be sufficient to set aside the conviction.
The authorities cited by the Appellant may be lawfully followed by this court.
Despite not raising some of these issues at trial they can now be relied upon by the Appellant.
If the conviction is not set aside due to this appeal then the sentence should be reduced.

The application to add a further ground

61 At the hearing of the appeal the appellant submitted that he was not guilty of contempt because there had been a miscommunication of the direction issued by the magistrate. He submitted that the superintendent of Hakea Prison had told him that the direction was that he should appear personally before the magistrate. He said that he understood this to mean that he was not required to appear on the video link but would be transported to Perth to appear in person before the magistrate.

62. This claim did not relate to any of the grounds of appeal. When this was pointed out the appellant sought to amend his grounds by adding a new ground that addressed this issue. The proposed new ground was that the conviction was a miscarriage of justice because the magistrate's direction had been miscommunicated and there had been no non-compliance with the direction as communicated to the appellant. I refused the application to amend the grounds for the reasons that follow.

63. A claim that the magistrate's direction had been miscommunicated to the appellant on 16 December 2011 was not made at the hearing before the magistrate on 22 December 2011. To the contrary, that hearing proceeded on the accepted basis that the direction had been properly conveyed to the appellant. The evidence as to the direction and the superintendent's confirmation that the direction had been given was contained in the transcript of the proceedings of 16 December 2011. That transcript was provided to the appellant and his counsel and its receipt into evidence was not objected to.

64. Furthermore, on 16 December 2011 the appellant's counsel had confirmed that he had discussed the direction with the appellant and that the appellant had understood it and made a considered decision not to comply. There was no suggestion at the hearing on 22 December 2011 that what was said in that regard by counsel was incorrect or was said without authority.

65. The appellant gave evidence at the hearing and made no claim that the direction had been miscommunicated. Indeed, his defence was inconsistent with any such claim.

66. The defence case was that whilst there had been deliberate non-compliance with the direction this did not constitute contempt in the face of the court. Alternatively, if it did, the court should not proceed to a conviction having regard to the appellant's letters of apology. The terms of the letters of apology were also inconsistent with any claim that the appellant had been misled as to the direction.

67. In neither of the sets of the grounds of appeal filed in this matter was there any claim made

that the appellant had been unfairly convicted because the direction had been miscommunicated. In written submissions annexed to the affidavit filed on 8 October 2012 the appellant stated:

> A direction was subsequently given indirectly to the appellant by his Honour Magistrate Randazzo that the appellant present himself, via video link, to the court. This direction was conferred [sic] and explained to the appellant via his legal representative and the superintendent in a brief recess.

68. This is identical to the written submissions made by the appellant's counsel at the hearing before the magistrate. The appellant evidently adopted those submissions and accepted that they were an accurate statement of what occurred. They are inconsistent with any claim that the direction was miscommunicated. Any such claim is, accordingly, without any possible factual basis.

69. If the appellant's claim, in substance, was that he could give fresh or new evidence to show that his conviction for contempt was a miscarriage of justice then the claim was unsupported by any affidavit. Given the length of time for which this appeal has been pending, the lateness of the application to include a new ground, the absence of any evidence to support such a ground and the inconsistency between the proposed ground and both the evidence in the Magistrates' Court and the way in which the appellant's case had been conducted both in the Magistrates' Court and on appeal, I considered that there was no proper basis for allowing the application. Even if leave to amend had been granted a new ground in the terms proposed would have had no prospect of success.

Was the contempt 'in the face of the court'?

70. The appellant was charged with a contempt of court contrary to s15(1)(e) of the MCA. That subsection provides that a person is guilty of a contempt of the court if the person does not, in the face of the court, comply with a lawful direction of the court. The appellant argues that because he was not in the court and could not be heard or seen by the magistrate his contempt could not be 'in the face of the court'.

