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SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

Ex parte TUBMAN; Re LUCAS & ANOR

Herron CJ, Asprey and Mason JJA

24 November 1970

(1970) 72 SR (NSW) 555; [1970] 3 NSWR 41; (1970) 92 WN (NSW) 520

CONTEMPT OF COURT – LAWYER APPEARED AT A MAGISTRATES' COURT FOR A DEFENDANT CHARGED WITH AN OFFENCE WHILST TAKING PART IN A PUBLIC DEMONSTRATION – WHEN DEFENDANT CAME TO COURT EVERY SEAT IN THE COURT WAS OCCUPIED BY POLICE OFFICERS – TWO POLICE OFFICERS ALLEGEDLY PREVENTED PERSONS HAVING ACCESS TO THE COURTROOM – THE PUBLIC WAS EXCLUDED FROM THE BUILDING – POLICE OFFICER IN CHARGE ACTED ON AUTHORISATION FROM THE CHIEF MAGISTRATE – WHETHER CASE OF CONTEMPT MADE OUT.

HELD: Rule discharged without costs.
Herron CJ:
1. The two policemen referred to were at the door of the Court acting as orderlies, sometimes in the Court and sometimes outside it, and were not engaged in an attempt to prevent members of the public from gaining access except possibly to prevent too many persons from entering so that they would be compelled to stand in the courtroom in opposition to the conventional ruling of magistrates and the long-standing practice against such use of the court.
2. It must be remembered that police officers have always assisted to keep order and act as orderlies and to summon parties and the like and to facilitate generally the business of Magistrates' Courts. There was not the slightest evidence that either respondent had anything to do with the actions of these orderlies or gave any improper order to them.

3. In relation to the number of policemen, about 27 in all, who took their seats in the Summons Court when it was announced that the demonstration charges were to be dealt with in that Court in preference to a charge court, all of these policemen were arresting constables or informants in the cases. There was not the slightest evidence to show that this course was followed as a method of excluding members of the public nor was it done in concert and what was more important still, it was not the result of any direction, order or suggestion by either of the police officer respondents.

4. Inspector Lucas by his actions intended to facilitate the business of the Court and that he did in fact do so. He intended to and did in fact keep order in the precincts as he was required to do by virtue of his office and the direction of the Chief Magistrate. Inspector McGill's actions were dictated by Inspector Lucas and the same result followed in each case. No case of contempt had been made out against either respondent.

5. The actions of the police officer respondents could not be said to have interfered with the due course of justice and the Appeal Court would not exercise its powers of summary conviction unless the thing done was of such a nature as to require the arbitrary and summary interference of the Court to enable justice to be duly and properly administered without any interruption or interference.

6. The applicant failed to prove any real or definite tendency to prejudice or embarrass court proceedings which was the essence of contempt.

Asprey JA:
7. Words or acts, used in the face of or outside the Court, which interfere or tend to interfere with the course of justice constitute contempt of Court. When the proceedings of a Court are to be administered as a forum open to the public, any person who, without lawful authority or justification prevents or attempts to prevent not only parties, their legal representatives or witnesses but also members of the public who are desirous of being present at those proceedings from entering the Court or its precincts could be adjudged guilty of contempt of Court on the ground that, just as "the broad principle is that the Courts of this country must, as between parties, administer justice in Public" (to quote Viscount Haldane) so it is that any unwarranted restriction of the publicity to which those proceedings are entitled tends to detract from the dignity of the Court and weaken its authority to

administer justice in the manner which clear legal principle of unquestioned authority binds it to observe.

***Parashuram Detaram Shamdasani v King Emperor* [1945] UKPC 25; (1945) AC 264 at p268, applied.**

8. It is well established that those who preside in Magistrates' Courts as well as in other Courts of Justice inherently have the power, where it becomes necessary in order to administer justice, to exclude from the Court-room all or any persons by whose behaviour interruption to the orderly procedures of the Court is caused or is reasonably to be apprehended.

9. It is the inherent right of all Courts to employ the services of persons to assist them in the performance of the judicial office and to carry out the directions of those who reside in them for the purpose of keeping order in the Court-room and its precincts.

Mason JA:

10. Whether the police officers were guilty of contempt turned on the question whether their acts were calculated, or had a tendency, to interfere with the proper administration of justice. The proper administration of justice in a Magistrates' Court necessitates a compliance with the provisions of s67 of the *Justices Act* 1902 (NSW) as amended which provides that the room or place in which the hearing takes place shall be deemed an open and public Court to which all persons may have access so far as the same can conveniently contain them. The section recognises the traditional rule that justice must be administered, in public and attended by publicity. The only consideration to which that rule yields is the paramount duty of the Court to ensure that justice is done. In exceptional circumstances such as "tumult or disorder, or the just apprehension of it" where justice cannot otherwise be secured, it may be permissible for a Court to be closed and the proceedings heard *in camera*.

11. The right of a citizen to enter a Court and observe the proceedings is, subject to the availability of accommodation, a matter to which s67 explicitly refers. It is also subject to the reasonable regulation by those in authority of a crowd or throng of persons who may by accident or design bar the entrance to the Court. It is self-evident that a Court cannot proceed to the proper despatch of its business unless those in authority, when occasion demands it, take reasonable steps to ensure that access to the Court room is available to those whose presence is essential to the conduct of the business of the Court.

12. It is important that the independent dignity of the Court should be manifest lest there be some impairment of public confidence in the impartiality of the Court. There was on this occasion an absence of a sufficient appreciation for the independent position and dignity of the Court. Care should have been taken to ensure that the public seating accommodation was not occupied almost in its entirety by police officers. Likewise the statement that a loud hailer would be used within the Court room should not have been made; the Magistrate very properly rejected the proposal, doubtless on the ground that its use was quite unbecoming to the dignity and calm atmosphere of the Court.

13. In the circumstances, the applicant did not establish that a contempt of Court was committed by the respondent police officers.

HERRON CJ: The Court is called upon to exercise its summary power of punishing contempts of court alleged to have been committed by Reginald Hamilton Lucas, Inspector First Class of the New South Wales Police Force, and by Malcolm Keith McGill, an Inspector First Class of the said Police Force. The first-named respondent is the Senior Police Prosecutor and officer in charge of the Police Prosecuting Branch. The second-named respondent is attached to No.1 Sub-district and is Assistant to the Superintendent thereof.

The applicant is Mr Quentin Tubman, a member of the Bar, and he alleged, that contempts had been committed by the respondents of a Court of Petty Sessions, Liverpool Street, Sydney, on Monday 21 September 1970. The applications were, by consent, heard together.

There can be no question that this Court has power to deal summarily not only with contempt of itself, but with contempt of any inferior court: *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351; [1955] ALR 265.

Rules nisi were obtained from this Court on 28 September 1970. From the affidavits filed in support of the rules nisi it appeared that the charge of contempt originally centred around happenings in a Court of Petty Sessions known as the Summons Court in the Liverpool Street building. Mr Tubman was present in that Court to appear for a defendant who had been charged

with an offence allegedly committed while taking part in what have become known as Moratorium or Vietnam demonstrations.

As I have said, the gravamen of the allegation of contempt at first centred around the Summons Court in which the charge against Mr Tubman's client was to be heard. These allegations were:

> (a) that outside the door of the Summons Court, the door being closed, stood two policemen who prevented free access to the court by members of the public;
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> (b) that inside the Court every seat provided for the public was occupied by a policeman so that except for members of the legal profession or representatives of the press the public was excluded.
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> However, as the matter developed at the hearing senior counsel for the applicant enlarged the area of complaint by alleging
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> (c) that by the action of the two respondents the public was excluded from the building in which the Summons Court was situated and the vestibule adjacent thereto.

It was the evidence and argument relating to the last-mentioned charge that occupied most of the hearing before us. I have had the advantage of reading the judgments of Asprey JA and of Mason JA and I agree with their conclusions as to the result of the applications and, generally speaking, with the reasons for such conclusions. I would add shortly something for myself.

At the conclusion of the evidence and argument it became increasingly clear that the application based upon charges (a) and (b) above could not succeed. As to (a), the two policemen referred to were at the door of the Court acting as orderlies, sometimes in the Court and sometimes outside it, and were not engaged in an attempt to prevent members of the public from gaining access except possibly to prevent too many persons from entering so that they would be compelled to stand in the courtroom in opposition to the conventional ruling of magistrates and the long-standing practice against such use of the court.

There is no substance in the suggestion of contempt by those two policemen whose evidence I have heard and which I accept. It must be remembered that police officers have always assisted to keep order and act as orderlies and to summon parties and the like and to facilitate generally the business of Courts of Petty Sessions. On no view of the evidence could a case of contempt be supported under this head. There is not the slightest evidence that either respondent had anything to do with the actions of these orderlies or gave any improper order to them.

