39/11; [2011] VSC 584

SUPREME COURT OF VICTORIA

GREEN v MAGISTRATES' COURT of VICTORIA & ANOR

Pagone J

27 July, 16 November 2011

CONTEMPT OF COURT – PERSON FOUND GUILTY OF CONTEMPT OF COURT AND SENTENCED TO A TERM OF IMPRISONMENT – ERROR OF LAW ON THE FACE OF THE RECORD – WHAT CONSTITUTES THE RECORD – FAILURE BY MAGISTRATE TO FOLLOW STEPS IN *ZUKANOVIC v MAGISTRATES' COURT OF VICTORIA AT MOORABBIN* [2011] VSC 141; (2011) 32 VR 216 – JURISDICTIONAL ERROR – PROCEDURAL FAIRNESS – NEED FOR CLEAR ARTICULATION OF THE CHARGE – NATURAL JUSTICE – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1989, S134(c) and (e).

G. was found guilty of contempt of court when he failed to answer some questions before a Magistrate. The Magistrate ruled that G. had no reasonable grounds for refusing to answer the questions and found him to be in contempt and sentenced him to 14 days' imprisonment. Upon an application for an order in the nature of *certiorari* to quash the Magistrate's order—

HELD: Application granted. Orders set aside and remitted to the Magistrates' Court for directions and re-determination.

1. Contempt of court is a serious criminal offence which requires a Magistrate to ensure that an alleged contemnor has a fair hearing. In *Zukanovic v Magistrates' Court of Victoria at Moorabbin* J Forrest J considered the steps necessary to be taken by a Magistrate prior to determining a charge of contempt of court under s133 of the *Magistrates' Court Act* 1989 (Vic).

***Zukanovic v Magistrates' Court of Victoria* [2011] VSC 141; (2011) 32 VR 216, applied.**

2. Whilst the Magistrate may have thought it sufficient to proceed as he did in view of what had occurred before him only moments before, a fair hearing of the contempt charge required the Magistrate to articulate the charge as a separate step in the proceeding and to do so with sufficient precision to have enabled G. to address submissions on the charge as formulated. The Magistrate had not long before ruled that the privilege against self incrimination had not been made out during that part of the hearing in which G. had been attending to give evidence. G. was not formally represented during that part of the hearing under s56A of the *Magistrates' Court Act* 1989 (Vic). He was subsequently charged with a failure to answer questions without excuse and of prevarication but was not given details of the charge beyond the earlier ruling which had been made in the context of whether he had reasonable grounds to object to answering questions on the basis of self incrimination. The conclusion, and the ruling, on that question did not automatically or inevitably mean that G. was in contempt.

3. G. had refused to answer questions claiming reliance upon the privilege against self incrimination protected by s128 of the *Evidence Act* 2008 (Vic). He was charged with contempt under a different section of a different Act. G. ought to have had the benefit of a sufficient articulation of the charge for consideration of that part of the procedure dealing with that charge under that section. It may have seemed obvious and inevitable to all present that the plaintiff would be found to be in contempt because the Magistrate had only minutes before ruled that G. was not entitled to refuse to answer questions relying upon the privilege against self incrimination, but a finding of contempt was not an automatic consequence of the ruling which required no separate process to be followed. The finding of contempt in this case required the laying of a charge under a particular section and carried with it the right and obligations considered by Forrest J in *Zukanovic*.

4. The failure by the Magistrate to take a plea was contrary to the principles as enunciated in *Zukanovic*. For present purposes it may be sufficient to note that s134 did not depend upon or use the words "exceptional circumstances" as a factor in the finding of contempt or in the imposition of a penalty.

5. The absence of an articulation of a separate charge of contempt and the apparent treatment of the ruling and direction in the context of s128 of the *Evidence Act* 2008 during a hearing under s56A of the *Magistrates' Court Act* 1989 (Vic) as sufficient for the finding of contempt under s134(2) of the *Magistrates' Court Act* 1989 (Vic) were revealed on the face of the record and constituted a misconception of the nature of the function which the learned Magistrate was performing.

PAGONE J:

1. The plaintiff seeks an order under Order 56 of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) in the nature of *certiorari* quashing orders by a Magistrate made on 25 March 2010 finding the plaintiff in contempt of court and imposing a sentence of imprisonment for 14 days. The plaintiff initially filed a notice of appeal to the County Court under s254 of the *Criminal Procedure Act* 2009 (Vic) and was granted bail pending the hearing of that appeal. The DPP objected to the jurisdiction of the County Court to entertain that appeal and on 11 October 2010 Judge Rizkalla heard argument on whether the appeal was within the County Court's jurisdiction. The learned Judge expressed the view that the Court did not have jurisdiction to hear the appeal and adjourned that proceeding for two months to allow the plaintiff to obtain advice and to consider his options. The County Court proceeding was further adjourned to February 2011 after counsel for the plaintiff gave the County Court an undertaking to issue proceedings in the Supreme Court to challenge the Magistrate's order and sentence.

