20/70

SUPREME COURT OF NEW SOUTH WALES — COURT OF APPEAL

Ex parte TUCKERMAN and ORS; Re NASH and ANOR

Asprey, Holmes and Mason JJA

24 August 1970 — [1970] 3 NSWLR 23

CONTEMPT IN THE FACE OF THE COURT – SEVERAL DEFENDANTS ENTERED A MAGISTRATES' COURT AND MADE A GESTURE BY RAISING THEIR LEFT ARM WITH THE HAND OR FIST CLENCHED – THE PRESIDING MAGISTRATE DIRECTED A POLICE OFFICER TO CHARGE THEM ALL WITH CONTEMPT OF COURT – SOME TIME LATER THE CHARGES WERE BROUGHT ON BEFORE THE MAGISTRATE AND EACH WAS ASKED TO SHOW CAUSE WHY HE SHOULD NOT BE COMMITTED FOR CONTEMPT OF COURT – EACH DEFENDANT CLAIMED THAT THE GESTURES WERE "SYMBOLIC CONSIDERATIONS" AND INVOLVED NO DEFIANCE OR OPPOSITION TO THE AUTHORITY OF THE COURT – THE MAGISTRATE FOUND THE CHARGES PROVED AND SENTENCED THEM ALL TO IMPRISONMENT WITH HARD LABOUR FOR 14 DAYS – WHETHER MAGISTRATE IN ERROR: *JUSTICES ACT* 1902 (NSW), S152.

HELD: Rules nisi discharged with costs.

1. It could not be said that the procedure followed by the Magistrate in these cases involved a departure from the rules of natural justice. The charges set out with particularity the conduct complained of and the applicants were given an opportunity to put their side of the case to the Magistrate.

2. It has always been recognised that contempts in the face of the Court may be dealt with immediately and that no other course may sufficiently protect the authority of the Court. It is not without significance that at first instance Lawton J dealt at once with the students whose unseemly conduct in Court gave rise to the appeal in *Morris v Crown Office* [1970] 2 QB 114; [1970] 1 All ER 1079; (1970) 2 WLR 792.

3. It is clearly established that words or acts which interfere or tend to interfere with the course of justice constitute contempt of Court although it has been emphasised that it is not possible to particularise the acts which can or cannot constitute a contempt in the face of the Court. In determining whether particular acts can constitute contempt of Court it has been said that the power to punish for contempt will not be exercised so as to protect a court from honest criticism based on rational grounds or to suppress vigorous advocacy which does not constitute a defiance of the authority of the Court. But these observations have no application to the circumstances of the present case.

4. The question here was whether on the material before him the Magistrate could properly conclude that the acts of the applicants had a tendency to interfere with the course of justice. The expression "interfere with the course of justice" is not confined to a physical disturbance of particular proceedings in a court which prevents the court from attending to its business according to law; it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments.

5. The acts of the applicants were of such a nature as to be capable of being regarded as contempt of court. The gestures were of a kind that had been in the past, and perhaps was now associated with philosophies and attitudes which have consistently denied the rule of law which forms the basis of a truly democratic society. The gestures were not the product of the particular moment but were made in concert in the sense that they were pre-arranged.

6. The Magistrate was clearly entitled to regard these statements as asserting an attitude of opposition to the authority of the Court, and as manifesting a studied disregard of the jurisdiction conferred upon the Court by the law. Indeed, the Magistrate was entitled to regard these statements as confirming an impression which he had gained from his own observation of the gestures which had been made, namely that they were made as gestures of defiance to the authority of the Court. Certainly, he would have been justified in thinking that if gestures of this kind were to be permitted and repeated, they would have had a tendency to lower the authority of the Courts and to weaken the spirit of obedience to the law.

7. Whatever in fact the gestures of the applicants were intended by them to represent, acts, words or other forms of behaviour which give the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the Courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.

ASPREY, HOLMES and MASON JJA: These are six applications to make absolute rules nisi for prohibition granted by Taylor J on 20 August 1970. By consent of the parties they were heard together. The rules nisi were in the form appropriate to an application for common law prohibition, but it emerged during the course of argument that the applications to Taylor J, were for both common law prohibition and statutory prohibition with the result that we considered the argument advanced on behalf of the applicants on the footing that their claim to relief is not confined to common law prohibition.