As to (b), the facts are that a number of policemen, about 27 in all, took their seats in the Summons Court when it was announced that the demonstration charges were to be dealt with in that Court in preference to a charge court. All of these policemen, the evidence reveals, were arresting constables or informants in the cases. There is not the slightest evidence to show that this course was followed as a method of excluding members of the public nor was it, as I believe, done in concert and what is more important still, it was not the result of any direction, order or suggestion by either of the respondents.

It seems to have been Mr Tubman's view that this was a device used to stack the Court's seating accommodation so as to keep out the public. Such a view may have been reasonably held by him on appearances alone, but it was clearly a mistaken one. No case for contempt is made out on this head.

As to (c), this became the subject of much debate and controversy as to the facts and was ultimately the allegation of contempt largely relied on by the applicant's counsel,

There is not a great deal of dispute about what was said and done when all the evidence is considered and analysed. The competing accounts of the facts which emerge from the respective cases, where they do exist, are explained by a difference in emphasis given to the happenings by the various witnesses. The angle of viewpoint occasionally differs according to which side of the record the witness is supporting. It is understandable that Mr Tubman and those associated with the defence of the protesters should have formed the impression that the police were so drawn up

as to prevent some of the supporters or of the Friday's demonstration from entering the building and thus being prevented from having access to the courtrooms. Mr Tubman and the witnesses supporting his case saw a line of policemen and heard what Inspector Lucas said on one or more occasions. Seen in isolation and divorced from the broad picture of the morning's happenings, such events gave them the impression that there was an unauthorised exclusion of members of the public. But a review of the whole of the facts does not support this as the correct view.

Mr Tubman did not know that Mr Riley CSM, had authorised Inspector Lucas to take steps to preserve order. Nor was it known to Mr Tubman that in fact some hundreds of persons had entered the Court's vestibule or the eight courts sitting before 10 a.m. There must have been, I would think, about 200 persons in the vestibule, a place 51 x 36 feet. There were 335 persons actually charged on the day in question as well as 30-odd summons cases listed. There were 100 persons to be charged in the Summons Court alone with offences arising out of Friday's demonstrations. Hence congestion was reasonably enough anticipated by the respondents. Also, it was reasonable that their actions should be influenced by their experiences of other court incidents associated with demonstrations when serious breaches of order and decorum were witnessed.

Inspector Bush gave, I believe, an objective account of the whole matter and I accept generally his evidence. It may be that he sees some aspects from his angle of viewpoint and tends to stress as to Inspector Lucas's words that he requested or asked persons not having direct business with the Court to refrain from entering or remaining. The applicant's case is that the statements by the respondent Lucas were of a peremptory nature and more of an order than a request. Maybe at times the language may have taken on the tone of an order but none the less there was a persuasive content in it also. As Mr Moore, a solicitor, says, the words "co-operation is requested" and "we are trying to avoid congestion" followed the so-called order to leave.

Having regard to the respondents' reasonable anticipation, as I find it was, of congestion, of possible disruption to orderly conduct of the business of the courts, of the need to keep the vestibule free for access to the office by defendants on bail, I reject the applicant's submissions that contempt of court was committed by either respondent. Their actions were *bona fide*. They were authorised by the Chief Magistrate. In addition an important function of the Police Prosecuting Branch, of which Inspector Lucas is the head, is to keep order in the courts and their precincts and to obey the directions of the Magistrates.

This Branch also is responsible, in co-operation with other police, for the custody of defendants charged with offences. It must be remembered that in Courts of Petty Sessions there are no Sheriff's officers or orderlies such as perform duties in this Court sitting in civil jurisdictions. However, at Darlinghurst where criminal trials take place uniformed police officers are always present performing many duties connected not only with the preservation of order but of a semi-clerical nature as well.

I am satisfied that Inspector Lucas by his actions intended to facilitate the business of the Court and that he did in fact do so. He intended to and did in fact keep order in the precincts as he was required to do by virtue of his office and the direction of the Chief Magistrate. Inspector McGill's actions were dictated by Inspector Lucas and the same result must follow in each case. No case of contempt has been made out against either respondent.

The actions of the respondents cannot be said to have interfered with the due course of justice and this Court will not exercise its powers of summary conviction unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court to enable justice to be duly and properly administered without any interruption or interference.

Where the applicant fails is that he has failed to prove any real or definite tendency to prejudice or embarrass court proceedings which is the essence of contempt. As Mr Tubman, as a responsible member of the Bar, properly brought matters of public importance to our notice, no order for costs should be made against him. The rule in each case is discharged without costs.

ASPREY JA: These are applications, by consent ordered to be heard together, to make absolute two rules nisi which on 28 September 1970 were granted calling upon the respondents, each of whom was a member of the NSW Police Force, to show cause why they should not be committed

or otherwise dealt with for contempt of Court. In answer to a request for particulars the solicitors for the applicant provided the following:

> "1. It will be alleged that the respondents were in contempt, by their conduct on the morning of Monday, 21 September 1970 at the premises known as the Central Court of Petty Sessions, of the following courts:
> (a) all courts held in the premises known as Central Court of Petty Sessions on that day,
> (b) the court presided over by Mr T Williams, stipendiary magistrate, on that day,
> (c) all courts sitting to hear and determine charges arising out of a certain procession and demonstration held in Sydney on Friday, 18 September 1970,
> (d) all courts hearing any manner of appeal, from any determination made upon or in the course of the hearing of any such charge.
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> 2. The conduct complained of, on the occasion above-mentioned, on the part of both respondents was, by each of them, the making of announcements, the giving of directions and instructions to constables and members of the public generally, and otherwise the taking of steps calculated in each case to have the effect
> (a) of excluding the public generally from free access at will to any court held or to be held in the premises known as Central Court of Petty Sessions, Liverpool Street, Sydney on Monday, 21 September 1970.
> (b) of excluding the public generally from free access at will to that court in which fell to be heard and determined charges arising out of a certain procession and demonstration held in Sydney on Friday, 18 September 1970,
> (c) of qualifying, curtailing and conditioning, by reference to the discretion of constables, the right of the public generally to have and to enjoy free access to courts of petty sessions to be held in the premises known as Central Court of Petty Sessions, Liverpool Street, Sydney.

On the hearing Senior Counsel for the applicant abandoned any reliance upon clause 1(d).

It was submitted on behalf of the applicant that each respondent was on 21 September 1970 guilty of contempt for the reasons that

> (1) the public was excluded from the hearing by the Court of certain charges against a number of persons arising out of the events which took place in Sydney on Friday 18 September 1970
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> (2) the hearing of those charges was required by law to take place in open Court pursuant to Section 67 of the *Justices Act* 1902 (as amended)
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> (3) there is a power to close a Court which is vested only in the presiding Magistrate sitting in that particular Court but that power was not exercised on 21 September 1970 and
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> (4) the charges arose out of controversial public events and members of the police force were both prosecutors of the charges and witnesses giving evidence on the hearing of the charges and also the arresting officers of the defendants charged.

In the evidence in the applicant's case and in the development of the submissions on his behalf it was made clear that reliance was placed upon an alleged restriction upon persons entering a vestibule which is a portion of the precincts of the Central Court of Petty Sessions. It may be useful at this stage to state shortly that the respondents asserted that their activities were prompted by their anticipation that on Monday 21 September 1970 there would be considerable problems in avoiding congestion and noise in the precincts of the Central Court of Petty Sessions and the possibility of demonstrations and disorder therein disrupting the business of the Court and that, after consultation with Mr Riley the respondent Lucas was directed by Mr Riley to take such measures as he thought fit to prevent congestion, noise and disorder in the precincts of the Court and to facilitate the business of the Court.

The factual material before us consisted of a number of affidavits and the cross-examination of certain of the deponents. Having carefully considered all this material I find the facts to be as follows:

On Friday 18 September 1970 a large number of people marched through certain Sydney streets and parks as "an anti-Vietnam war protest demonstration" and on this occasion some 102 persons were arrested and charged with various offences. The persons so charged were called upon to appear at the Central Court of Petty Sessions on the morning of Monday 21 September 1970.

The Central Court of Petty Sessions is an old building erected in Victorian times. The building itself is approached from Liverpool Street by a flight of steps leading to a flat area, then by some further steps on to a comparatively small verandah. A further flight of steps from the verandah leads into a lobby and at each side of the lobby there is an entrance into Courts No. 4 and 5 respectively. The lobby then leads into a vestibule the dimensions of which are 51'5" x 36'. On the left on entering the vestibule is an entrance to the Summons Court, the dimensions of which are 33'3" x 25'6". On the right of the vestibule is an entrance through which the public attend the general offices of the Court. At the far end of the vestibule are entrances to Courts Nos. 1, 2 and 3. Just after entering the vestibule from the lobby, to the left there is a stairway which leads up to Courts Nos, 7 and 8. The vestibule contains some seating accommodation and in it there are a number of pillars, telephone booths and other furniture which serve to take up some of the available space. On the right hand side of the vestibule on entering it from the lobby is a notice board upon which lists of the cases for hearing on any particular day are posted up. Whilst the Summons Court is much larger in size than Courts Nos. 4, 5, 7 and 8 it is in turn much smaller than Courts Nos. 1, 2 and 3.