2. The orders made by the Magistrate arose in the context of a compulsory examination under s56A of the *Magistrates' Court Act* 1989 (Vic) in relation to a committal proceeding against Ali Chaouk. Section 56A has since been re-enacted as s104 of the *Criminal Procedure Act* 2009 (Vic) but the provision applicable to the plaintiff was s56A of the *Magistrates' Court Act* 1989 (Vic). Pursuant to that section the Magistrates' Court may make an order requiring a person to attend before the Court for the purpose of being examined by or on behalf of an informant. The plaintiff had been required to give evidence under s56A in relation to his involvement in the beating of a Mr Aakbari. Mr Rose appeared for the informant and explained to the plaintiff that questions were going to be asked about that matter. Mr Rose informed the plaintiff about s128 of the *Evidence Act* 2008 (Vic) which deals with the privilege against self incrimination. Under that section a witness may object to "giving particular evidence" or "evidence on a particular matter" on the ground that "the evidence may tend to prove that the witness (a) has committed an offence against or arising under an Australian law or a law of a foreign country; or (b) is liable to a civil penalty".

3. Mr Rose asked the plaintiff various questions during the s56A examination including questions about a telephone conversation from a particular telephone number with Ali Chaouk in relation to others. The plaintiff answered some questions but either declined to answer others or answered them by saying "no comment" or words to that effect. The plaintiff's refusal to answer some questions was on the basis of a claim that the answer might tend to incriminate him. The plaintiff had the assistance of Mr Burns of counsel for part of the hearing on 25 March 2010 but was not formally represented.

4. The Magistrate ruled that the plaintiff had no reasonable grounds for the objection and directed that certain questions be answered. The plaintiff then answered some of the questions but maintained his previous position on others. The Magistrate, upon application by Mr Rose for the Crown, found the plaintiff to be in contempt and imposed a sentence of 14 days imprisonment. He was bailed pending an appeal to the County Court. The plaintiff subsequently appeared before the Magistrate and purged the contempt by answering the questions he had previously not answered. The finding of contempt and the sentence, however, have not been vacated.

5. The proceeding in this Court for judicial review is under Order 56 of the *Supreme Court (General Civil Procedure) Rules* rather than by way of statutory appeal under s272 of the *Criminal Procedure Act* 2009 (Vic). The existence of the statutory right of appeal was relied upon by the second defendant ("DPP") as a basis to deny relief as a matter of judicial discretion. The existence of a specific statutory appeal may be a good reason not to grant discretionary relief by way of judicial review where, for example, the alternative forum provides a specialist tribunal or where there may clearly be seen a legislative policy of directing certain disputes to a particular forum or through a particular process. Other factors relevant to an unfavourable exercise of the Court's discretion may be whether a party may be thought to be obtaining some inappropriate forensic advantage in pursuing one process rather than an alternative one specifically provided for by statute or otherwise. Considerations of that kind do not arise in this matter and I see no reason to withhold the relief sought if the plaintiff's claims are otherwise established.[1]

6. The plaintiff's claim in this proceeding was maintained on the basis of error of law on the face of the record, jurisdictional error and a denial of procedural fairness. The "record" for these purposes does not include the evidence[2] but does include any statement by the Magistrate

made orally of his reasons for a decision[3] and such other matters in the transcript to the extent necessary to enable understanding of the reasons.[4] The errors were particularised by the plaintiff in broad terms but it may be fair to identify them as being (a) that the Magistrate had erroneously rejected the plaintiff's claim for privilege against self incrimination, (b) that the Magistrate erred in the process by which he found the plaintiff guilty of contempt and (c) that the Magistrate erred in considering that imprisonment was an appropriate sentence unless exceptional circumstances were made out.

7. In considering these submissions it is important to bear in mind that proceedings under Order 56 are not the same as an appeal. The jurisdiction invoked is the supervisory jurisdiction of the Court[5] and the Court's role is limited to ensuring that the decision maker has acted within lawful authority. The Court's role in the exercise of its supervisory jurisdiction is not as wide as it might be in an appeal where the correctness of the decision might be open for consideration at large.[6]

8. The plaintiff was found guilty of contempt under s134(1)(c) and (e) of the *Magistrates' Court Act* 1989 (Vic) which relevantly provide as follows:

> (1) A person is guilty of contempt of court if—
> [...] (c) being examined as a witness or being present in court and required to give evidence, the person refuses to be sworn or to answer any lawful question or, without sufficient excuse, to produce any documents or things that the person has been or is required to produce; or
>
> [...] (e) in the opinion of the magistrate the person is guilty of wilful prevarication.

The Magistrate's conclusion that the plaintiff was in contempt followed a series of questions in respect of which the plaintiff had responded with "No comment" or some expression to that effect. The questions related to a telephone conversation between the plaintiff and a Mr Ali Chaouk and a person known as Boris. The plaintiff was asked his reason for answering no comment to the questions put by Mr Rose. The plaintiff's response was that he was attending the hearing to answer certain questions about a telephone call but was not aware of anything else "pertaining to what [we're] talking about today". He said that he was aware of what the questions he was being asked were about in respect of which he had said that he had no comment and that if he answered anything he "may be incriminating" himself. The Magistrate pressed him about the claim of self incrimination to which the plaintiff responded:

> Your Honour, I don't know the line of questioning where this is going, but I may incriminate myself.