71. Section 15 of the MCA provides as follows:

> (1) A person is guilty of a contempt of the Court if the person—
> (a) while the Court is sitting, wilfully—
> (i) interrupts the proceedings;
> (ii) misbehaves before the Court;(iii) insults a person constituting the Court;
> (b) wilfully insults or obstructs—
> (i) a person going to a courtroom for the purpose of constituting the Court;
> (ii) a person leaving a courtroom having constituted the Court;
> (c) when required by the Court to take an oath or affirmation, does not do so;
> (d) when required by the Court to give evidence that the person is competent and compellable to give, does not do so;
> (e) does not, in the face of the Court, comply with a lawful direction of the Court.
>
> (2) A person who—
> (a) having been served with a summons to attend as a witness, without reasonable excuse, does not attend as required by the summons; or(b) having been required by the Court to produce a record or thing to the Court, without reasonable excuse, does not do so,
> is guilty of a contempt of court unless the omission is an offence.
>
> (3) A person is guilty of a contempt of the Court if—
> (a) the Court makes a lawful order ordering a person to do an act (other than to pay money) or to cease (temporarily or permanently) doing an act;(b) the person, without reasonable excuse, does not comply with the order; and(c) another written law does not provide a means for punishing noncompliance with or enforcing the order.
>
> (4) This section applies in relation to an act or omission by a person outside the State as if it were an act or omission by the person in the State.

72. There are three broad categories of contempt provided for in this section. Those in 15(1) are contempts of a type that occur during the conduct of proceedings and are likely to interfere or interrupt them. Sub-section 15(2) deals with failures to comply with witness summonses or orders to produce records. These second type of failures may or may not occur during the course of proceedings or have the effect of interfering with them. Sub-section 15(3) deals with noncompliance

with court orders. Again, this type of contempt may or may not interfere with proceedings, though it is likely to be committed in circumstances where the subsequent enforcement of an order made in proceedings is in issue.

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

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

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

> The view of what is sufficiently proximate to necessitate exercise of the power has changed. Originally, so far as can now be discerned, only conduct which could be seen by the judge was regarded as sufficiently proximate, leaving other conduct to be dealt with on indictment....In more modern times the disposition to deal in the same summary way with contempt without resort to trial on indictment has expanded so what is now regarded as proximate has been enlarged to encompass conduct outside the actual courtroom.
>
> The elements of immediacy and necessity to which earlier reference has been made require that before the power is exercised there must be such proximity in time and space between the conduct and the trial of the proceedings that the conduct provides a present confrontation to the trial then in progress. Each case will require consideration on its own facts. The seriousness of the consequences to the trial if the tendency to interfere with it takes effect, the persistence of the contemnor, the likelihood of the continuance and repetition of such conduct unless stopped and the unavailability of unsuitability of any other remedy will all be relevant to whether the time at which and the place where the conduct has occurred is sufficiently proximate for the exercise of the power.

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

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

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

77. In the present case the phrase appears in s15(1)(e) without any words that would suggest that a limited meaning was intended. The phrase should be interpreted having regard to its use as developed over time. Accordingly, s15(1)(e) should be interpreted as referring to acts which

interfere with the conduct of proceedings that are in progress or imminent. It is not limited to acts which are seen or heard by the presiding magistrate. It may include acts which occur outside the courtroom so long as those acts are proximate to the proceedings and have the effect of, or tendency to, interfere with them.

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

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

80. For these reasons, whilst I would grant leave in respect of them, ground 1 of the 17 September 2012 grounds and ground 3 of the 8 October 2012 grounds both fail.

Was the failure to appear a contempt?

81. The appellant argues that he held a genuine belief at the time of the alleged contempt that it was important for him to be personally present in the court in order to instruct his lawyers and have a proper understanding of what was occurring. He submits that he also had a right to appear personally, or at least reasonably believed that he had such a right, based on s77(2) of the CPA. The implication is that he should not have been found guilty of contempt because his refusal to comply with the direction was not a wilful act of defiance or motivated by disrespect for the court.