The importance for present purposes of what I have described is that access to all eight Courts, to the rooms of the Chamber Magistrates and to the general offices of the Court for parties, their legal representatives and witnesses, for all persons having business to transact in the building and for the general public is had from the vestibule.

On the morning of 21 September 1970 the presiding Magistrate in the Summons Court was Mr Williams SM and Mr Riley CSM was the Magistrate to preside in the No. 1 Court. All the Courts in the building had business before them due to commence at 10 a.m. and each was presided over by a Stipendiary Magistrate. The respondent Lucas was an inspector first-class of the NSW Police Force and also the senior police prosecutor and officer-in-charge of the Police Prosecuting Branch. The Police Prosecuting Branch, in addition to providing members of the police force for the purpose of prosecuting police and other cases in the Courts of Petty Sessions, is also responsible for supplying to the Central Court of Petty Sessions and other Courts police constables to assist the various Magistrates in the same way as Court ushers in civil Courts. Subject to the directions of a presiding Magistrate, the Police Prosecuting Branch is also responsible for keeping order in the various Courts of Petty Sessions and the precincts thereof. It is also responsible in co-operation with other police, for the custody of persons in custody before the Courts of Petty Sessions. Clause 1 of Section of the Regulations made pursuant to the *Police Regulation Act* 1899 (as amended) and the *Police Regulation (Superannuation) Act* 1906 (as amended) provides that "Police will obey the orders of Stipendiary or Police Magistrates, or any single Magistrate or Bench of Magistrates, made by them in the execution of their judicial duty..."

On Monday mornings there is usually more congestion in the precincts of the Central Court of Petty Sessions than on other mornings of the week. We were given comparative figures for Monday 14 September 1970 and Monday 28 September 1970 for the number of persons respectively charged on those days and these were 138 and 143 respectively and the total number of charge cases listed on those two days were respectively 262 and 226; bail recognizances were 36 and 38 and bail refunds were 20 and 29 respectively. Those figures were described as average figures. On Monday 21 September 1970 the number of persons charged at the Central Court of Petty Sessions was 335 and the total number of charge cases listed was 382 and in addition to the charge cases there were 33 summons cases listed; bail recognizances were 165 and bail refunds were 85.

Over the past few years the attendance at the Central Court of Petty Sessions of a large number of persons arrested during demonstrations together with their friends and others has caused problems at the Court by reason of congestion and noise. In particular, in the weeks preceding 21 September 1970, there had been various incidents involving students and demonstrators in the Courts at the Central Court of Petty Sessions and in its precincts and in other Courts of Petty Sessions. Although we were supplied with evidence giving particulars of certain of these incidents, in some cases with accompanying photographs, there will be no need for me to go into the details thereof. It will suffice to say that, in addition to congestion and noise created on these occasions, the actions and dress of a number of persons both male and female concerned in these incidents could only be described as the activities of persons who were completely irresponsible to use only mild terms to describe their behaviour. The inevitable inference to be drawn is that

the objectives of these individuals were to interrupt and ridicule the administration of justice in the Courts by appearing in fancy dress, by distributing pamphlets and publishing inscriptions of a grossly obscene and offensive character and by other conduct plainly intended as planned acts in defiance of the Court's authority.

Both Mr Riley CSM and the respondent Lucas, because of the large number of persons arrested in the demonstration on 18 September 1970 along with the normally heavy business in the various Courts to be expected on a Monday morning, apprehended that on 21 September 1970 considerable problems would arise in avoiding congestion and noise in the precincts and envisaged the possibility of demonstrations and disorders disrupting the business of the Central Court. In addition to the usual number of persons who might be expected to be present at one or other of the eight Courts for one reason or another, the respondent Lucas anticipated that a large number of people would accompany those arrested in connection with the demonstration.

In my opinion, Mr Riley CSM and respondent Lucas had reasonable grounds for entertaining these expectations in the circumstances. I pause here to say that Counsel or the applicant objected to the admission of the evidence relating to the incidents occurring at the Central Court in the few weeks prior to 21 September 1970. I think that such evidence was clearly admissible to show that those responsible for order at the Central Court had a "just apprehension" of the occurrence of disorder (see *Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520 per Earl Loreburn at AC pp445-446).

However, I have not taken into account the evidence tendered in relation to the incidents during the same period in the Victorian Courts as it does not appear from the evidence that those matters were in the minds of either Mr Riley CSM or the respondent Lucas on 21 September 1970.

With these apprehensions in mind, shortly after 9 a.m, the respondent Lucas accompanied by Inspector Bush, second-in-charge of the Police Prosecuting Branch, interviewed Mr Riley CSM and was informed by him that he, Mr Riley, intended to follow the pattern which had been adopted on a prior occasion when a large number of demonstrators had been charged. Mr Riley directed the respondent Lucas that the Summons Court was to be used for the bulk of the demonstration cases as that Court was closer to the entrance of the building than Courts Nos. 1, 2 and 3 and is convenient for the payment of fines or the entry of bail to release persons in custody. The question of congestion in the vestibule and noise which interfered with the disposal of Court business in the adjacent Courts was discussed and also the possibility of demonstrations and disorders in the precincts and the possible trespass by unauthorised persons into private portions of the Court building. Mr Riley directed the respondent Lucas to arrange for the demonstration cases listed in Courts Nos. 2 and 3 to be taken in the Summons Court and that he would inform Mr Williams SM of what was being done in that regard.

Mr Riley also directed the respondent Lucas to take such measures as he (Lucas) thought fit to prevent congestion, noise and disorder in the precincts and to facilitate the business of the Central Court that morning. Permission was obtained by Lucas to use loud hailers in the Court precincts as had been done on a prior occasion when there were similar problems. There were 235 charge cases in No. 2 Court that morning including the 102 cases arising out of the demonstration on 18 September 1970 and it was arranged that most of these 102 cases would be taken in the Summons Court.

The respondent Lucas entered the vestibule at about 9.25 a.m. and from the number of people already therein it was apparent to him that congestion and noise problems would get beyond control unless the number of persons entering the vestibule was restricted. At that time or shortly thereafter the vestibule was full or nearly stating that this applied to all police present other than those in charge of matters. It was made clear that this announcement was not limited to the Summons Court or to the demonstration cases. Some people then left the vestibule. He then arranged with the respondent McGill with two sergeants and two constables to take up a position at the main entrance and, he repeated his announcement outside the Court where the numbers of persons on the verandah on the steps and the courtyard were continually growing into a substantial crowd. From time to time similar announcements were made. At about 9.35 a.m. the respondent McGill (who was an inspector first-class attached to No. 1 police sub-district and the assistant to the superintendent thereof) with the four other police placed themselves at

the top of the steps leading to the lobby and, because of the congestion already apparent in the vestibule and the presence of a large number of people on the verandah and outside the Court building, requested persons who were not engaged in the business before the Courts or their relatives to wait outside the vestibule until the congestion had eased.

A number of the arresting police who had been present in No. 2 Court apparently left that Court when it was announced that most of the demonstration cases were being transferred to the Summons Court and some 27 of them entered the Summons Court and sat down waiting for the Court to open and they occupied all the seating accommodation in the Court except for three or four seats. Others of these arresting police remained in the vestibule. The police who thus seated themselves in the Summons Court did so of their own volition and were not directed by either of the respondents to follow this course. It was generally expected that the demonstration cases would be remanded to another date and it is a matter of common knowledge that an arresting policeman in a charge case is present in Court upon a remand of the case in order that the date to which the case is proposed to be remanded is one which his other police duties will allow him to attend. He may be consulted also about the availability of witnesses and other matters. If the case proceeds to a hearing, however, he is usually the first witness called for the prosecution. If the case is remanded, he attends to the defendant in custody until the arrangements for bail have been completed. I shall refer later herein to the presence of the police in the Summons Court on this occasion.