Pressed again by the Magistrate about the questions being specific in their nature and how it was that the plaintiff said he could be incriminating himself, the plaintiff said that he had come to the hearing regarding a conversation on the telephone, that that was all he knew about for the questioning that day and that he had no recollection of the conversation. The Magistrate then found that there were no reasonable grounds for the plaintiff's objections and directed the plaintiff to answer each of the questions which had been put in respect of which he had answered "No comment" beginning with the question "Are you known as Greenie?". The plaintiff thereupon responded "No comment" and repeated the same when asked whether he was proposing to answer each of the other questions when re-asked with "No comment".

9. At the conclusion of that exchange Mr Rose asked that the plaintiff be held in contempt of court. The charge and the process adopted by the Magistrate are recorded in the following exchange:

> MR ROSE: Are you proposing when I ask each of those questions to answer again "No comment"?
> MR GREEN: No comment.
> MR ROSE: In that case, your Honour, we've got to the state where pursuant to s134(1) of the *Magistrates' Court Act*, particularly subparagraphs (c) and (d), I would ask that this witness be held in contempt of court.
> HIS HONOUR: Mr Green, the provision that Mr Rose is referring to – I alluded to it earlier but I'll explain again. It's headed "Contempt of Court" and a person is guilty of contempt of court if, and under paragraph (c) of sub-s (1), being examined as a witness refuses to answer any lawful question. That's paraphrasing paragraph (c). And under paragraph (d) ---
> MR ROSE: No, it's not under s127. That's my mistake.

HIS HONOUR: No, sorry, s134(1)(d).
MR ROSE: That doesn't apply.
HIS HONOUR: I beg your pardon. So you're withdrawing that?
MR ROSE: Yes.
HIS HONOUR: OK. So that's the provision.
MR ROSE: (e) is the other one, your Honour, not (d).
HIS HONOUR: And paragraph (e) of s134(1), a person is guilty of contempt of court if in the opinion of the magistrate the person is guilty of wilful prevarication. I'm satisfied with the proceedings as they have gone this morning that those two paragraphs of s134(1), (c) and (e), are made out and that you are a person who is guilty of contempt of court and I so inform you of that. Mr Rose, the next step in the proceedings then would be for a formal charge to be laid. Is that correct?
MR ROSE: No, you can make an order pursuant to sub-s (3) straight away. But I think what should happen is that he should be made aware of the penalties for contempt and we give him the opportunity to purge his contempt, your Honour, by answering the questions. Then if he doesn't do that forthwith, then we might proceed to the issue of what should happen to him.

The basis upon which the Magistrate ruled that the two paragraphs of s134(1)(c) and (e) had been made out and found the plaintiff guilty of contempt was the Magistrate's earlier ruling that the plaintiff had no reasonable grounds for the claim of privilege under s128 of the *Evidence Act 2008* (Vic) and the plaintiff's failure (in part) to comply with the Magistrate's earlier direction that the plaintiff answer the questions put to him. The plaintiff had previously been told that his refusal to answer any lawful question may result in his being charged with contempt but the Magistrate treated the ruling in respect of s128 of the *Evidence Act* 2008 (Vic) and the continued refusal to answer certain questions after a direction that they be answered as sufficient to find, and perhaps simultaneously a finding, without separate inquiry, that the plaintiff was in contempt under s134(1) of the *Magistrates' Court Act* 1989 (Vic).

10. What next occurred was a discussion concerning the imposition of penalty. At that point the plaintiff was asked whether he wished to seek legal advice. He said that he did and was excused from the witness box to speak to Mr Burns of counsel in relation to the next step of the process. The Magistrate informed the plaintiff that he would then resume the hearing in relation to the charge of contempt of court and, after a short adjournment, the Magistrate resumed the hearing and Mr Burns appeared on behalf of the plaintiff. The balance of the proceeding concerned the penalty to be imposed upon the prior finding of contempt which I have set out above. There was no further argument about whether a contempt had been committed but the Magistrate gave further reasons in the course of his ruling on penalty about his conclusion that a contempt had been committed. In particular the Magistrate said:

HIS HONOUR: Mr Green appeared before me in answer to the notice of order. After taking the affirmation Mr Green answered "No comment" to most questions put to him. I gave him the opportunity to seek legal advice, which he did from Mr Burns of counsel. Although on his return to the witness box he answered some questions with "I have no recollection", he responded again with "No comment" to all other questions.

Having advised Mr Green of the provisions of s128 of the *Evidence Act* 2008 and noting his response, I ruled that there was no reasonable ground for his objection and directed him to answer the questions put to him by senior counsel Mr Rose. After further advice from Mr Burns, he again answered questions with "No comment". Upon application of Mr Rose, I declared Mr Green to be an unfavourable witness pursuant to s38 of the *Evidence Act* and permitted Mr Rose to cross-examine Mr Green. Mr Green answered each and every question with either "No comment" or "I have no recollection". Once again I directed Mr Green to answer the questions, to which he responded, when questioned, "No comment".

