06/83

SUPREME COURT OF THE NORTHERN TERRITORY — ALICE SPRINGS

TIPPETT v MURPHY

Muirhead ACJ

1, 3 September 1982 — (1982) 16 NTR 13, (1982) 62 FLR 183

CONTEMPT OF COURT – IN THE FACE OF THE COURT – ROLE OF BARRISTER IN RELATION TO COURT.

T., a member of the legal profession carrying on practice as a member of the Central Australian Aboriginal Legal Aid Service, was representing C. charged with a serious indictable offence. In the course of the committal proceedings, the prosecutor put many leading questions to a witness who was "tribally married" to C. T. made objection "in courteous and proper terms to these leading questions", whereupon M, the magistrate directed the prosecutor not to lead the witness. The prosecutor put another question to which T. objected. The prosecutor reframed the question and put it again, but before the witness could reply, M. spoke to T. in a "loud and forceful manner ", to which T. replied:

> "The whole situation is a farce, Your Worship, forcing this woman to give evidence against her husband when she clearly does not want to do so. If she were a white person, she would not be required to do so. It seems to me to make a mockery of the whole court process, your worship".

Without "warning, request for apology or explanation" M. told T. to "stand up", and M. then formally charged him with "contempt of court" and adjourned the proceedings to the following morning to enable T. to be legally represented. The following morning, M. charged T. who pleaded not guilty and was represented by counsel who unsuccessfully sought an adjournment so that the matter could be determined by another magistrate. Submissions and explanations were made on T's behalf, M. found the charge proved and convicted and fined T. $10 in default imprisonment. T. appealed against this conviction—

HELD:
(1) Conviction quashed. The evidence fell far short of that required to establish contempt within the usual meaning of that doctrine.

(2) For words or actions to constitute contempt in the face of the court, they must be such as to interfere or tend to interfere with the course of justice.

(3) Role of barrister in relation to court discussed.

MUIRHEAD ACJ: *[After stating the facts, His Honour continued]:* It is against this conviction that the appellant now appeals. Several grounds are set out in the notice of appeal, but to all intents and purposes the appeal was argued on the issue as to whether the magistrate erred in finding that the words in question constituted an offence. The magistrate in initially charging the appellant used the words "contempt of court" and these words are used in the notice of appeal. In fact the appellant was convicted for a breach of s46(1) of the *Justices Act*. This reads as follows:-

> "45. Contempt of Court
> "(1) Any person who—
> (a) Wilfully interrupts the proceedings of the Court;
> (b) Conducts himself disrespectfully to the justice or justices during the sittings thereof;
> (c) Obstructs or assaults any person in attendance, or any officer thereof in the execution of his duty, in view of the Courts; or
> (d) Wilfully disobeys any order made by the Court under section 61(2)—
> shall be guilty of an offence. Penalty $20 or imprisonment for one month."

The powers of a court of summary jurisdiction to punish for contempt in the face of the court are essentially provided by this section. It was derived in this Territory from the equivalent South Australian legislation and has its source in earlier English legislation (for some history of the powers of inferior courts as to contempt see *R v Lefroy* (1873) LR 8 QB 134).

Mr AJ Hannan QC, in the earlier edition of *Summary Procedure of Justices in South Australia*, expressed the view upon the basis of Victorian decisions that no appeal lay to the Supreme Court

from an order under that section, the only remedy being by way of *certiorari*. But I respectfully agree with the decision of Mitchell J in *O'Hair v Wright* (1971) SASR 436 in which she held that an appeal lies from the equivalent section under the *Justices Act*. It has not here been argued to the contrary and I am satisfied that this court has jurisdiction to deal with the appeal. As Mr Haley pointed out, the nature of the appeal has been determined in this Territory by the decision of the Full Court in *Messel v Davern* ((1981) 9 NTR 21; (1981) 35 ALR 35; (1981) 54 FLR 376, 27 May 1981):-