The applications arise out of events which occurred at Waverley Court of Petty Sessions on Monday 17 August 1970 when each of the applicants attended that Court to answer a charge of trespass which had been brought against him, and which was alleged to have occurred on the previous day. From a short affidavit which was by the applicants, the records of the proceedings in the Waverley Court which were tendered in evidence in the proceedings before this Court, and agreed facts, it appears that as each of the applicants, other than the applicant Jones, entered the court room in which Mr Nash SM was sitting, following the calling of his name outside the court, he made a gesture by raising his left arm with the hand or fist clenched. The applicant Jones made the same gesture as he left the court when the charge of trespass against him had been adjourned.

The making of the gesture was evidently pre-arranged between the applicants and so much was frankly admitted to us by counsel for the applicants. The learned Magistrate, having observed the gestures directed the respondent Alex Robert Bunt, a Sergeant of Police, to apprehend the applicants and to charge them with contempt of Court. Each of the applicants was apprehended at 12.35pm and was at 12.45pm approximately, with an offence under s152 of the *Justices Act* 1902 as amended, in the following terms:

> "At Waverley in the State of New South Wales on the seventeenth day of August 1970 during the sittings of a Court of Petty Sessions presided over by Leonard James Nash, Esquire, Stipendiary Magistrate in and for the said State, you did commit contempt of Court in that you did raise your arm with a closed hand towards such Stipendiary Magistrate."

The applicants were kept in custody until 2.30 p.m. on the same day when the learned Magistrate proceeded to deal with the charges. In each case the charge was read over to the applicant and the Magistrate, after calling upon the applicant to show cause why he should not be committed for contempt of Court, heard what the applicants had to say. In each case the Magistrate sentenced the applicant to imprisonment with hard labour for fourteen days for contempt of Court. The remarks made by the applicants when called to show cause why they should not be dealt with for contempt of Court are of some importance and we set out those remarks as they appear in the court records.

The applicant Michael Eric Hamel-Green said: "The gesture I made in the Court is an international symbol of solidarity in the oppression of justice. It stems from situations in America and Vietnam. This symbol, far from being held in contempt should be recognised with sorrow. If it is held that the symbol is contempt then I feel that this Court is being used for political purposes. I did not intend my gesture as a gesture of contempt for human beings. I intended it as a sign of solidarity. We are facing a situation where the Government is making us.
BENCH: I do not wish to listen to you. Unless you can show cause why I should not deal with you for contempt and send you to gaol. This Court is dealing with legal matters and not outside issues. Do you wish to address me on what I should do with you?
DEFT: Why do you consider the gesture contempt?
BENCH: I do not have to explain my actions.
DEFT: What are you asking me to address you on? A. Why you should not go to gaol for contempt.
DEFT: My gesture was not contempt at human values."

The applicant Phillip John Tuckerman said:

"I would like to say that I cannot recognise the power of this Court for trying to punish me for standing up to an imperialist Government.
BENCH: I am only interested in you showing cause why I should not deal with you. The penalty is a maximum of 14 days gaol. You may overlook the fact that I am not interested in your views and what you may say, only what you might say in regard to showing cause why I should not deal with you for contempt. If you do not now do so, you may lose your opportunity.
DEFT: I would say again that this Court has no right to sentence me for protest against the corruptions of the Government. I refuse to acknowledge the right of this Court to try me for my actions, On this occasion or on any subsequent occasion."

The applicant Graham Leslie Dowling said:
"I have no real feelings for the Court. The person against who we were demonstrating is a hypocrite and the arbitrary manner in which he makes laws and in which we were picked up. I have no disrespect for persons of this Court, but then I have no real respect for the officers. I have no contempt for the Court, my action was expressing solidarity with people.
Q. What do you say I should do with you today? A. It is not really for me to say.
Q. This will be your only opportunity. Do you wish to say anything why I should not send you to gaol?
A. My action was not directed at you personally or at the Court."

The applicant Ian Michael Macdonald said:
"The action may seem disrespectful to yourself. I might say that the action is not disrespectful to yourself but to the law system of this country. I have had a lot of action with the courts over the past 18 months. The system affects certain people with wealth far easier. They get off far easier. I feel that until such times that law courts are restructured so that people are not oppressed I will continue to clench my fist which is the symbol of liberation.
BENCH: Is there nothing you wish to say why I should not deal with you for contempt? A. No."

The applicant John Landau said":
"I consider a closed fist is not a symbol of contempt, rather it stresses solidarity of oppressed people. It is not expressed towards you and should be interpreted in that sense."