82. Section 77 of the CPA provides as follows:

> **Video or audio link, use of when accused in custody etc.**
> (1) This section applies if—
> (a) an accused is required to appear before a court in proceedings on a charge against the accused other than the trial of the charge or sentencing proceedings;
> (b) the accused is in custody or detention, whether in relation to the charge or not; and
> (c) there is a video link or audio link between the place of custody or detention and the court.
>
> (2) If the accused's appearance will be his or her first in relation to the charge, the person in charge of the accused must ensure the accused is brought before the court in person unless the court has ordered that the accused be brought before the court by means of a video link or audio link.
>
> (3) If the accused's appearance will be his or her second or subsequent in relation to the charge, the person in charge of the accused must, despite any warrant that requires the accused be brought before the court, ensure the accused appears before the court by means of the video link or audio link, unless the court has ordered that the accused be brought before the court in person.
>
> (4) A court may make an order under subsection (2) or (3) at any time on its own initiative or on an application by a party to the case if it is satisfied it is in the interests of justice to do so.
>
> (5) An audio link must not be used under this section unless a video link is not available and cannot reasonably be made available.
>
> (6) When the accused appears before the court by means of a video link or audio link, the court may, in relation to the charge, exercise any power in this Act and comply with the *Bail Act* 1982 as if the accused were personally present before it.
>
> (7) This section does not affect the operation of the *Sentencing Act* 1995 section 14A.

83. The appellant argues that pursuant to s77(2) his first appearance on the stealing charges should have been in person. Accepting for the sake of argument that the appellant had not appeared in respect of these charges prior to 15 December 2011, s77(2) was applicable. However,

that subsection is addressed to the person in charge of the accused, in this case being the superintendent of the prison at which the appellant was being held. The subsection does not require the court to ensure that a person in custody is brought before it for a first appearance. In any event, provision is made for the court to order that an accused be brought before the court by means of a video link or audio link. It is unclear whether any such order had been made requiring the appellant to appear by video link on 15 December 2011 before Magistrate Hawkins. However, there is no doubt that on that day Magistrate Hawkins made an order that the appellant was to appear the following day by video link.

84. If the appellant was under the mistaken impression that he had both a right to appear personally and a right to refuse to comply with a direction from a magistrate to present himself on video link then he was wrong. Any such mistake was an error of law and could not excuse his non-compliance.

85. Furthermore, whilst it is possible to understand how the appellant may have had an expectation that in light of s77(2) he would be brought before the Magistrates' Court to appear personally on the first appearance, it is more difficult to understand how he could have believed that he was justified in defying a specific direction from a magistrate to appear by video link. There is no doubt on the evidence that the direction to appear by video link was conveyed to the appellant and that he made a deliberate decision to refuse to comply with it. He persisted in that refusal despite receiving legal advice that he must comply.

86. To the extent that the appellant suggests that he was not in contempt because he did not intend to so act, his argument is misconceived. Intention to commit contempt in the face of the court is not an element of the offence under s15(1)(e) of the MCA. In *Resolute Ltd v Warnes* [2000] WASCA 359 [13] (Ipp J) (Kennedy and Miller JJ agreeing) it was held that intention to interfere with the administration of justice was not a required element of the offence of contempt at common law. See also *Re Coroner's Court of Western Australia; Ex parte Porteous* [2002] WASCA 144 [13]; (2002) 26 WAR 483. The provisions of s15 of the MCA are the statutory equivalent of the common law contempt offence in respect of the Magistrates' Court. It is also noteworthy that the word 'wilfully' is not included in s15(1)(e) whereas it does appear in s15(1)(a) and s15(1)(b).

87. The appellant also sought to argue that s15(1)(e) of the MCA should be read as requiring an absence of a reasonable excuse for noncompliance. There is no reference to such an element in that subsection. The appellant submits, however, that the inclusion of such an element in s 15(3)(b) indicates that this element is implied into other subsections. That argument cannot be accepted. The specific inclusion of reasonable excuse in s15(3) suggests that it was deliberately confined to that species of contempt. The implication of words into a statute should not be done lightly or in the absence of some compelling reason to do so: See *Bermingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292, 302; (1988) 38 A Crim R 412 (McHugh JA) and *R v Young* [1999] NSWCCA 166; (1999) 46 NSWLR 681, 687 688; 107 A Crim R 1 (Spigelman CJ).

88. In any event, the reasonable excuse that the appellant claimed he had, namely a mistaken view as to his right to appear in court in person, could not be viewed as reasonable in the circumstances here. His reasons for non-compliance with the magistrate's directions were only relevant to penalty.