During the course of these proceedings an audio recording of a phone call to Mr Green was played to the court and a copy of the transcript handed to me. I explained the provisions of s134 of the *Magistrates' Court Act* to Mr Green and he indicated an understanding of those provisions and declined to say anything further.

I found Mr Green guilty of contempt under s134(1)(c) and (e) of the *Magistrates' Court Act*, being satisfied that he had refused to answer lawful questions and been guilty of prevarication. I granted Mr Burns leave to appear on behalf of Mr Green to make submissions. I note Mr Green is 53 and has one previous court appearance at this court on 4 April 2005, when he received a without conviction adjourned undertaking for 12 months for a charge of possession of controlled weapon without excuse. This process today was invoked by the prosecution because of Mr Green's refusal to make a statement. I don't propose to make an assessment of the seriousness of Mr Green's refusal to give evidence,

> save to say that I am satisfied that Mr Green's general refusal lacks objective justification. There is no evidence that he acted under duress or out of necessity.

The Magistrate thereupon dealt with the penalty and imposed a term of imprisonment for 14 days.

11. The first ground relied upon in challenge of the Magistrate's decision is that of error on the face of the record. The error was said to lay in the learned Magistrate's failure to adopt the steps identified in *Zukanovic v Magistrates' Court of Victoria at Moorabbin*.[7] It was submitted that consistently with *Zukanovic* the Magistrate's invocation of the jurisdiction under s134(2) required "a direction to arrest, a charge being laid, being informed of the charge by way of adequate particulars, and an opportunity to plead".

12. Contempt of court is a serious criminal offence[8] which requires a Magistrate to ensure that an alleged contemnor has a fair hearing.[9] In *Zukanovic v Magistrates' Court of Victoria at Moorabbin*[10] J Forrest J considered the steps necessary to be taken by a Magistrate prior to determining a charge of contempt of court under s133 of the *Magistrates' Court Act* 1989 (Vic). His Honour reviewed the authorities and identified what needs to be done as follows:

> First, to set out the charge. This could be done either orally or in writing. What was essential was that Mr Zukanovic understood the charge the Magistrate was laying.
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> Second, to afford Mr Zukanovic the opportunity to consider the charge and if necessary, to seek further legal advice, or an adjournment or, perhaps, further particulars of the charge.
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> Third, to give Mr Zukanovic the opportunity to state whether he pleaded guilty or not guilty to the charge.
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> Fourth, in the event that Mr Zukanovic pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.[11]

It may be necessary (as was argued in *Zukanovic*)[12] to take care not to construe ss133 and 134 by reference to each other in all respects, but the principles enunciated by his Honour which I have set out above have ready application to a charge of contempt under s134 as much as under s133. In this case it was submitted for the DPP that the steps needed to be followed in laying, considering and finding a charge of contempt may fairly be said to have been followed by the Magistrate. The plaintiff was said to have been given an opportunity to consider the charge in general terms and he did have access to legal advice. The plaintiff was said to have had an opportunity to state whether he pleaded guilty or not guilty albeit that it may have occurred implicitly in his counsel's submissions on penalty. In that context Mr Burns had submitted to the Magistrate that what had occurred "in relation to contempt is contempt" and that the plaintiff had answered some questions as far as they could be answered but that in relation to his answer about whether the plaintiff was a member of Hell's Angels the contempt was "at the lower end of the scale because he has co-operated with the material questions". The plaintiff was also said to have been given an opportunity to present evidence and to make submissions relevant to the determination of the charge in the context of having been asked more than once about the basis upon which he refused to answer questions.

13. The jurisdiction relevantly exercised by the Magistrate in finding the plaintiff in contempt was that conferred by s134(1) of the *Magistrates' Court Act* 1989 (Vic). There were no pleadings founding that jurisdiction but their equivalent is the charge which was made orally and recorded in the transcript. The charge for these purposes is not merely the statement of the section under which it may be laid but must include such details as are relied upon to make it out. The certified extract of the Court's order stated that the matter came before the Court by "Information Alone" but that is plainly not correct and no information was relied upon before me by the DPP. The passage I have set out in full in paragraph nine above sets out what then occurred and is the place where the charge is recorded. The charge for contempt was made orally in the course of an examination when Mr Rose asked that the plaintiff be held in contempt of court.