> "We have said enough to indicate our view that the nature of an appeal under Pt VI is not an appeal in the strict sense and is not a rehearing *de novo*. It is a rehearing ie a new trial of the issue raised by the notice of appeal using the evidence in the court below with a discretion to receive further evidence. In the exercise of that discretion the court may in special circumstances hear the whole case again. Whatever way the court proceeds, its function is to determine the rights of the parties by reference to the circumstances as they then exist at the conclusion of the appeal, by reference to the law as it then exists and to give such judgment as ought to be given if the case at that time came before the court of first instance. In that sense the onus of establishing facts to support a conviction will remain upon the prosecution, whether appellant or respondent to the appeal, and of establishing those facts to the usual criminal standard of proof, beyond reasonable doubt."

The broad nature of the appeal does not, of course, justify this court in lightly interfering with the findings of the magistrate as the Full Court stated in *Messels case*, *supra*:

> "It is for instance well established that an appellate court which hears an appeal on documents and not on oral evidence will generally defer to the conclusion which the lower court has formed upon the question which of the witnesses whom it has seen and heard are credible": *Uranerz (Aust) Pty Ltd v Hale* (1980) 30 ALR 193 at 197; (1980) 54 ALJR 378.

Mr Riley argued in this case that the magistrate had the advantage of assessing the appellant's demeanour, an advantage that I must not overlook in examining the matter. This, of course, is true; apparently innocuous words may be insulting or disrespectful by the very method of their enunciation and delivery. In determining this appeal I have taken this well into account and I have examined the transcript closely. The magistrate directed the appellant to stand up on two occasions, once when he was "charged". The magistrate commented in later argument that he noted the appellant to be "sitting side-on to the bar table" at some stage and he did not consider he was "conducting himself properly in his demeanour at that stage", a factor which the magistrate said he was prepared to ignore. He told the appellant's counsel that it was the words themselves which he found disrespectful. In these circumstances I must deal with the matter on the basis that it was the words themselves which formed the basis of the conviction. As I have said, I have had the advantage of hearing the tape of the incident and I am in a good position to assess the manner, not only in which the appellant addressed the magistrate, but the manner and tone with which the magistrate spoke to the appellant as counsel appearing before him.

[After referring to the conversation which led to the appellant's being charged, His Honour continued]:
That, of course, did not improve the situation, but it was in the nature of things that a reply of some sort should be made. If one bears in mind the background to this matter the reply was understandable, coming from counsel vested with the responsibility for his client's defence and whose professional duties were largely concerned with Aboriginal people. It would have been better not made and perhaps it evidenced some frustration and cynicism. But I am entirely unconvinced that it was, or could properly be interpreted as disrespectful to the magistrate himself or to his court, that it could be classified, as the magistrate classified it, as a "comment in contempt of court". But the damage was done, the magistrate left the bench giving the appellant, as I have said, no opportunity to respond or explain. The following day, during the course of argument, the magistrate stated that there were three matters which constituted the contempt. He expressed it in these words: "... the situation is a farce; that I had reached my decision — that I was biased because the person is an Aboriginal, and thirdly, that the proceedings I was conducting was a mockery."

With respect to the magistrate, that was an extreme interpretation. The appellant, who I consider was called upon to reply, was surely referring to "the situation" in which the law required this witness to give evidence against her "husband". His comment that she "clearly does not want to do so" was fair comment and his observations which related to racial disadvantage, whilst again perhaps better not made, obviously related to the law in this sphere not recognizing

tribal marriages. His final words were an unnecessary comment, but expressed concern for the processes of justice.

To interpret them as some type of attack or reflection on the magistrate himself was too hasty a conclusion. In my view, following the very sharp and somewhat colloquial reprimand the appellant had received, the words in reply were neither disrespectful to the court itself nor intended to be so. I consider the magistrate erred in finding himself satisfied beyond reasonable doubt that the appellant thereby conducted himself disrespectfully and as a matter of law I do not consider the words, said as they were, were such as to be capable of constituting an offence against s46(1)(b).