89. For those reasons ground 2 of the 17 September 2012 grounds and ground 4 of the 8 October 2012 grounds both fail. There is also reference in ground 4 to the apology letters sent by the appellant to both Magistrates'. Those letters are also referred to in other grounds and will be dealt with below.

Was it wrong to convict in light of the apology?

90. The appellant submitted that a conviction for contempt should not have occurred given his written apology. The suggestion was that the apology showed that the appellant did not act out of disrespect for the court and that if proper regard was had to that fact a finding of contempt would not have been made.

91. An apology by a contemnor is a matter to be taken into account when imposing punishment: *Wood v Staunton*, 185. An example in this jurisdiction is *6IX Southern Cross Radio Pty Ltd; Ex parte*

Director of Public Prosecutions (WA) [1999] WASCA 254 [39]. An apology necessarily incorporates an acceptance of the wrongfulness of the conduct. An apology, therefore, cannot be a defence to an allegation of contempt, rather it is a matter relevant to penalty.

92. Pursuant to s16(6) of the MCA the Magistrates' Court has the power to amend or cancel the order imposing punishment where an apology is made for a contempt. The use of the word 'may' in this subsection indicates that the power is a discretionary one (s56(1) *Interpretation Act* 1984 (WA)) and relates to the question of punishment not to the finding of and conviction for contempt. It is analogous to the power of a court to release a contemnor from prison where a contempt is purged.

93. In this case, whilst the appellant's letters have been referred to as 'letters of apology' that is a characterisation which may be doubted. The letters do contain expressions of regret for what occurred, however they also seek to justify the appellant's course of action. In particular, he states:

> My position and therefore my argument is that, a person should have the right to choose to appear ***in person*** before the court when so summoned, in my view when you are produced by video link and present to the court in your prison greens, in prison you are inherently depicted as a criminal, this is ***prejudicial*** to how you are perceived, I don't feel I need to explain this in it [sic] entirety as I believe you may understand my point. [emphasis in original]

94. The magistrate took into account the letters of apology but was of the view that they were merely an attempt to place the appellant's defiance of court authority in a good light. His Honour said that the appellant had effectively said to the court that he would determine how he would appear and had disobeyed a clear direction to him for his own reasons.

95. These were conclusions that it was open to the magistrate to reach on the evidence before him. There is no basis for suggesting that the magistrate's discretion was improperly exercised in the way in which he dealt with the apology or in finding the appellant guilty of contempt and imposing a sentence of 1 month's imprisonment. The weight to be accorded to matters relevant to penalty is part of the discretionary exercise. Failure to give weight to a relevant sentencing consideration only gives rise to appellable error if it amounts to a failure to exercise the discretion entrusted to the court: *Dinsdale v The Queen* [2000] HCA 54; (2000) 202 CLR 321, 330; (2000) 175 ALR 315; (2000) 74 ALJR 1538; (2000) 115 A Crim R 558 and *Vagh v The State of Western Australia* [2007] WASCA 17 [76].

96. Ground 3 of the 17 September 2012 grounds and ground 1 of the 8 October 2012 grounds both fail.

Were the contempt proceedings fair?

97. As the alleged contempt occurred while the court was sitting it was open to the magistrate under r31(1) of the MCGR to deal with it summarily 'if satisfied that the alleged contempt should be dealt with immediately because it is an immediate threat to the authority of the court or the integrity of the proceedings'. In this case the contempt was a deliberate defiance of a direction made in the course of proceedings. It was in these circumstances an immediate threat to the authority of the court.

98. The defiance of the direction also affected the integrity of the proceedings. The immediate consequence was that the matter was stood down until later in the day. The continued defiance when the matter was recalled necessitated the proceedings on the stealing charges being adjourned to another day. This caused delay, inconvenience and prevented necessary procedural steps in respect of those charges from being taken.

99. For these reasons it was open to the magistrate to proceed summarily. The appellant's submissions are that aspects of the summary proceedings were unfair. Whether this is so, and whether the trial as a whole was therefore unfair, depends upon an examination of what occurred.