14. The events occurred before the decision in *Zukanovic* and, therefore, before the learned Magistrate could have had the benefit of the observations of his Honour J Forrest J about the need to set out the charge sufficiently for the plaintiff to understand it and to give the alleged contemnor

an opportunity to consider the charge and the opportunity to state whether he pleaded guilty to the charge. No doubt the learned Magistrate thought it sufficient to proceed as he did in view of what had occurred before him only moments before. However, a fair hearing of the contempt charge required the learned Magistrate to articulate the charge as a separate step in the proceeding and to do so with sufficient precision to have enabled the plaintiff to address submissions on the charge as formulated. The learned Magistrate had not long before ruled that the privilege against self incrimination had not been made out during that part of the hearing in which the plaintiff had been attending to give evidence. The plaintiff was not formally represented during that part of the hearing under s56A of the *Magistrates' Court Act* 1989 (Vic). He was subsequently charged with a failure to answer questions without excuse and of prevarication but he was not given details of the charge beyond the earlier ruling which had been made in the context of whether he had reasonable grounds to object to answering questions on the basis of self incrimination. The conclusion, and the ruling, on that question did not automatically or inevitably mean that the plaintiff was in contempt. In *Zukanovic* J Forrest J observed:

> Each of the steps that I have set out were fundamental to a fair trial of the charge of contempt in which the Court is placed in a unique position. This is not mere window dressing. The application of this process was highly relevant to how Mr Zukanovic may have sought to defend the charge. He may have desired to take issue with the procedure which the Magistrate intended to take. He may have sought to argue that another Magistrate should hear the matter, or that utilising s133 of the MCA was inappropriate in the circumstances. Whether these applications would have met with any success is not to the point - he should have been given the opportunity to canvas these matters with the Magistrate. Moreover, there was a real advantage to Mr Zukanovic having time to consider the charge and determine what course he wished to take. He had told his solicitor that the blowing of the bubble was not deliberate. This would have afforded him an arguable defence to the charge of contempt. But it was too late; by the time he gave these instructions the Magistrate had laid the charge and found it proved.[13]

Similar observations apply to the circumstances of the plaintiff in the case before me. The plaintiff may have been in contempt by failing to answer questions put to him but the steps identified by his Honour in *Zukanovic* are not mere formalities or "mere window dressing"[14] and the seriousness of a charge of contempt requires that the steps be followed. It may have seemed obvious to the learned Magistrate that the very conclusions he had just reached in respect of the objections would lead inevitably to the conclusion that the plaintiff had been in contempt of court. In that regard, however, it is worth recalling the salutary observation of Megarry J in *John v Rees*:[15]

> It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious," they may say, "why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start." Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.[16]

The plaintiff had refused to answer questions claiming reliance upon the privilege against self incrimination protected by s128 of the *Evidence Act* 2008 (Vic). He was charged with contempt under a different section of a different Act. The plaintiff ought to have had the benefit of a sufficient articulation of the charge for consideration of that part of the procedure dealing with that charge under that section. It may have seemed obvious and inevitable to all present that the plaintiff would be found to be in contempt because the Magistrate had only minutes before ruled that the plaintiff was not entitled to refuse to answer questions relying upon the privilege against self incrimination, but a finding of contempt was not an automatic consequence of the ruling which required no separate process to be followed. The finding of contempt in this case required the laying of a charge under a particular section and carried with it the right and obligations considered by Forrest J in *Zukanovic*.

15. In *Re Refugee Review Tribunal; Ex parte Aala*[17] it was said:

> There is a jurisdictional error if the decision maker makes a decision outside the limits of the

> functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.[18]

Examples of errors which may be said to go to jurisdiction were given in *Craig v South Australia*[19] which, however, were said "not to be seen as providing a rigid taxonomy of jurisdictional error".[20] The question in this case is whether the Magistrate committed a jurisdictional error in his dealing with the charge of contempt. There is no doubt that his Honour had jurisdiction to deal with such a charge but in my view the failure to follow the steps articulated in *Zukanovic* is sufficient to dispose of the case in favour of the plaintiff. In *Kirk v Industrial Court of New South Wales*[21] it was said:

> First, the Court stated, as a general description of what is jurisdictional error by an inferior court, that an inferior court falls into jurisdictional error "if it mistakenly asserts or denies the existence of jurisdiction or if it *misapprehends* or disregards the nature or *limits* of its *functions or powers* in a case where it correctly recognises that jurisdiction does exist" (emphasis added). Secondly, the Court pointed out that jurisdictional error "is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of *entertaining a matter or making a decision* or order *of a kind* which wholly or partly lies *outside the theoretical limits of its functions and powers*" (emphasis added). (The reference to "*theoretical* limits" should not distract attention from the need to focus upon the limits of the body's functions and powers. Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.) Thirdly, the Court amplified what was said about an inferior court acting beyond jurisdiction by entertaining a matter outside the limits of the inferior court's functions or powers by giving three examples:
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> (a) the absence of a jurisdictional fact;
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> (b) disregard of a matter that the relevant statute requires be taken to account as a condition of jurisdiction (or the converse case of taking account of a matter required to be ignored); and
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> (c) misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.
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> The Court said of this last example that "the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern" and gave as examples of such difficulties *R v Dunphy; Ex parte Maynes R v Gray; Ex parte Marsh* and *Public Service Association (SA) v Federated Clerks' Union*.[22]

The absence of an articulation of a separate charge of contempt and the apparent treatment of the ruling and direction in the context of s128 of the *Evidence Act* 2008 during a hearing under s56A of the *Magistrates' Court Act* 1989 (Vic) as sufficient for the finding of contempt under s134(2) of the *Magistrates' Court Act* 1989 (Vic) are revealed on the face of the record and constitute a misconception of the nature of the function which the learned Magistrate was performing.