The applicant Michael Cornelius Hetherington Jones:
BENCH: I now call upon you to show me cause why I should not deal with you for contempt. Do you have anything you wish to say to me in that regard?
DEFT: Simply that the Attorney-General as the man responsible for the laws of this country should set an example to the citizens.
BENCH: I am not much concerned with this, I am calling on you to show cause why I should not deal with you for contempt.
DEFT: I am showing cause. If the Attorney-General refuses to implement laws set down it seems that he sets a precedent which other citizens should follow. If he sets laws about trespass, but not laws about the *National Service Act*, I have the right to disregard this Court which only represents the Liberal Party. I do not consider myself guilty of contempt. I have shown by a gesture as persons show by wearing R.S.L. badges that they adhere to certain policies. I am adhering to a policy."

In their affidavit the applicants admit that they made the gestures complained of but they deny that the gestures were accompanied by any grimace, noise or violence or offer of violence to any person then present in the Court or that their gestures were calculated to disturb the peace of the Court or to deflect or delay from the execution of its duty in the ordinary course of business. They further say that the gestures were limited to symbolic considerations but the affidavit refrains from any attempt define or describe the symbolic considerations referred to.

On behalf of the applicants it was submitted to this Court that the rule nisi for common law prohibition should be made absolute on the ground that the hearings before the Magistrate had involved a departure from the rules of natural justice in that, so it was alleged, insufficient notice had been given to the applicants of the hearing of the contempt charges with the result that they had an inadequate opportunity to prepare their defence. It was then submitted that the applicants were entitled to relief by way of statutory prohibition on the ground that there was no evidence on which the learned Magistrate could properly conclude that the conduct of the applicants constituted a contempt of Court.

Section 152 of the *Justices Act* 1902 as amended, provides as follows:

> "If any person shall, during any proceeding before a Court of Petty Sessions presided over by a Stipendiary Magistrate, or during any proceeding under this Act, or any Act amending the same, before a Stipendiary Magistrate, or before justices (one of whom is a Stipendiary Magistrate), be guilty of contempt, such person may be punished in a summary way by such Stipendiary Magistrate by a fine not exceeding four dollars, or by imprisonment for a period not exceeding fourteen days."

In cases where the contempt of a Court of record alleged consists in a contempt in the face of the Court it has been accepted that it is permissible for the Court to deal with the matter immediately in a summary way, without the necessity for appointing some subsequent day for the hearing of the charge. The authority conferred by s152 of the *Justices Act* 1902 as amended, on a Court of Petty Sessions to punish for contempt in a summary way is a grant of authority to that Court to deal with contempt in the face of the Court in the manner in which contempts in the face of a superior court have been traditionally dealt with by those courts.

The argument for the applicants, however, is based not so much on the provisions of s152 as upon the submission that the issues raised by the charge were such as a matter of justice or fairness as to require the giving of longer notice than was in fact given and upon the further submission that the Court was under a duty to ensure that the applicants were provided with legal assistance to assist them in their defence.

So far as the first submission is concerned, it loses such force as it might otherwise have when it is remembered that in their affidavit the applicants admitted that they made the gesture complained of. Counsel for the applicants has sought to overcome this point by asserting that the applicants do not now concede that they raised their hands or fists towards the Magistrate as averred in the charges and that they did not appreciate the details of the charge when they swore their affidavit. It is a sufficient answer to say that this Court can act only on the basis of sworn evidence but we would go further and say that the direction in which the applicants raised their arms cannot in the circumstances of this case make any difference to their guilt or innocence of the matter charged.

In our opinion it cannot be said that the procedure followed by the Magistrate in these cases involved a departure from the rules of natural justice. The charges set out with particularity the conduct complained of and the applicants were given an opportunity to put their side of the case to the Magistrate. As we have already said, it has always been recognised that contempts in the face of the Court may be dealt with immediately and that no other course may sufficiently protect the authority of the Court. It is not without significance that at first instance Lawton J dealt at once with the students whose unseemly conduct in Court gave rise to the appeal in *Morris v Crown Office* [1970] 2 QB 114; [1970] 1 All ER 1079; (1970) 2 WLR 792. It was not suggested by the Court of Appeal that the procedure followed was inconsistent with an application of the rules of natural justice.

What we have already said is in itself sufficient to dispose of the argument so far as it is directed to common law prohibition, but we should say in addition that, apart from the positive assertion that the Magistrate was under a duty to see that the applicants had the benefit of legal advice and representation, nothing was advanced to support that submission, either by reference to authority or principle.

We turn now to the claim for relief so far as it is directed to statutory prohibition. Here the applicants' argument is that the making of the gestures was not a contempt because it did not involve any interference in the conduct of the Court's business on 17 August 1970. In our view the argument proceeds upon too narrow a view of what is involved in contempt of Court.