The applicant, a member of the New South Wales Bar, who was appearing for one of the defendant demonstrators, entered the Summons Court at about 10 a.m. and observed about five members of the legal profession seated at the bar table, four journalists in the press seats, three police prosecutors at the prosecutor's table and two police court attendants in addition to the 27 police and three or four members of the public seated at the rear of the bar table. Mr Williams SM entered the Summons Court at 10.20 a.m. and thereupon Mr Staples of Counsel who was appearing for a defendant addressed Mr Williams and complained that persons were being prevented by police from entering the Court building and that the Court-room had been "stacked" with police. The respondent Lucas then by permission addressed the Magistrate and gave his account as to what had taken place in the precincts of the Court. Mr Williams directed the respondent Lucas to order all persons who were standing in the Court-room at that stage to leave it. He did so, and with the Magistrate's permission, ordered all members of the police force seated in the Court who were not arresting officers in the charge cases then before the Court to leave both the Summons Court and the vestibule. After this order was given no seated police officer left the Summons Court. The applicant then addressed Mr Williams SM and stated that everything the respondent Lucas had said was accurate but that he took exception to the respondent Lucas taking it upon himself to do the things which he had stated he had done and he asked the Magistrate to take suitable action to direct him to desist. The Magistrate took no action in response to the applicant's submissions but proceeded with the charge cases. Three remands were then dealt with by the magistrate and the Court adjourned at 10.50am and resumed at 11.10am. After the adjournment, according to the evidence of Mr DC Moore, a solicitor who gave evidence for the applicant, the public accommodation in the Summons Court was half occupied by police and half by members of the public.

I have pointed out earlier that the presence of the arresting police on the seating accommodation in the Summons Court was not brought about by the direction of either of the respondents so that from the point of view of their responsibility in this case that mater can be disregarded..

However, in justice to the applicant, I should say that it was in all the circumstances most unfortunate that so many police should have occupied so much of the space in the Summons Court on that occasion. I accept the evidence that there were 27 police so seated but in addition there were three police at the police prosecutor's table and two police acting as Court orderlies entering and leaving the Court.

In a Court of the size of the Summons Court there would undoubtedly have been the appearance of an overwhelmingly body of police in the Court-room. Whilst it is customary for arresting police to be present in the Court-room for the purposes which I have mentioned above, nevertheless feelings run high in these demonstration cases and an impression, however

unintended, might have been created in the minds of many persons who would enter the Court on that occasion that the police themselves would be a usual duty. On the other hand, in assessing this situation, the nature of the available accommodation at the Central Court of Petty Sessions is also a factor to be taken into account. Remand cases of this type are usually dealt with expeditiously and the arresting policemen in each case must be near at hand. In this building it is a common practice for the arresting policemen to be in the Court-room itself or in the vestibule. The vestibule already contained a number of arresting police and was greatly congested. The addition of another 27 police in the vestibule may have tended to create an equally bad impression to persons wishing to enter any of the Courts, all of which lead off the vestibule. However unfortunate was the impression created, it must be conceded that the physical features of the building were undoubtedly a contributing factor. In this connection it might also be observed that a number of the defendants themselves in the demonstration cases were in fact desirous that arresting police should be present as it was their intention to attempt to identify them for the purpose of laying counter-charges against them. There was conflict in some of the evidence relating to the method adopted by the police to avoid the congestion which would have been overwhelming if all persons on that occasion had been allowed unrestricted access into the vestibule.

It was alleged by some of the witnesses for the applicant that the police had in absolute terms refused to permit persons to enter the building whereas the evidence given by the respondents and on their behalf was to the effect that the words which they addressed to persons who proposed to enter, the building were couched in the language of request and an appeal for co-operation.

Upon a consideration of the whole of the evidence, whilst the actual words used by members of the police force may have been more brusque than a reading of their affidavits would indicate, nevertheless I am satisfied, that the meaning conveyed by the language used was not that of an order or demand but was in essence that of request. It is notable that Mr DC Moore, who was the solicitor to whom I have earlier referred as a witness for the applicant, stated that in his recollection the respondent Lucas said to those present in the vestibule:

> "The only persons who can remain in this vestibule are those on bail who have business in the Court office or are professional men or witnesses. All other persons must leave the Court and remain outside. Your co-operation is requested. We are trying to avoid congestion."

Another solicitor, Mr JM Grahame, another witness for the applicant, said that the respondent Lucas said "I want your co-operation." Senior Counsel for the applicant made it clear to us that it was conceded that the respondents Lucas and McGill acted at all times *bona fide*, doing their best to control a situation which they believed would benefit from their activities. However, his contention was that they acted without authority and illegally. If both that concession and that contention were correctly made, it is possible that the applicant could not succeed. But I consider that, in light of the importance of the arguments presented to us, it would be unsatisfactory in the public interest to dispose of these cases on that ground.

Before proceeding to deal with these arguments one other factual matter should be referred to. The evidence discloses that a great many persons on that morning entered the building and obtained access to the other seven Courts besides the Summons Court and all these other Courts were busily engaged transacting a variety of legal matters. In addition there were the persons who visited the Chamber Magistrates and the general offices of the Court. There is no evidence that any of these people complained to any magistrate, police officer or Court official of any prevention, attempted prevention or untoward restriction of their movements in going about their business on that day at the Central Court of Petty Sessions.

What was alleged to have been done by the respondents and their officers was done quite openly and in the presence of large numbers of people and if the allegations made against them were correct, it would ordinarily be expected that evidence of it would have been readily available. There is also no evidence to suggest that any person who for the purposes of the business before the Court had occasion to be in the Summons Court that morning was prevented from entering the Court nor was there any difficulty in dealing with the three remand cases which took up the business of the Court after the addresses by the presiding Magistrate, by Mr Staples the applicant and by the respondent Lucas. On the resumption of the Court at 11.10 a.m. with the gradual easing of the congestion in the vestibule the business of the Court proceeded in a normal fashion.

The arguments of Counsel have raised questions of importance relating to the administration of justice in Courts of Petty Sessions and the powers of the Magistrates to control the procedures of those Courts to attain the objective that in them justice is done. It will now be convenient to consider some of these matters.

Words or acts, used in the face of or outside the Court, which interfere or tend to interfere with the course of justice constitute contempt of Court (*Parashuram Detaram Shamdasani v King Emperor* [1945] UKPC 25; (1945) AC 264 at p268). I have no doubt that, when the proceedings of a Court are to be administered as a forum open to the public, any person who, without lawful authority or justification prevents or attempts to prevent not only parties, their legal representatives or witnesses but also members of the public who are desirous of being present at those proceedings from entering the Court or its precincts could be adjudged guilty of contempt of Court on the ground that, just as "the broad principle is that the Courts of this country must, as between parties, administer justice in Public" (to quote Viscount Haldane) so it is that any unwarranted restriction of the publicity to which those proceedings are entitled tends to detract from the dignity of the Court and weaken its authority to administer justice in the manner which, subject to some exceptions to which I am about to refer, clear legal principle of unquestioned authority binds it to observe.

Section 67 of the *Justices Act* 1902 (as amended), whose ancestor is Section 12 of the *Summary Jurisdiction Act* 1848 (11 & 12 c.43), provides:

> "The room or place in which a Justice or Justices sits or sit to hear and determine any information or a complaint shall be deemed an open and public court, to which all persons may have access so far as the same can conveniently contain them."

The power to deny some persons access to a Court under Section 67 is quite different from the power to "close" a Court. Except when he is acting pursuant to s32 of the *Justices Act* or pursuant to the provisions of some statute, e.g. The *First Offenders (Women) Act* 1918 Section 3, a Magistrate has no power to 'close' the Court in which he is sitting in the sense of sitting *in camera* or in private which expressions import the exclusion of all persons (other than those required to be present) from the Court-room irrespective of the ability of the room's accommodation for them or, their behaviour.

In the present case it is common ground that the residing Magistrate did not "close" the Summons Court in that meaning of the term. I regard Section 67 as a statutory reinforcement of a power which Magistrates, in common with all persons occupying judicial office, inherently possess. It is a long standing practice for Magistrates not to allow persons to remain standing in the Court-room whilst the business of the Court is being conducted therein and to direct persons who cannot find seating accommodation to leave. This is a power which Magistrates possess both under s67 and inherently.

On this morning Mr Williams SM did direct all persons, both members of the public and the Police Force, who were without seating accommodation to leave the Summons Court. This aspect of the matter needs no further consideration. The real subjects of complaint are allegations that persons were prevented from entering the vestibule and from entering the Summons Court. As regards the Summons Court evidence that any defendant, or his legal representatives or witnesses were denied access thereto on 21 September 1970. If Miss Lyons, who went to the Summons Court, at 10.35 a.m. in error, was denied access this was done on the basis that there was no seating accommodation for her in that Court at that time. It remains to deal with the question of entry in to the vestibule.

The inherent powers of Justices can be correctly stated more widely than the particular power set forth in s67. In *Cocker v Tempest* [1841] EngR 242; (1841) 7 M & W 502 at pp503-504; 151 ER 864 at p865; 9 Dowl 306, Alderson B said:

> "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion."