16. It is not, therefore, necessary for me to consider the other grounds upon which the plaintiff sought to establish jurisdictional error. In particular the plaintiff placed emphasis on the contention that the Magistrate erred in concluding that the privilege against self incrimination had not been made out. It was contended for the plaintiff that he did have the right to claim the privilege against self incrimination in the circumstances. The questions asked of the plaintiff related to a police investigation of an alleged serious assault that took place at the club house of the Hell's Angels in Thomastown and about the plaintiff's knowledge of, or involvement in, the assault. It had been alleged that the plaintiff was a party to an intercepted telephone call made to a person or persons involved in the physical assault. It was submitted before me on behalf of the plaintiff that answers to questions put to the plaintiff before the Magistrate could have exposed the plaintiff to criminal liability or could have provided evidence that could lead to the plaintiff being exposed to criminal liability. At the commencement of the plaintiff's questioning the prosecutor had told the plaintiff that he was called to give evidence in relation to his "involvement in the beating of Mr Aakbari". His counsel in the proceeding before me maintained that questions directed to the plaintiff's knowledge of the existence of the premises, knowledge of the whereabouts of the premises, and

the address of the premises in the context of the phone call may well have tended to prove that the witness had committed an offence.

17. It may be desirable that I refrain from expressing a concluded view about the learned Magistrate's decision on whether the claim of privilege against self incrimination had been made out lest it inappropriately pre-empt any consideration of the contempt charge if pursued. It may be sufficient for present purposes to express my tentative view in favour of the plaintiff's claim and that the Magistrate's decision on the issue enlivened by s129 of the *Evidence Act* 2008 (Vic) was a necessary part of the record for the purposes of the decision made under s134 of the *Magistrates' Court Act* 1989 (Vic) as was the adjudication[23] in the sense of the actual order or ruling.[24] The transcript of proceedings and the reasons for decision do not ordinarily constitute part of the record unless incorporated by reference.[25] The incorporation of the transcript or reasons does not occur merely by "introductory or incidental reference".[26] As was explained in *Craig v South Australia*:[27]

> ... [I]t should not be understood [...] that a merely introductory or incidental reference to the reasons for decision produces the consequence that the whole or part of the reasons somehow become part of both the formal order and "the record" of the particular court. As Mahoney JA has pointed out, such a result would mean the question of what constitutes "the record" would "be determined by accidents of whether particular words were used in the judgment of the body concerned". The qualification should be understood as referring only to so much of the reasons or transcript of proceedings as is referred to in the formal order in a way which brings about its incorporation as an integral part of that order and "the record". If, for example, the formal order incorporates undertakings given by a party "as set out in" a particular designated document or is said to be made "in terms of proposed orders set out in the reasons for judgment", the order and the record will incorporate only those parts of the particular document or the reasons for judgment which set out, qualify or otherwise affect the content of those undertakings or proposed orders. Conversely, a merely introductory or incidental reference will not suffice to incorporate, in either the formal order or the record, reasons given for making the formal order which do not in fact constitute part of it. Thus, for example, an introductory remark such as the phrase "for the reasons given" or the word "accordingly" will not, of itself, have the effect of incorporating the whole or any part of the reasons for decision in either the formal order or "the record".[28]

A reason for confining the scope of inquiry in proceedings by way of judicial review is in part to ensure that proceedings for judicial review do not become a "contrived substitute"[29] for some other remedy. However ordinarily the record will include "the documentation which initiates the proceedings and thereby grounds the jurisdiction of the tribunal, the pleadings (if any) and the adjudication".[30] The "record" for the purposes of the charge of contempt in this case was necessarily oral[31] was found recorded in the transcript and in this case depended upon the Magistrate's decision that no reasonable grounds existed for the plaintiff not to answer the questions.[32] That decision formed part of the learned Magistrate's finding of contempt.

18. It was also contended that the learned Magistrate erred in not formally taking a plea upon the charge of contempt and that in considering the penalty his Honour revealed an error in the construction of s134 by requiring that the plaintiff was guilty "unless exceptional circumstances" were made out. The failure to take a plea is something which the learned Magistrate ought to have done and his failure to have done so was contrary to the principles as enunciated in *Zukanovic*. The other grounds are arguably errors which are either not disclosed on the face of the record or ones which were within the Magistrate's jurisdiction. For present purposes it may be sufficient to note that s134 does not depend upon or use the words "exceptional circumstances" as a factor in the finding of contempt or in the imposition of a penalty.

19. The second ground relied upon in challenging the decision is that the plaintiff was denied procedural fairness. It was submitted in answer to that ground that the Magistrate had informed the plaintiff "early on in the compulsory examination" that if he failed to answer any lawful questions he "may be charged with contempt" under s134 of the *Magistrates' Court Act* 1989 (Vic). This response, however, does not address the need for the clear articulation of the charge and the need to take the other steps set out in *Zukanovic*. In *Coward v Stapleton*[33] it was said:

> [I]t is a well-recognized principle of law that no person ought to be punished for contempt of court unless the specific charge against him be distinctly stated and an opportunity of answering it given to him.[34]

The duty was not discharged by an earlier warning of the risks of a failure to answer questions. What ought to have occurred was an articulation of the charge said to come within s134(1) of the *Magistrates' Court Act* 1989 (Vic).