100. Proceeding summarily was not the only option. It was also open to the magistrate to refer the matter to the Attorney General for consideration of commencing and conducting proceedings in the court against the appellant for alleged contempt: MCGR r32(2) and r33. There would have been a number of advantages to that course. It would have ensured that responsibility for making

the decision to prosecute was placed in the hands of an independent authority and that any appearance of a lack of impartiality was avoided. In cases where it is not necessary to immediately deal with a contempt in the face of the court a referral to the Attorney General will often be the preferable course. The power to proceed summarily should be exercised with circumspection and be reserved for serious cases of misbehaviour: *Stuart v Brown* (1996) 17 WAR 525 and *Gliosca v Ninyette* (1992) 10 WAR 562.

101. In this case the magistrate did not consider it necessary to deal with the contempt immediately and it is arguable that it would have been more appropriate to have referred the matter to the Attorney-General. On the other hand a referral would likely have involved delay greater than the adjournment allowed by the magistrate. There was good reason to think that it was necessary to deal with the alleged contempt as expeditiously as possible given the appellant's persistent refusal to appear on the video link and the likelihood that he would continue to so refuse unless dealt with. If this type of challenge to the authority of the court was not dealt with quickly there was also a risk that others might be emboldened to take the same position and the effective management of the courts would be undermined. In any event, the fact that it was open to refer the matter to the Attorney-General does not invalidate the proceedings and the question that must be determined is whether the appellant received a fair trial.

102. The appellant submits that he was denied a fair trial because he was tried by his accuser. That is, of course, true to the extent that the proceedings for the contempt were initiated by the magistrate and that his Honour formulated the written notice of the alleged contempt. As I have noted earlier in these reasons, whilst the role of a judicial officer as both accuser and judge is undesirable it is a necessary characteristic of the power to deal with some acts of contempt summarily.

103. The fact that the magistrate initiated the charge does not in itself establish bias or reasonable apprehension of bias. If it did, summary proceedings for contempt in the face of the court could never occur. The appellant must point to something that might cause a reasonable observer to apprehend that the magistrate might not bring an impartial or unprejudiced mind to the resolution of the matter: *Johnson v Johnson (No 3)* [2000] HCA 48; (2000) 201 CLR 488; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21 and *Able Lott Holdings Pty Ltd v City of Fremantle* [2012] WASC 431 [19] [26].

104. The appellant does not point to any particular conduct of the magistrate to substantiate his claims. Nor was any complaint of bias or apprehended bias made at the time. The concern is said to arise from the fact that the magistrate both initiated the contempt proceedings and presided over them. But, as I have said, this is in the inherent nature of summary contempt proceedings. It does not, of itself, establish apprehended bias. The appellant suggested that the magistrate was 'personally affronted', but there was nothing whatsoever in the transcript to substantiate that claim. It would certainly be unwise for a magistrate to proceed summarily if his or her judgment was likely to be impaired by anger at some personal insult. In this case, however, the magistrate appears to have been scrupulously fair and measured in his dealings with the appellant.

105. Indeed the magistrate took steps that had the effect of ensuring that the appellant received a fair trial:

- he adjourned the proceedings to allow the appellant to consider his position and take legal advice;

a written notice of the alleged contempt clearly stating that the contempt was the failure to comply with the direction to appear by video link on 16 December 2012 was prepared and delivered to the appellant;

- the notice also set out that a hearing would be held on 22 December 2011, that the appellant would have an opportunity to adduce evidence on the issue at that time and the available penalties in the event of conviction were also set out;
- at the hearing on 22 December 2012 the charge was read, a plea taken and the appellant and his solicitor provided with a copy of the transcript of the proceedings of 16 December 2012 that had been certified;
- the appellant was given an opportunity to give evidence in his defence and he availed himself of that opportunity;
- an opportunity was afforded for the appellant to make submissions both as to liability and penalty and written and oral submissions were made on his behalf by the solicitor who represented him on that day.

106. These steps accorded with those that it has been said are necessary to be taken by a magistrate to accord an accused procedural fairness when determining a charge of contempt of

court under s 133 of the *Magistrates' Court Act 1989* (Vic) by J Forrest J in *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141; (2011) 32 VR 216 [41]. They are equally appropriate in the present context. See also *Gliosca v Ninyette*.

107. For these reasons grounds 2 and 5 of the 8 October 2012 grounds both fail.

Was the sentence excessive?