In *O'Toole v Scott* [1965] UKPC 14; [1965] AC 939; [1965] 2 All ER 240; [1965] 2 WLR 1160, a case relating to a NSW Court of Petty Sessions, Lord Pearson, speaking for the Privy Council in discussing the discretionary power of a Magistrate to permit some person, not being the informant, his Counsel or solicitor, to conduct the case for the informant, said "There is no statutory limitation of the discretion; the discretion is not conferred by statute, but is an element or consequence of the inherent right of a judge or magistrate to regulate the proceedings in his Court... Its exercise should not be confined to cases where there is a strict necessity, it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice."

Recently in *Simms v Moore* [1970] 2 QB 327; [1970] 3 All ER 1; [1970] 2 WLR 1099, Lord Parker CJ, with the concurrence of Bridge and Bean JJ at p3 said:

> "Justices have always had an inherent power to regulate the procedure in their courts in the interests of justice and a fair and expeditious trial... No statute, whether the *Summary Jurisdiction Act* 1848, or the *Magistrates Court Act* 1952 abrogated that right."

Quite apart from the question of the Court's capacity to contain persons desiring access thereto, the fact that s67 provides for a hearing in an open and public Court does not abrogate the inherent power of a Magistrate to exclude persons from the Court where circumstances exist for him to exercise that power as a necessary step to be taken for the securing of justice. In *Scott v Scott*, *supra*, the House of Lords was concerned to consider the power of a Judge of the Divorce Court to order at his discretion a hearing of a case *in camera* whilst administering the provisions of s46 of the English *Divorce Act* 1857 (20 & 21 Vic. c85) which made provision for evidence to be given in open Court. Notwithstanding that express statutory provision, the House of Lords decided that the Divorce Court was to conduct its business on the general principles, as regards publicity, which regulated the other Courts of Justice in England and that the power conferred by s46 must be treated as given subject to their observance. Viscount Haldane LC at p437 said

> "While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions, such as those to which I have referred. But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done ... As the paramount object must always be to do justice, the general rule as to publicity — after all only the means to an end — must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience but on necessity."

Earl Loreburn at pp445-446 observed:

> "The Court may be closed or cleared if such a precaution is necessary for the administration of justice. Tumult or disorder, or the just apprehension of it, would certainly justify the exclusion of all from whom such interruption is expected, and, if discrimination is impracticable, the exclusion of the public in general ... It would be impossible to enumerate or anticipate all possible contingencies, but in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court."

See also the judgment of Lord Shaw in the same case at p482. Lastly, a reference may be given to the judgment of Viscount Reading CJ (with the concurrence of Darling, Avory, Rowlett, Bailhache, Atkin and Sankey JJ) in *R v Governor of Lewes Prison; Ex parte Doyle* (1917) 2 KB 254 where at p271 he said:

> "It is in my judgment plain that inherent jurisdiction exists in any Court which enables it to exclude the necessary to exclude the public where it becomes necessary in order to administer justice. That is the true meaning of the language used by Earl Loreburn and by Viscount Haldane LC in *Scott v Scott* (*supra*)."

It is, therefore, well established that those who preside in Courts of Petty Sessions as well as in other Courts of justice in this State inherently have the power, where it becomes necessary in

order to administer justice, to exclude from the Court-room all or any persons by whose behaviour interruption to the orderly procedures of the Court is caused or is reasonably to be apprehended. Despite the phrases in the authorities to which I have referred which speak of the exercise of this power 'in the Courts', or the like, these expressions should not be understood as a literal definition of the scope of the power for tumult, disorders or congestion in the precincts of a Court-room can in many instances produce the same results as if conduct of that kind had occurred in the Court-room itself, not only by the interruption of its proceedings by the penetration of noise, but by preventing the free access and egress of such persons who wish to enter or leave the Court or its offices or by deterring people from attempting to do so. In my opinion, the power of which I am speaking is exercisable in relation to persons and their behaviour in the precincts of the Court-room as well as in the Court-room itself.

At the Central Court of Petty Sessions the precincts of the Court would include not only the vestibule and its passages but also the verandah of the Court and the steps which lead up to it. If the conduct of persons in the precincts of the Court were to constitute contempt within the meaning of s152 of the *Justices Act*, it would not be correct to say that such contempt could not be punished in a summary way under that section as, in my opinion, s152 is not to be read as limited to conduct occurring only in the Court-room itself. Nothing that was said by this Court in *Ex parte Tuckerman; Re Nash & Anor* [1970] 3 NSWR 23 (24 August 1970) should be understood as so restricting the application of s152 as in those cases the Court was concerned only with contempt in the face of the Court and its observations in relation to s152 should be read in that context.

However, whatever the powers of a magistrate might be to control the access of persons to a Court-room or its precincts, it was claimed that the respondents had no authority or justification in acting to regulate such access. In my opinion, this argument has no substance. It would be absurd to suggest that, although such a power was possessed by a magistrate, its physical execution must be exercised by him personally. It is the inherent right of all Courts to employ the services of persons to assist them in the performance of the judicial office and to carry out the directions of those who reside in them for the purpose of keeping order in the Court-room and its precincts.

The uncontradicted evidence is that in the Central Court of Petty Sessions these duties are habitually undertaken by members of the Police Prosecuting Branch and, when numbers are required in excess of those which that Branch can supply, I see nothing irregular in the fact that members of the Police Force are co-opted from other branches. If the validity of the Regulation cited by me above is questionable, no particular Statutory authority would be necessary for members of the Police Force to undertake such duties as every member thereof has a continuing duty to keep order in public places (*Horne v Coleman* (1929) 46 WN (NSW) 30; *Attorney General v Perpetual Trustee Co (Ltd)* [1952] HCA 2; (1952) 85 CLR 237 at pp265, 277, 278, 303-304; [1952] ALR 125; [1955] HCA 9; (1955) 92 CLR 113 at pp118, 120-121; [1955] ALR 469).

Assistance rendered to a magistrate to facilitate his judicial work and to secure the maintenance of order in his Court and its precincts would fall within that category of duty. It was argued also that what the respondents did in relation to entry into the vestibule was not done upon the direction of Mr Williams SM as the Magistrate presiding in the Summons Court on 21 September 1970. The respondents concede this to be so. Their actions were taken after consultation with and upon the direction of Mr Riley CSM. The appointment of Mr Riley as Chairman of the Bench of Stipendiary Magistrates stems from s7A(2) of the *Justices Act* but the statute makes no express provision for his authority as such Chairman over and above the authority of any other Stipendiary Magistrate. By convention he undertakes on behalf of the Bench of Magistrates the administrative duties which must necessarily be performed by one of their number in facilitating the performance of the judicial work at the Central Court of Petty Sessions. In any event, so far as the precincts of the Central Court of Petty Sessions are concerned, Mr Riley CSM has the same power as every other Magistrate of taking the appropriate steps to ensure that order is maintained therein and that all persons have the proper means of access thereto and egress therefrom and, as the Stipendiary Magistrate presiding on 21 September 1970 in No. 1 Court, he had the same interest, and indeed, duty in that regard as Mr Williams SM as the Magistrate presiding in the Summons Court. Hence the directions which he gave to the respondent Lucas with regard to the precincts of the Central Court of Petty Sessions were not only directions which he was empowered to give but were also directions which the respondent Lucas and the other members of the Police

Force acting under his supervision were entitled to execute.

It only remains to apply the principles to which I have referred to the facts as I have found them to be.

(1) The Summons Court was not a "closed" court at any time on 21 September 1970. Between 10.20 a.m. and 10.50 a.m. the business of the Summons Court was transacted in the presence of some members of the public and, so far as concerns each of the three individual defendants who were remanded during that brief period, there were present in addition, to his own legal representatives other members of the Bar and solicitors, four members of the Press and three, four or five members of the public. No evidence, of course, was given in respect of these three cases which were by consent remanded to another date. On the resumption of the Summons Court at 11.10 a.m. there was a substantial number of members of the public in that Court having regard to its accommodation for them. During the period of 30 minutes prior to the short adjournment at 10.50 a.m. and thereafter this Court was an open and public Court so far as it could conveniently contain them (see s67 of the *Justices Act*). At no time was anyone wrongfully excluded from the Summons Court.

(2) Whether or not Mr Riley CSM was lawfully entitled to act in giving directions to the respondent Lucas on behalf of all the Magistrates who were to preside at the various Courts at the Central Court of Petty Sessions that morning, he was entitled to take steps to prevent any interference with the business to be transacted in the No. 1 Court in which he was himself to preside. Although he gave no evidence in these applications it may be properly inferred that he reasonably apprehended that the administration of justice in No. 1 Court would be impeded by a large congregation of people in the precincts of the Court operating to prevent persons who were required to attend No.1 Court either as parties or for professional or other reasons having access to and egress from that Court which led off the vestibule. In those circumstances he was entitled to direct the respondent Lucas to take those steps by himself and by such other members of the police force as were requisite for the purpose.
(3) The respondent Lucas was entitled, and in fact bound, to carry out the directions given to him by Mr Riley CSM provided that what was done by him was reasonable in all the circumstances of the case.