20. The third ground relied upon is that the learned Magistrate exceeded jurisdiction by proceeding in ignorance of a precondition to jurisdiction or by misapprehending the nature of the limits of his functions or powers. Section 134 could plainly have applied to the plaintiff's circumstances and the section gives a wide discretion to the Magistrate to "adopt any procedure that the Court thinks fit". That discretion is not, however, without limits. It is a discretion which must be moulded to the circumstances of the case and the dictates of fairness and justice. I do not think the discretion wide enough, on the facts of the plaintiff's circumstances, to exclude the need to follow the steps set out in *Zukanovic*, *Coward v Stapleton* and other cases.

21. In the event I will order that the decision of the learned Magistrate be quashed and remitted to the Magistrates' Court for re-determination. The facts in this case on this aspect of the matter are unlike those in *Zukanovic* where his Honour decided not to make further directions as to the further hearing of the charge.[35] In this case there are no insurmountable difficulties associated with addressing the evidence because it is readily found in the transcript. The plaintiff has not served any part of the sentence which had been imposed upon him and I do not consider the facts in this matter to render it unfair for the matter to be remitted to the Magistrates' Court for reconsideration. It may be desirable that any reconsideration be before a different Magistrate but I shall not make a formal order to that effect and will leave the parties to make any submission on that point to the Magistrate allocated to re-hear the charges if pressed.

22. In the event it has not become necessary for me to consider an issue raised for the plaintiff after hearing of the proceeding. The proceeding was heard on 27 July 2011. Subsequently the plaintiff sought leave to re-open the hearing to lead evidence and submissions on whether he had a right of appeal to this Court pursuant to s272 of the *Criminal Procedure Act* 2009 (Vic). That issue arose in the context of submissions for the DPP that I ought to decline relief under Order 56 because he had abandoned, or at least not pursued, a statutory right of appeal. I am not disposed to withhold relief under Order 56 and, therefore, need not consider whether leave to re-open ought to be given nor whether the material relied upon would be sufficient to support the plaintiff's case. I would not, if it were necessary for me to consider whether to do so, grant leave to re-open the hearing. Nor do I regard the material relied upon as sufficient to assist the plaintiff if I had granted leave.

23. Whether to grant leave to re-open a hearing is discretionary[36] and exceptional.[37] Ordinarily a party will be held to the way in which the party presented the case and courts should avoid the dangers of retrospective wisdom.[38] An important factor in deciding whether to grant leave will be the reason or explanation for the evidence not being led at trial.[39] The issue about the statutory appeal arose in the course of hearing before me and counsel for the plaintiff was unaware why the appeal had been abandoned. No application was then made to stand down the proceeding and no suggestion has been made that the inability to lead the facts relevant to the abandonment was through inadvertence or might otherwise fall within the categories considered by Kenny J in *Inspector-General in Bankruptcy v Bradshaw*.[40]

24. In any event, the reasons offered were that the plaintiff could not appeal to this Court under s272 of the *Criminal Procedure Act* 2009 (Vic) because, in essence, proceedings under s134 of the *Magistrates' Court Act* 1989 (Vic) are not criminal proceedings conducted pursuant to the provisions of the *Criminal Procedure Act* 2009 (Vic). I doubt the correctness of that contention and accept the DPP's submissions that an appeal under s134 of the *Magistrates' Court Act* 1989 (Vic) is competent under s272 of the *Criminal Procedure Act* 2009 (Vic). It is unlike the position of an appeal to the County Court under s254 of the latter Act because such an appeal would not be from a proceeding conducted "in accordance with Part 3.3". In contrast, an appeal to this Court under s272 is not confined or conditioned by that qualifying phrase but extends to "a criminal proceeding". The latter is a wider phrase and encompasses a proceeding for contempt.[41]

25. I will hear the parties on any order about costs, but will otherwise make orders:

1. Dismissing the plaintiff's application for leave to re-open the hearing.

2. Setting aside the orders made on 25 March 2010 finding the plaintiff to be in contempt of court and imposing a penalty of 14 days imprisonment.

3. Remitting the charge against the plaintiff for contempt to the Magistrates' Court of Victoria at Melbourne for directions and re-determination.

