14/81

SUPREME COURT OF VICTORIA

ERICKSEN v HOARE
(sub nom R v The Coroner at Melbourne; Ex Parte Ericksen)

Anderson J

1 December 1980 — [1981] VicRp 22; [1981] VR 205

PRACTICE AND PROCEDURE – CONTEMPT OF COURT – REMARK MADE BY WITNESS IN THE WITNESS BOX TO COUNSEL DURING AN INQUEST – REMARK TREATED BY CORONER AS WILFUL MISBEHAVIOUR – WITNESS INVITED TO MAKE AN APOLOGY – CORONER TREATED APOLOGY AS A QUALIFIED APOLOGY – WITNESS SENTENCED TO ONE MONTH'S IMPRISOMENT – WHETHER CORONER IN ERROR: *MAGISTRATES' COURTS ACT* 1971, S46(3); *CORONERS ACT* 1958 S7.

During an inquest, E., a witness said to counsel from the witness box "You'd better watch out for yourself when I get out of this court. ... He's a liar, a thief and a cheat for saying that". Without either charging E. with any alleged offence and without giving E. any opportunity to say anything further, the Coroner stated that he was of the view that what E. had said amounted to wilful misbehaviour and that the court might accept an apology and might remit the punishment in whole or in part. E. made his apology which the Coroner regarded as a qualified apology and then imposed a sentence of one month's imprisonment. Upon appeal—

HELD: Coroner's order quashed.
1. The expression "wilful misbehaviour" is not defined in the sections referred to, but the words "wilful" and "misbehaviour" are words well known to the law and in the context which the phrase appears in s46(3) of the *Magistrates' Courts Act* 1971 and s7 of the *Coroners Act* connotes misbehaviour which is deliberate and intentional, and it may include the spoken word. The conduct complained of, however, must be wilful, and such proceedings against an offender, though summary in the sense that the tribunal takes it upon itself there and then to deal with the alleged contempt, are nevertheless criminal.

2. No person should be punished for contempt of court, which is a criminal offence, unless the specific charge against the person be distinctly stated, and an opportunity of answering it given to the person. The person must be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment. Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon.
***In re Pollard* (1868) LR 2 PC 106; and**
***Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 575; [1953] ALR 743; 17 ABC 128, applied.**

3. In the present case, the threat of violence was not initially put to E. and E. was not afforded the opportunity of explaining the interpretation which could have been placed on the words uttered. When E. was afforded the opportunity it was too late because the Coroner had already determined what he was going to do.

ANDERSON J: This is the return of an order nisi calling upon the coroner to show cause why a writ of *certiorari* should not be issued to remove into this Court and to quash an order made by him on 27 October 1980 in the course of the said inquest whereby he committed the applicant, Thomas Ericksen, to prison for one month, and to quash also the warrant of commitment issued by the said coroner on 27 October 1980 in respect of the said applicant, on the ground that there had been a failure to comply with the rules of natural justice in that:

A. the applicant was not given an adequate opportunity
(i) to be heard on the question of whether his conduct amounted to wilful misbehaviour;
(ii) to advance evidence bearing on the question whether his conduct amounted to wilful misbehaviour;

B. the applicant was not given an opportunity to
(i) give reasons why summary measures should not be taken,
(ii) advance evidence or argument in mitigation of penalty;

C. the nature of the charge was not brought to the attention of the applicant sufficiently or at all.

S46(3) of *Magistrates' Courts Act* 1971 provides:

> "If any person— ...
> (d) wilfully misbehaves in court in any manner— the chairman may orally or in writing direct the apprehension of any such person and if he thinks fit commit him to prison for any time not exceeding six months or may impose a fine of not more than $500 for such offence ..."

Section 46(5) gives a person found guilty of wilful misbehaviour the opportunity of apologising for his misconduct if the chairman of the court thinks fit, and the sub-section is in the terms quoted by the coroner when he addressed the applicant. Section 7 of the *Coroners Act* makes applicable to a coronial inquiry the provisions of s46 of the *Magistrates' Courts Act*. Section 7(b) provides that:

> "Every coroner shall have in respect to all inquests ... the same power of punishing for wilful misbehaviour or wilful interruption of the proceedings of the court or wilful prevarication in giving evidence therein as a justice or justices has or have by any law now or hereafter in force in the case of like offences committed in any magistrates' court."

The expression "wilful misbehaviour" is not defined in the sections referred to, but the words "wilful" and "misbehaviour" are words well known to the law and in the context which the phrase appears in the sections referred to they connote misbehaviour which is deliberate and intentional, and it may include the spoken word. The conduct complained of, however, must be wilful, and such proceedings against an offender, though summary in the sense that the tribunal takes it upon itself there and then to deal with the alleged contempt, are nevertheless criminal.