In the case of *Ex parte Bellanto; Re Prior* (1963) SR (NSW) 190 at 201, the Full Court of New South Wales had this to say about the issue of contempt by a barrister:

> "If in the course of a case a person whether layman or barrister persists in a line of conduct or use of language in spite of the ruling of the presiding judge, he may well be guilty of contempt of court, the offence being disregard of the ruling and setting the court at defiance. But the use of summary procedures to suppress methods of advocacy which are merely offensive, eg to an opposing barrister, or as a measure of reprisal by a judge after a brush with counsel, is to use it for a purpose for which it was never intended."

For words or actions to constitute contempt in the face of the court they must be such as to interfere or tend to interfere with the course of justice: *Parashuram Deteram Shamdasani v King Emperor* (1945) AC 264. Their Lordships, dealing again with contempt proceedings against a barrister, stated (at 270) and with respect there is much wisdom here:

> "It is a power which a court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction."

In *R v Commissioner of Police; Ex Parte Blackburn (No 2)* (1968) 2 QB 150 at 154-5; (1968) 1 All ER 319 at 320; [1968] 2 WLR 1204, Lord Denning referred to the power to punish for contempt. He said:

> "It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise; more particularly as we ourselves have an interest in the matter. Let me say it once that we never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations."

It was argued before me, and the magistrate made mention of the fact himself, that here we are dealing with a breach of a statutory provision and caution must be exercised before drawing too much upon the "contempt" authorities. But the magistrate initially charged the appellant with contempt and he refers to contempt in the subsequent proceedings. Section 46 is designed to give courts of summary jurisdiction summary powers to prevent interference with their functions. But they are, in fact, provisions designed to cope with contemptuous behaviour and the Territory legislation follows the format of the South Australian legislation in prefixing the section by the words "contempt of court". The section will generally apply to lay persons. I have no previous experience of it being applied either in South Australia or in this Territory to counsel. Counsel appearing before me were unable to refer to any precedent of such use in this Territory. This is not to say that it should not be applied where the disrespect is manifest and where it does constitute an interference with the court process. But I do regard those authorities which called for sparing use of contempt powers as important and relevant. As Lord Denning has emphasized, it is not the feeling of the judges which matter, it is interference with the processes of justice which are of concern. Here, there was no such interference save that the magistrate elected to adjourn the preliminary examination until the next day. This was his decision which followed the incident; it was not forced on him by the appellant's conduct.

Our courts function, and hopefully function effectively, because of traditional discipline and respect which exists between the bench and the bar. This is almost an inbuilt discipline which depends for its maintenance, not upon sanctions or the threat of sanctions, but by professional recognition that the trial processes can only be successfully so conducted. The roles of the barrister, magistrate and judge are different, but the goal is a mutual one; The proper administration of justice, an important goal to maintain if we seek a free and just society. The barrister's role

requires energy and the freedom to plead his client's case with vigour. All concerned must at times exercise restraint and understanding of the pressures to which all are subject. At times there are brushes and misunderstandings; these are part and parcel of litigation. But justice will suffer if practitioners appearing before a court are constrained in the performance of their responsibilities by fear of finding themselves charged with a quasi criminal offence by reason perhaps of excess of enthusiasm or comments made in exchanges with the bench, particularly unguarded comments. The brushes which inevitably occur can generally be dealt with the patience and restraint on the part of all concerned. Practitioners are bound by codes of professional conduct by well established ethics. If professional misconduct occurs, it can always be dealt with under the *Legal Practitioners Act*.

For the reasons set out above. I am satisfied that the learned special magistrate was in error and the conviction was wrongly entered. As the appellant's professional reputation is involved (and he was originally charged by the magistrate with contempt) I add that the evidence fell far short of that required to establish contempt within the usual meaning of that doctrine. The conviction is quashed. No order as to costs.