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[1] *Kuek v Victorian Legal Aid* [1999] VSC 447, [39] – [41] (Warren J).
[2] *Easwaralingam v Director of Public Prosecutions* [2010] VSCA 353, [22]; (2010) 208 A Crim R 122 (Tate JA).
[3] *Administrative Law Act* 1978 (Vic) s10.
[4] *Easwaralingam v Director of Public Prosecutions* [2010] VSCA 353, [22]; (2010) 208 A Crim R 122.
[5] *Rees v County Court* [2011] VSC 67, [26] (Cavanough J); *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [8]; (2011) 32 VR 216 (J Forrest J).
[6] Ibid.
[7] [2011] VSC 141; (2011) 32 VR 216.
[8] *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* [2000] NSWCA 198; 158 FLR 81; (2000) 181 ALR 694, [5] (Spigelman CJ); *Rich v Attorney-General (VIC)* (1999) VSCA 14; 103 A Crim R 261; *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [37]; (2011) 32 VR 216 (J Forrest J).
[9] *Fraser v R* (1984) 3 NSWLR 212, 224-5; 15 A Crim R 58 (Kirby P and McHugh JA); *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [37]; (2011) 32 VR 216.
[10] [2011] VSC 141; (2011) 32 VR 216.
[11] Ibid [41] (citations omitted).
[12] Ibid [54].
[13] *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [44]; (2011) 32 VR 216 (J Forrest J).
[14] Ibid.
[15] [1970] 1 Ch 345.
[16] Ibid, 402; see also: *R v University of Cambridge (Dr Bentley's Case)* (1723) 93 ER 698; RFV Heuston, *Essays in Constitutional Law* (2nd ed, 1964) 185; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) [7.35], 413; DH Clark, 'Natural Justice: Substance and Shadow' (1975) *Public Law* 27, 47 – 57; Sir William Wade and Christopher Forsyth, *Administrative Law* (10th ed, 2009), 423; c.f. *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278; [1971] 1 WLR 1578, 1595 (Lord Wilberforce), 1600 (Lord Simon).
[17] [2000] HCA 57; (2000) 204 CLR 82; (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6.
[18] *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82, 141 (Hayne J); (2000) 176 ALR 219; (2000) 75 ALJR 52; (2000) 62 ALD 285; (2000) 21 Leg Rep 6; *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 571; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[19] [1995] HCA 58; (1995) 184 CLR 163, 177; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron, McHugh JJ; see also *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 573-4; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[20] *Kirk v Industrial Court (NSW)* [2010] HCA 1; (2010) 239 CLR 531, 574 [73]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[21] [2010] HCA 1; (2010) 239 CLR 531; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[22] [2010] HCA 1; (2010) 239 CLR 531, 573 – 574 [72]; (2010) 262 ALR 569; (2010) 84 ALJR 154; (2010) 113 ALD 1; (2010) 190 IR 437.
[23] *Hockey v Yelland* [1984] HCA 72; (1984) 157 CLR 124, 143; (1984) 56 ALR 215; (1985) 59 ALJR 66.
[24] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 182; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
[25] Ibid 181.
[26] Ibid 182.
[27] [1995] HCA 58; (1995) 184 CLR 163; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359.
[28] Ibid 182 (citations omitted).
[29] *Sidebottom v County Court of Victoria* [2001] VSC 18; (2001) 117 A Crim R 574, 580 (Hedigan J).
[30] *Hockey v Yelland* [1984] HCA 72; (1984) 157 CLR 124, 143; (1984) 56 ALR 215; (1985) 59 ALJR 66 (Wilson J); *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 162, 183; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
[31] *R v Chertsey Justices; Ex parte Franks* [1961] 2 QB 152, 161 (Lord Parker CJ, Winn and Widgery JJ).
[32] *Craig v South Australia* [1995] HCA 58; (1995) 184 CLR 163, 183; (1995) 131 ALR 595; (1995) 69 ALJR 873; 39 ALD 193; 82 A Crim R 359 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).
[33] [1953] HCA 48; (1953) 90 CLR 573; [1953] ALR 743; 17 ABC 128.
[34] Ibid 579-8 (Williams ACJ, Kitto and Taylor JJ).
[35] *Zukanovic v Magistrates' Court of Victoria at Moorabbin* [2011] VSC 141, [65] – [68]; (2011) 32 VR 216 (J Forrest J).
[36] *NCON Australia Ltd v Spotlight Pty Ltd (No. 4)* [2011] VSC 271, [111] (Robson J); see also: *Reid v Brett* [2005] VSC 18, [41] (Habersberger J); *Goldsmith v Sandilands* [2002] HCA 31; (2002) 190 ALR 370; (2002)

76 ALJR 1024; (2002) 23 Leg Rep 17 and *Re Australasian Meat Industry Employees' Union (WA Branch); Ex parte Ferguson* (1986) 67 ALR 491.

[37] *Spotlight Pty Ltd v NCON Australia Ltd* [2011] VSCA 267, [17] (Mandie J).

[38] *Nudd v R* [2006] HCA 9; (2006) 225 ALR 161, [79] – [80]; (2006) 80 ALJR 614; (2006) 162 A Crim R 301 (Kirby J).

[39] *NCON Australia Ltd v Spotlight Pty Ltd (No. 4)* [2011] VSC 271, [112].

[40] [2006] FCA 22, [24].

[41] *Edensor Nominees Pty Ltd v Anaconda Nickel Ltd* [2002] VSC 365, [9] (Balmford J); *Attorney-General (Vic) v Horvath Snr* [2001] VSC 269, [45] (Ashley J); *DPP v Garde-Wilson* [2006] VSCA 295; [2006] 15 VR 640, [17]; (2006) 168 A Crim R 296 (Bongiorno AJA).

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