108. There is a suggestion in the particulars to ground 5 that the sentence imposed by the magistrate should be reduced. The appeal notice does not indicate that this is an appeal against sentence and there are no grounds that specifically allege any error in respect of the punishment imposed. However, I will give consideration to whether the sentence imposed was manifestly excessive.

109. A ground of appeal which alleges that a sentence is manifestly excessive asserts the existence of an implicit error: *Royer v The State of Western Australia* [2009] WASCA 139; 2009) 197 A Crim R 319 and *Dinsdale v The Queen*. A claim of manifest excess depends upon establishing implied error in the type or length of sentence imposed. The implied error that must be established is that a sentence of the nature and length imposed could not have been reached in the proper exercise of sentencing discretion.

110. It is not enough that an appellate court considers that it would have imposed a different sentence. It must be established that there has been some error in the exercise of sentencing discretion: *House v The Queen* (1936) HCA 40; (1936) 55 CLR 499; 9 ABC 117; (1936) 10 ALJR 202. An appellate court may not substitute its own opinion for that of a sentencing judge merely because that court would have exercised the discretion in a different manner. There must be a material error of fact or law discerned in the reasoning or a failure to properly exercise discretion by imposing a sentence that constitutes a substantial error: *Lowndes v The Queen* [1999] HCA 29 [38]; [1999] HCA 29; (1999) 195 CLR 665, 671 672; 1999) 163 ALR 483; (1999) 73 ALJR 1007; (1999) 12 Leg Rep C1; (1999) 8 CA 29.

111. In order to determine if a sentence is manifestly excessive relevant considerations include the maximum penalty prescribed by law for the offence, the standard of sentencing customarily observed for that type of offence, the level of seriousness of the circumstances of offending and the personal circumstances of the offender: *Chan* (1989) 38 A Crim R 337, 342.

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

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

114. The factors relevant to sentencing for contempt were summarised by Dunford J in *Wood v Staunton*. That summary has been referred to with approval in a number of cases from this court, including *Corruption and Crime Commission v Allbeury* [216] (Buss JA):

> In *Wood v Staunton (No 5)* (1996) 86 A Crim R 183, the defendant was found guilty of contempt of the Royal Commission into the New South Wales Police Service. The contempt was the defendant's refusal to answer a series of questions at the Royal Commission. Dunford J said that relevant matters for consideration in assessing the proper punishment for this type of contempt included:
> 1. the seriousness of the contempt proved;
> whether the contemnor was aware of the consequences to himself of what he did;
> the actual consequences of the contempt on the relevant trial or inquiry;
> whether the contempt was committed in the context of serious crime;
> 5. the reasons for the contempt;
> whether the contemnor has received any benefit by indicating an intention to give evidence;
> whether there has been any apology or public expression of contrition;
> 8. the character and antecedents of the contemnor;
> 9. general and personal deterrence; and
> 10. denunciation of the contempt (185).

See also *Principal Registrar of the Supreme Court of New South Wales v Jando* [2001] NSWSC 969; (2001) 53 NSWLR 527 [16] - [18]; 125 A Crim R 473 (Studdert J). In that case, Studdert J also cited *Registrar of the Court of Appeal v Gilby* (Unreported, NSWCA, 20 August 1991), which referred to 'whether the contempt was motivated by fear of harm should evidence be given' [16].

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

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

Conclusion

117. On the basis that the provisions of the CAA apply, leave to appeal in respect of each ground is required: s9(1) of the CAA. Leave can only be granted if there is a rational and logical prospect of the ground succeeding: *Samuels v The State of Western Australia* [2005] WASCA 193; (2005) 30 WAR 473. There must be a clear arguable case that an error has occurred or that there has been a miscarriage of justice.

118. Since those grounds dealing with the question of whether the contempt was in 'the face of the court' required detailed consideration, I will grant leave in respect of them. However, after such consideration, those grounds cannot succeed. The remaining grounds had no rational or logical prospect of success and leave in respect of them must therefore be refused. As a consequence, the appeal is dismissed.

APPEARANCES: The appellant Mansell appeared in person. No appearance of the respondent Mignacca-Randazzo. *Amicus Curiae*: Mr AJ Sefton and Ms CA Lakewood, counsel. Attorney-General for Western Australia.