In *In re Pollard* (1868) LR 2 PC 106, at p120, the Judicial Committee of the Privy Council were at pains to point out that in their judgment "no person should be punished for contempt of court, which is a criminal offence, unless the specific charge against him be distinctly stated, and an opportunity of answering it given to him". The coroner, having earlier told the applicant that in his opinion his words were contempt, similarly indicated, when the applicant was brought back into court, that he considered the applicant guilty - "I am of the view that that is wilful misbehaviour" – without first giving the applicant an opportunity on either of the two occasions of addressing him.

As appears from the material before me, the coroner, when the applicant was brought back into court, having read to the applicant the relevant parts of the transcript, then stated that he was of the view that what the applicant had said was wilful misbehaviour. The applicant was, to my mind, not charged either formally or informally with any alleged offence, but was informed without any preliminaries that his behaviour constituted wilful misbehaviour, and he was not afforded any opportunity at all to say anything before the coroner expressed his view which was tantamount to a declaration that the applicant was guilty of wilful misbehaviour. Immediately upon the coroner expressing his view that there had been wilful misbehaviour, he proceeded to inform the applicant of his powers to deal with the offence and he went on to say that where a person was guilty of misconduct, the court might if it thought fit accept an apology for the misconduct and might remit the penalty or punishment either wholly or in part.

In the context in which this exposition of the law appeared, it would seem to me that the coroner, having informed the applicant of his powers, was in effect inviting an apology. What the applicant subsequently said seems to me to confirm that that was what the applicant believed to be the case, for he said that, in the circumstances as they appeared to him, he did not think it necessary that he be legally represented and he thereupon made his apology to the coroner and to the court for what he had said to counsel, while still maintaining, as one would reasonably think he was entitled to do if the implications in counsel's question were untrue, that what had been put to him was so monstrous that his emotions were overcome and that in defence of himself and his family, he felt he had to say something. It seems to me that all the applicant's mind had been directed to had been the tendering of an apology. The coroner regarded the apology as "qualified apology" which was not acceptable, and thereafter, without affording the applicant any opportunity of making submissions as to what the nature of the penalty should be, imposed the sentence of imprisonment for one month. After the apology was tendered, and before the coroner

said that he was not accepting the apology, he did ask the applicant, "That is all you wish to say?" and the applicant answered "Yes", but, in the context, that inquiry by the coroner was I think reasonably referable to the making and content of the apology, and it should not be regarded in the circumstances as an enquiry as to what the applicant might wish to say on the question of penalty generally.

I consider there are two instances in the case before me where the rules of natural justice have been transgressed. In the first place, I consider that the coroner pronounced his finding of wilful misbehaviour without first giving the applicant an opportunity of answering the charge. The circumstance that the applicant apologised is not to the point, for that took place at a time when, an adverse finding having been stated, he spoke for the first time by way of apology and it was then only on the aspect of penalty in circumstances in which I am of the opinion the applicant reasonably concluded that all that was being sought was an apology.

Indeed, it was not until almost the end of the proceedings that the coroner indicated that he was treating the applicant's words to counsel as a threat of physical violence, and it was only then that the applicant twice endeavoured to protest that he had not stated or intended physical action but that his intention was to report counsel's behaviour to the Bar Council. He had had no earlier opportunity of advancing this alternative interpretation of his words, and it is clear, I think, that the coroner himself had not adverted to this alternative aspect. It is not to the point that he now rejected it or might earlier have rejected it had the applicant had an opportunity of so explaining his interpretation. The fact is that, in my opinion, he had not been afforded the opportunity and that it was then too late in the final stages for the applicant to remedy the oversight, because the coroner had already determined what he was about to do.

As was said by the Full High Court in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 575 at p580; [1953] ALR 743; 17 ABC 128:

> "The person must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment. Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon."

I think, therefore, that grounds A and B of the order nisi have been made out. Ground C, if it is taken to mean that the real gravamen of the offence, i.e. a threat of violence, was not initially put to the applicant, has likewise been made out. The much used and abused assertion that justice must be seen to be done has particular application in contempt matters.

I have said sufficient to indicate that it is appropriate that the order of the coroner, in whatever form it is or should be recorded, be quashed, and that part of it which is already in being, namely the warrant, is accordingly so dealt with. To the extent that it may be thought desirable that the actual order of the coroner be similarly disposed of, I am prepared to order that the actual order of the coroner be similarly disposed of, I am prepared to order that he be directed to record in writing, the charge against the applicant, and his finding that the applicant was guilty of wilful misbehaviour under s46(3) of the *Magistrates' Courts Act* 1971, and that a writ of *certiorari* issue to remove that order and the warrant into this court, and on this being done for them to be quashed without further order.

[There was a lengthy discussion as to the question of costs but no decision was reached – the parties themselves to resolve the question with a right to apply. Ed]