(4) Inasmuch as it could not be anticipated, when Mr Riley CSM gave his directions to the respondent Lucas shortly after 9 a.m., what the extent of the congestion would in fact be and whether or not there would be any disorderly conduct of the type previously experienced and, if so, what form that conduct would take Mr Riley was quite justified in imparting in his directions to the respondent Lucas a measure of discretion as to the course which he, Lucas, should adopt to meet the exigencies of any situation which might be anticipated to arise.

(5) Neither Mr Riley nor the respondent Lucas were bound to wait until the congestion became so great and chaotic that the business of the Court could not be carried out. In my opinion, they were entitled to take all reasonable precautions against that situation arising if they had a just apprehension of it. It is true that there can be no punishment for a future contempt (cf. *Hulbert Crowe v Cathcart* (1894) 1 QB 244 at p246) but that principle has no relevance in considering the right to protect judicial proceedings from anticipated interruption or interference.

(6) Everything the respondent Lucas or the respondent McGill did on the occasion in question was admittedly done in good faith and, in my view, nothing was done which exceeded what was reasonably necessary in the circumstances both existing and anticipated. So far from constituting any contempt of Court, what was done did enable the business of the eight Courts comprised in the building to be transacted on that day regularly and expeditiously.

For these reasons I am of the opinion that each of the rules nisi should be discharged.

So far as the question of costs is concerned I am of the opinion that the applicant, although mistaken in alleging that the respondents were guilty of contempt of Court, was to some extent actuated by the atmosphere which prevailed in the Summons Court on the morning in question and by the situation which he encountered in the congested precincts of the Court when he arrived at about 9.45 a.m. Ordinarily this would not, in my view, relieve him from the penalty of costs in a matter of this kind but the bringing of these applications has enabled a number of questions to be determined which appear to me to be of considerable importance to the Bench of Magistrates, to the legal profession, the NSW Police Force and the public and in these circumstances I think that it is proper that the orders nisi should be discharged without any order as to costs being made (cf *Scott v Scott* (*supra*) per the Earl of Halsbury at p487).

MASON JA: These motions to make Absolute rules nisi for contempt have been heard together by

consent of the parties. The applicant is a member of the Bar and the respondents are Inspectors of Police, the first-named respondent Inspector Lucas being Senior Police Prosecutor and the officer in charge of the Police Prosecuting Branch, the second-named respondent Inspector McGill being the officer in charge of certain police assisting in crowd control at Central Court of Petty Sessions on Monday, 21 September 1970, at the request of Inspector Lucas. The applications have their origin in events which occurred at Central Court on that day when there were listed for hearing before the Court, in addition to other cases, 102 cases involving charges against persons arising out of the Vietnam Moratorium demonstration in the City of Sydney on the preceding Friday. Many affidavits have been filed as to what occurred and a number of the deponents have been cross-examined. There is some conflict on the facts as between the applicant's case and the case presented by the respondents and it will be convenient to summarise briefly the evidence which has been presented.

The applicant's account is that he attended the Court in Liverpool Street at 9.45 a.m. on 21 September 1970, in order to appear for a person who had been charged with an offence. There was a large crowd of people in groups of three to six persons in the grounds in front of the Court building and at the entrance to the building. There was no noise or commotion. Ranged across the steps immediately in front of the building was a line of six policemen. He heard an announcement by Inspector Lucas over a loud hailer to the following effect:

> "All charges against persons arising out of what might be called 'last Friday's demonstration' will be dealt with in the Summons Court. Only persons coming off bail, members of the public having business in the Petty Sessions Office and defendants and members of the profession will be allowed into the building."

When the applicant sought to pass the line of policemen he was questioned as to his identity. Having identified himself as a member of the Bar and his companions as his client and instructing solicitor, he was permitted to enter the building with them.

In the vestibule of the Court building he saw a large number of persons including many policemen. The crowd which he observed there was larger than was customary, but there was no noise or commotion or unusual activity. At the entrance to the Summons Court were two policemen. The applicant saw members of the legal profession enter the Summons Courts after having what appeared to be a consultation with the policemen.

The applicant entered the summons Court at 10 a.m. With the exception of three persons, every place in the three long benches behind the Bar table were occupied by policemen. In all he estimates that about fifty policemen were present in the Court. The only other persons in the Court room were about five members of the legal profession seated at the Bar table and four persons at the table reserved for use by representatives of the Press. When the Court commenced its business at 10 a.m. complaints were made to the presiding Magistrate Mr Williams SM, by Mr Staples of counsel and the applicant concerning the circumstances which I have already described. The Magistrate stated that he had not authorised any police officer to take any step having the effect of excluding any person from access to the Court. Although the applicant does not mention it, other witnesses say that the Magistrate refused to order the police officers who were present in Court to leave the Court and remarked that they were entitled to be there.

According to the applicant Inspector Lucas responded to the complaints in an address during the course of which he said:

> "I take full responsibility for what has been done. I gave the instructions to Inspector McGill to prevent ordinary members of the public from entering. I did this to avoid confusion and in the interests of the Court and of the defendants."

The applicant asserts that until the morning adjournment, which other witnesses place at 10.50 a.m., no member of the public entered the Courtroom. It seems to be generally accepted that after the morning adjournment there were fewer police officers in Court and that there was room available on the long benches for members of the public who wished to remain in Court. Likewise it seems to be generally accepted that before the morning adjournment three cases only were adjourned or dealt with by Mr Williams, most of the time of the Court in this period being devoted to the controversy which had arisen.

The applicant's version of these events is, broadly speaking, confirmed by other witnesses, subject to some variations, Mr Moore, a solicitor, heard policemen in front of the entrance to the Court building, having questioned persons seeking to enter the building, say "You cannot go in. You must wait outside." He heard Inspector Lucas address the crowd in the vestibule through a loud hailer and say

> "The only persons who can remain in this vestibule are those who are on bail who have business in the Court office or are professional men or witnesses. All other persons must leave the Court and remain outside. Your co-operation is requested. We are trying to avoid congestion."

Mr Moore says that until the Court adjourned at 10.50 am, available accommodation for the public in the Summons Court was occupied by about 30 policemen, except as to two or three places. Mr May and Mr Grahame who are solicitors gave evidence to substantially the same effect, although their evidence differs in some respects. Both are in agreement that Inspector Lucas stated to the presiding Magistrate that he took responsibility for ordering persons other than those having business in the Court not to remain in the vestibule or the Court building. Mr Hunt a journalist states that he was about to enter the Court building when he was questioned by a Sergeant of Police as to whether he was a person had been charged. On his responding in the negative, he was informed that he could not enter. However, he was permitted to enter on production of his Press pass. Miss Lyons, a law clerk in the employ of the Public Solicitor, says that she entered the Court building in connection with a tenancy matter in the list. She attempted to enter the Summons Court, looking for Mr Grahame who was attending to the matter and was informed by one of two or three police officers at the entrance to that Court, "You cannot go in there." When she then indicated that she was concerned with a tenancy matter, the officer replied, "It won't be in there."

Mr Joyce, an area officer of the National Union of University Students who had advanced bail money on behalf of some defendants, says that he was informed by police officers at the entrance to the building that he could not enter.

A different version of events is given by the respondents and their witnesses. The respondents' case commences with the affidavit of Inspector Lucas who says that, in addition to its function of providing prosecutors, the Police Prosecuting Branch provides Court Constables for Central Court, that the Branch is responsible for keeping order, subject to the directions of the Magistrate, in the Courts and in the Court precincts and that it is responsible in co-operation with other police for the custody of persons in custody before the Courts. It seems, although it is not entirely clear from the evidence, that the responsibility of the Branch for keeping order in the Court building is no more than responsibility which derives from some administrative instruction or arrangement in the Police Department.

Inspector Lucas considered that, having regard to earlier experience, because the Court list included a large number of cases arising out of the Moratorium demonstration there would be considerable problems of congestion and noise in the precincts of the Court. In addition, he thought it a possibility that there would be demonstrations and disorders as had occurred previously at Central Court and elsewhere in cases involving Students and demonstrators. Shortly after 9 a.m. on the Monday morning he had a discussion with Mr Riley, the Chief Stipendiary Magistrate, who directed that the Summons Court should be used for the bulk of the demonstration cases as it was closer to the entrance of the building than the three charge Courts and was opposite the Court office. Mr Riley directed Inspector Lucas to take such measures as he thought fit to prevent congestion, noise and disorder in the Court precincts and to facilitate the business of the Courts. In particular, Inspector Lucas was directed not to permit persons in fancy dress to enter the Court building. Mr Riley granted Inspector Lucas permission to use loud hailers in the precincts in view of the large number of persons expected. In cross-examination Inspector Lucas said:

> "Q. And you knew that any instructions that you had received from Mr Riley had nothing whatever to do with excluding the members of the public from that Court.
> A. Yes, I would say that is a fair comment."