It is clearly established that words or acts which interfere or tend to interfere with the course of justice constitutes contempt of Court (*Parashuram Detaram Shamdasani v King-Emperor* [1945] UKPC 25; [1945] AC 264 at 268), although it has been emphasised that it is not possible to particularise the acts which can or cannot constitute a contempt in the face of the Court (*Izuora v R* [1953] AC 327 at 336; [1953] 1 All ER 827; [1953] 2 WLR 700. In determining whether particular acts can constitute contempt of Court it has been said that the power to punish for contempt will not be exercised so as to protect a court from honest criticism based on rational grounds or to

suppress vigorous advocacy which does not constitute a defiance of the authority of the Court. But these observations have no application to circumstances of the present case.

The question here is whether on the material before him the Magistrate could properly conclude that the acts of the applicants had a tendency to interfere with the course of justice. The expression "interfere with the course of justice" is not confined to a physical disturbance of particular proceedings in a court which prevents the court from attending to its business according to law; it comprehends as well an interference with the authority of the courts in the sense that there may be a detraction from the influence of judicial decisions and an impairment of confidence and respect in the courts and their judgments (*R v Dunbabin; Ex parte Williams* [1935] HCA 34; (1935) 53 CLR 434 at 442, per Rich J, with whom the other members of the Court agreed; [1935] ALR 232).

The approach to be taken by this Court to the question which arises was expressed by Dixon J (as he then was) in the same case at page 447 in the following terms:

> "It is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority. But it must be done by judicial remedies, and judicial remedies are necessarily administered by the Courts themselves. The Court must, therefore, undertake the task notwithstanding the embarrassment of considering what it should do in relation to an attack upon itself. There is no practicable alternative. It can but do its best to disregard all considerations except those which strictly relate to the question whether the publication amounts in law to a contempt. That question is whether, if permitted and repeated, it will have a tendency to lower the authority of the Court and weaken the spirit of obedience to the law to which Rich J has referred."

His Honour was there speaking with reference to a written publication which disparaged the Court, but the observations then made have equal application to the question which arises in the instant cases.

In our opinion the acts of the applicants were of such a nature as to be capable of being regarded as contempt of court. The gestures were of a kind that has been in the past, and perhaps is now associated with philosophies and attitudes which have consistently denied the rule of law which forms the basis of a truly democratic society. The gestures were not the product of the particular moment but were, as we have said made in concert in the sense that they were pre-arranged.

Even if it could be claimed that they were otherwise capable of having an equivocal character, that claim falls to the ground when attention is given to the statements made by the applicants in the course of the hearing of the Charges. The learned Magistrate was clearly entitled to regard these statements as asserting an attitude of opposition to the authority of the Court, and as manifesting a studied disregard of the jurisdiction conferred upon the Court by the law. Indeed, the learned Magistrate was entitled to regard these statements as confirming an impression which he had gained from his own observation of the gestures which had been made, namely that they were made as gestures of defiance to the authority of the Court. Certainly, he would have been justified in thinking that if gestures of this kind are to be permitted and repeated, they would have a tendency to lower the authority of the Courts and to weaken the spirit of obedience to the law.

It has been submitted on behalf of the applicants that the acts complained of were "limited to symbolic considerations". Whatever those words may mean, the submission, however, provides no support for the arguments addressed to us. In the first place, it was not made clear to the Magistrate or, for that matter, to this Court, despite our efforts to obtain elucidation of them, that the "symbolic considerations" involved no purpose of defiance or opposition to the authority of the Court. Indeed, the statements by the applicants during the hearing of the charges tend to indicate that the "symbolic considerations" did involve such a purpose. Secondly, whatever in fact the gestures of the applicants were intended by them to represent, in our opinion, acts, words or other forms of behaviour which give the appearance of defying the authority of a Court of law or which by intimidation, ridicule or otherwise tend to lessen the authority of the Courts to administer the law and to seek to apply even-handed justice between parties in a calm and orderly manner may be regarded as contempt of Court.

During the course of the hearing before this Court an application was made that the applicants should be released pending determination of these proceedings. We declined to grant the application on the ground that this Court had no power to make such order. We should add that having regard to the conclusions which we have formed that we would not have been disposed to grant the application had we had the power so to do.

It should be said that we had no power to deal with the sentences imposed. Apart from stating this matter of law we do not comment in any way upon the sentences which were entirely for the learned Magistrate. In the result, the rules nisi are discharged with costs, the respondent Magistrate's costs being those appropriate to a submitting respondent.