At 9.25 a.m. Inspector Lucas, having observed many people in the vestibule, concluded that congestion and noise would get beyond control unless steps were taken to restrict the number

of persons entering the vestibule. He then addressed the persons in the vestibule through a loud hailer, an address which he was to repeat at various times inside and outside the vestibule. Inspector Lucas, who is unable to remember precisely what it was that he said, asserts that his statements were in the nature of appeals for co-operation in order to avoid undue congestion and noise. He says that he requested, but did not order, persons other than those coming off bail or having direct business with the Court or Court offices or members of the legal profession or persons officially associated with the Court to leave the vestibule and wait outside and, in the case of those outside the building, not to enter the building. Inspector Lucas had requested Inspector McGill and the officers under his control to co-operate with him. It is admitted that Inspector McGill with two sergeants and two constables took up a position at the main entrance to the Court building.

It should not be thought that Inspector Lucas confined his announcements to the question of who could, or should, enter the building. He and other police officers informed the public that the cases arising out of the demonstration on Friday would be taken in the Summons Court and sought to keep open a passageway through the vestibule.

Inspector Lucas says that the two police officers on duty at the entrance to the Summons Court had no instruction from him to stop persons entering that Court; nor did he observe them stopping persons from entering the Court. He further says that the three benches in the Summons Court can seat no more than 31 persons, but does agree that they were mainly occupied by police officers. He denies that he had given any instruction to police officers to occupy the benches, with a view to excluding the public from the Court, or at all. He suggests that the presence of a large number of police in the Court was referable to the usual practice of having the arresting constable in Court so that, in the event of remand being sought, he can conveniently give information as to dates when he will be available to give evidence. The Inspector says that it was the general practice of Magistrates sitting at Central Court not to permit persons to remain in Court who cannot find a seat.

Inspector Lucas states, and there is no challenge by the applicant to the correctness of this statement, that everything which he did on that morning was done with the intention of facilitating the business of the Court and keeping order in its precincts and that he believed that he was properly carrying out his duties and the directions given to him by the Chairman of Stipendiary Magistrates.

The account of events given by Inspector Lucas is confirmed by Inspector Bush, the Assistant Senior Police Prosecutor of the Police Prosecuting Branch, who was present at the discussion with Mr Riley, CSM. Inspector Bush says that all but four of the persons seated on the three benches in the Summons Court were Police officers, making a total of 27 police officers seated in the Court. Inspector Bush spoke of recent occurrences in Courts of Petty Sessions involving congestion and disorder when charges against demonstrators and students had come before the Courts, other instances of most unseemly behaviour, including the writing of objectionable material on walls and the wearing of fancy dress in Court with the apparent intention of ridiculing the Court. It is evident that these events were known to Mr Riley and Inspector Lucas and that the possibility of a recurrence was present to their minds.

Inspector McGill gave similar evidence with respect to what occurred in the precincts of the Court building and the vestibule. Inspector McGill denies that he at any time ordered persons not to enter the Court building, although he admits persuading persons not to enter the building because it was congested. However, it is clear from his affidavit that he and his men at the entrance to the building questioned persons seeking to enter the building before 10.45 a.m. when the congestion was considerable.

Constables Dare and Hazell who were on duty at the entrance to the Summons Court deny that they refused permission to any person to enter the Court or that they said to any person "you can't go in here." However, it is conceded on behalf of the respondents that Miss Lyons may have spoken to some other police officer who was standing at the entrance to the Summons Court in their absence.

Mr White the deposition clerk in the Summons Court gives a more detailed account of

what transpired in that Court. He does say that Inspector Lucas said during the course of his address that the defendants were waiting outside the door of the Court ready to come into Court when their names were called and that he had a Court constable with a loud hailer who would call their names inside and outside the Court to which Mr Williams responded by saying that he would not allow the use of a loud hailer in the Court room. Mr White says that Inspector Lucas announced that all police in the Court room who were not informants or arresting police should leave the Court and that no one left as a result. After the morning adjournment the number of police officers in Court diminished as the Court disposed of its list.

It is unnecessary to refer in detail to the remaining affidavits relied upon by the respondents. It is sufficient for me to say that the list at Central Court that morning substantially exceeded the number of cases usually listed for hearing, that the accommodation available for members in the vestibule and the precincts of the Court building is by no means considerable and there was congestion in the early part of the morning. To deal with the large crowd expected at the Court additional police from No. 2 Division were brought in to the Court. They were advised by Sergeant Walsh that it was desired that only persons having business in the Court should enter the vestibule. One significant matter established in evidence was that members of the public, not associated with the litigation, were present in Courts other than the Summons Court, including persons identified as "regulars".

The respondents did seek to make use of affidavits deposing to riotous and disorderly conduct which has recently occurred in inferior Courts in Melbourne. For my part, I regard those affidavits as irrelevant. The matter deposed to is too remote and there is nothing to suggest that Mr Riley or the respondents were aware of those incidents on the morning in question.

The principal issues of fact between the parties concern what was said by the respondents in the announcements which were made through the loud hailers and the attitude of the police officers in front of the entrance to the Court building as they dealt with members of the public who sought to gain entrance to the building. As to the first matter, I find on the evidence that, although the respondents stated from time to time that they were requesting the co-operation of the public, they also said that only persons having business with the Courts of the kinds already mentioned would be allowed into the vestibule. I think that the evidence given by Mr Moore contains an accurate description of what was said by the respondents.

The conflict of evidence in this respect is largely a conflict between members of the legal profession and other independent persons having no reason to give an inaccurate account, of what occurred, but having every reason to mark and note with no little degree of surprise what on its face appeared to be a remarkable departure from the atmosphere usually prevailing at Central Court of Petty Sessions. The respondents, it will be recalled, were not able to give the details of the announcements which they made, although they asserted that they spoke in the language of request and co-operation only. However, it is plain from their evidence, in particular the cross-examination of Inspector McGill,that their object was to keep the vestibule free from congestion by preventing persons having no business with the Court from entering it or remaining there. That this was the object appears quite clearly from the instruction given by Inspector McGill to Sergeant Walsh; indeed it seems to have been the only advice given by Sergeant Walsh to his subordinates. There was no suggestion by Inspector McGill or Sergeant Walsh that in their conversation the achievement of this object was to be attained by request, rather than command, or indeed that the manner of achieving the object was mentioned at all. The same comment may be made of the instructions given by Sergeant Walsh to the men under him.

It is the tenor of these conversations and the absence of any evidence from the respondents as to instructions given to their subordinates which place emphasis on the desirability of avoiding the language of command, unless the object could not otherwise be attained, that leads me to the conclusion that the respondents did not at the time fully appreciate and observe the distinction between the two approaches. That conclusion derives additional support from Inspector Lucas' evidence concerning his conversation with Mr Riley. Mr Riley, it will be noted, told Inspector Lucas not to allow persons in fancy dress to enter the court building, but the evidence does not suggest that in any other aspect either Mr Riley or Inspector Lucas directed their minds to the question whether members of the public should be directed or requested not to enter the Court building.

The statements made by the respondents were certainly understood by the applicant and witnesses for the applicant as indicating that persons were not permitted to enter the Court building unless they had business with the Court.

Likewise, I am satisfied that from time to time members of the public were informed by the line of police officers at the entrance to the Court building that they could enter the building only if they had business with the Court. Again this thought was conveyed sometimes in the language of request and at other times in the language of order and decision. There seems, to be little doubt that the police officers at the entrance to the building interrogated persons intending to enter the building, but it should be said that, although they did not allow Mr Joyce to enter the building they did not prevent those members of the public who were observed in the Charge Courts from entering the building.

Several possible reasons suggest themselves as explanations why some persons, but not others, gained access to the building. It may simply be that those who insisted on exercising their rights gained admission; alternatively, it may be that the police officers took a less co-operative attitude in the case of members of the public who they thought were students by reason of the association of students with past disorders. Or it may be that there was accommodation available in the building such as to enable the police to admit persons intending to enter any Court in the building, apart from the Summons Court.

It seems clear enough that Miss Lyons was told that she could not enter the Summons Court. However, this is not of much significance because Miss Lyons' intended destination was elsewhere and the Summons Court may have not have had available seating accommodation at the time, Likewise it is clear that all the seating accommodation within the Summons Court was taken up by police officers, with the exception of two or three places occupied by civilians. I accept the statement of Inspector Lucas that he did not instruct the officers to take up the seats in the Court. However, it is equally evident that he did nothing to discourage the police from occupying these seats, believing, as he did, that they were entitled to be there. If any person was actually denied admission to the Summons Court, as distinct from the vestibule, and apart from Miss Lyons, the evidence does not disclose that any person was refused admission, it was no doubt due to the fact that there was no vacant seating accommodation and it was known that the practice of the Court was to require all persons in the Court to be seated.

It is conceded by the respondents that this Court has jurisdiction to determine whether there has been a contempt of a Court of Petty Sessions and to punish for that contempt (see *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351; [1955] ALR 265). The question is therefore whether on the evidence and findings of fact which I have outlined the respondents are shown to have committed a contempt of Court.

Whether the respondents were guilty of contempt turns on the question whether their acts were calculated, or had a tendency, to interfere with the proper administration of justice (*Parashuram Detaram Shamdasani v King Emperor* (1945) AC 264 at 268; *R v Dunbabin; ex parte Williams* [1935] HCA 34; (1935) 53 CLR 434; [1935] ALR 232). The proper administration of justice in a Court of Petty Sessions necessitates a compliance with the provisions of s67 of the *Justices Act* 1902 as amended which provides that the room or place in which the hearing takes place shall be deemed an open and public Court to which all persons may have access so far as the same can conveniently contain them. The section recognises the traditional rule that justice must be administered, in public and attended by publicity. The only consideration to which that rule yields is the paramount duty of the Court to ensure that justice is done (*Scott v Scott* [1913] AC 417; [1911-1913] All ER 1; 29 TLR 520). The speeches of Viscount Haldane LC, (at AC 437-438) and Earl Loreburn (at AC 445-446) recognise that, in exceptional circumstances where justice cannot otherwise be secured, it may be permissible for a Court to be closed and the proceedings heard *in camera*. Earl Loreburn specifically instances "tumult or disorder, or the just apprehension of it" as an example of such circumstances.

However, it is to be observed that in the present case the presiding Magistrate in the Summons Court proceeded to sit in open Court in accordance with the requirements of s67; members of the public were present as were representatives of the Press. The learned Magistrate did not close the Court; nor did he suggest that he apprehended tumult or disorder. It follows

that in determining whether the actions of the respondents were calculated to interfere, or had a tendency to interfere with the proper administration of justice it is necessary to proceed on the footing that the proceedings in the Summons Court were heard in open Court and that the presiding Magistrate evidently did not apprehend the existence of a situation which justified a closure of his Court.

The case for the applicant is that an interference with the right of the public to enter a Court and observe proceedings in a Court of justice is a contempt. No doubt a deliberate interference with the exercise of that right for the purpose of excluding the publicity which attaches to the proceedings of a Court or for the purpose of intimidating or influencing a Court may be so regarded, but that is not the present case.

The right of a citizen to enter a Court and observe the proceedings is, subject to the availability of accommodation, a matter to which s67 explicitly refers. It is also, I think, subject to the reasonable regulation by those in authority of a crowd or throng of persons who may by accident or design bar the entrance to the Court. It is self-evident that a Court cannot proceed to the proper despatch of its business unless those in authority, when occasion demands it, take reasonable steps to ensure that access to the Court room is available to those whose presence is essential to the conduct of the business of the Court.

In *John Fairfax & Sons Pty Ltd v McRae*, *supra* at CLR 371, speaking with reference to a publication in a newspaper alleged to be a contempt, Dixon CJ, Fullagar, Kitto and Taylor JJ, said

> "The actual intention or purpose lying behind a publication in cases of this kind is never a decisive consideration. The ultimate question is as to the inherent tendency of the matter published. But intention is always regarded by the court as a relevant consideration, its importance varying according to circumstances."

In particular circumstances it has been said that the inherent nature of the act complained of is such as to demonstrate its tendency to interfere with the proper administration of justice, without more. Illustrations of such circumstances are to be found in the publication of a newspaper article accusing a man of crime after proceedings have begun and before trial (*R v Odhams Press Ltd* (1957) 1 QB 73; [1956] 3 All ER 494; [1956] 3 WLR 796) and victimisation of a witness on account of the evidence which he had given (*Attorney-General v Butterworth* [1963] 1 QB 696 cf at 722, per Lord Denning MR; [1962] 3 All ER 326; [1962] 3 WLR 819).

In ascertaining the character and inherent tendency of the actions of the respondents in the present case it is necessary to have regard to the circumstances in which those actions took place and the purpose for which they were undertaken. It is conceded that the actions were taken *bona fide*, not with any intention of interfering with the despatch of the Court's business, but rather with a view to facilitating it. The Chief Stipendiary Magistrate and Inspector Lucas anticipated difficulties arising from congestion and considered that measures should be taken to alleviate those difficulties. Inspector Lucas did not perhaps sufficiently appreciate that he had been given no authority to exclude from the Court building ordinary members of the public, but the absence of such authority is not in itself to convert the actions of the respondents into contempts when it is recalled that their actions and the actions of other police officers were undertaken for the purpose which I have already mentioned.

I have already indicated that the incident involving Miss Lyons does not appear to have much significance. Miss Lyons' intended destination was elsewhere and the Court room may have been fully occupied at the time, in which event the remark of the police officer at the door would not have been unwarranted, although one could have wished that it had been delivered with some apparent tact and courteously. There is no evidence that any person desiring to enter the Summons Court from the vestibule was excluded. Accordingly, there is no basis for finding any contempt on the part of the respondents on this count.

The third matter is the presence of the large number of police officers in the Summons Court. It is not suggested, as I understand the appellant's case, that the police officers were not entitled to be present in Court. Nor for that matter does the evidence establish that the respondents or either of them instructed Police officers to take up the available seating accommodation.

Accordingly, I am of the opinion that the applicant has not established that a contempt of Court was committed by the respondents. At the same time I think it proper to make some comments about the state of affairs disclosed by the evidence, because the course of events in, my view clearly indicates that insufficient attention was given to the desirability of preserving the independent dignity of the Court and to the traditional rule of publicity.

It is important that the independent dignity of the Court should be manifest lest there be some impairment of public confidence in the impartiality of the Court. There was, I think, on this occasion an absence of a sufficient appreciation for the independent position and dignity of the Court. Care should have been taken to ensure that the public seating accommodation was not occupied almost in its entirety by police officers. Likewise the statement that a loud hailer would be used within the Court room should not have been made; the learned Magistrate very properly rejected the proposal, doubtless on the ground that its use was quite unbecoming to the dignity and calm atmosphere of the Court.

The rule as to publicity is of course primarily addressed to the Court itself so as to ensure that the Court conducts a public hearing of its proceedings and that it does not sit in private, save when the existence of exceptional circumstances warrant the taking of that course. But it is necessary that others should recognise that rule and conform with it. The rule was expressed by Street CJ in *R v Hamilton* (1930) 30 SR (NSW) 277 at 278; (1930) 47 WN (NSW) 84 in these terms:

> "The only consideration to which the rule as to publicity yields is the paramount duty of the Court to secure that justice shall be done. If it is made to appear that justice cannot be done otherwise, then there is power to direct that proceedings be had in private ... as was pointed out in *Scott v Scott* by Lord Haldane, who was then Lord Chancellor, before the public can be excluded from the Court it must be shown that by nothing short of the exclusion of the public can justice be done."

I should not wish to minimise the serious nature of the misconduct which has regrettably taken place in Courts of Petty Sessions on several recent occasions. Section 152 of the *Justices Act* arms the Courts with power to deal with misconduct of that kind. I do not regard that power as limited to punishment of contempt which occurs within a Court room and the judgment of this Court in *ex parte Tuckerman; re Nash* [1970] 3 NSWR 23 (delivered on 24 August 1970) should not be read as so confining the power.

No doubt in appropriate circumstances, as their Lordships suggested in *Scott v Scott*, *supra*, there is a power to close a Court, but that as Street CJ has pointed out, is a power which is exercisable, when justice cannot otherwise be done. That power was not exercised by the presiding Magistrate and the police officers should therefore have been careful to act in accordance with the notion that the Court was open to the public.

Their object in limiting the number of persons present in the vestibule would have been achieved by requesting the co-operation of the public without adding to that request statements which gave the appearance of command and decision. Had requests proved fruitless, the police officers would then have been justified in seeking directions from the presiding Magistrate.

In the result I am of the opinion that the rules nisi should be discharged and that there should be no order for costs. A not insubstantial part of the hearing was occupied in the reception of evidence on issues of fact which on my view should be determined in favour of the applicant. Moreover, I think that Inspector Lucas, by asserting in the Summons Court that he took full responsibility for what had occurred and by not disclosing that he had discussed the matter with the Chief Stipendiary Magistrate who had given him a discretion to act, created an impression, wrongly as it now transpires, that the matters complained of by the applicant with the result of decisions taken independently by the police in the absence of any consultation with the Court.

I therefore propose that the rules nisi should be discharged with no order as to costs.
