02/10; [2010] NSWSC 5

SUPREME COURT OF NEW SOUTH WALES

PROTHONOTARY of the SUPREME COURT of NSW v RAKETE

Harrison J

7 December 2009; 14 January 2010

CONTEMPT OF COURT – DEFENDANT ADMITTED USING A CAMERA TO FILM A WITNESS IN COURT GIVING EVIDENCE IN A CRIMINAL TRIAL BEFORE A JUDGE AND JURY – DEFENDANT CHARGED WITH TWO COUNTS OF CONTEMPT – WHETHER DEFENDANT DID AN ACT WITH THE INTENTION OF INTERFERING WITH THE ADMINISTRATION OF JUSTICE OR IN A MANNER THAT HAD A TENDENCY TO DO SO – CHARGES TO BE PROVED IN ACCORDANCE WITH THE CRIMINAL STANDARD – DEFENDANT NOT GUILTY OF THE FIRST CHARGE BUT GUILTY OF THE SECOND CHARGE.

R. used a digital camera to film a Crown witness giving evidence in court. Whilst seated in a position from which he had a direct and unobstructed view of the witness box, R. held the camera roughly at low chest height and recorded audio and visual images of the witness giving evidence. R. was approached by a Sheriff's officer and deleted the images on his camera. He was escorted from the courtroom, the camera seized and subsequently charged with two offences firstly, with doing an act with the intention of interfering with the administration of justice and secondly, that this was done in a manner which had the tendency to interfere with the administration of justice. At the trial, R. pleaded not guilty to each charge.

HELD: Defendant guilty of contempt in that he acted in a manner which had a tendency to interfere with the administration of justice but not guilty of doing an act with the intention of interfering with the administration of justice.

1. The test that applies to the second charge requires a Court to be satisfied beyond reasonable doubt that the defendant's act in filming the witness was an act done in a manner that had a tendency to interfere with the administration of justice. That test is objective. An intention to interfere with the administration of justice is not necessary to constitute a contempt; the critical question is whether the act is likely to have that effect, but the intention with which the act was done is relevant and sometimes important.

***Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* [1981] HCA 35; (1981) 148 CLR 245 at 258; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529;**

***Attorney-General v Butterworth* (1963) 1 QB at pp725-726; (and see at pp722-723); [1962] 3 All ER 326; [1962] 3 WLR 819;**

***John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351, at p371; [1955] ALR 265, applied.**

2. At one level there was evidence in the present case that the defendant's actions did in fact interfere with the administration of justice in that the defendant was escorted from the court following a request by a Sheriff's officer that he leave. Even if on one view that was only at the lower end of the scale of seriousness, it must clearly be regarded nevertheless as an interference with the administration of justice. It was at least potentially and probably actually disruptive to the court process and to the smooth and efficient running of the trial.

3. More particularly, the use of a camera in the courtroom during this trial would have been something that none of the jurors would be likely to have observed at any time before in the course of this particular trial up to that point. It was also a reasonable inference that none of the jurors would have experienced the use of a camera by an apparently unauthorised private person filming from the public gallery at any time previously in other similar circumstances either. A distraction of this sort, potentially interfering with the concentration and focus of jurors and diverting their attention from the very important task confronting them, would clearly have a tendency to interfere with the administration of justice. The fact that there was no evidence to suggest that the witness was not intimidated by what R. did or whether he was aware of what R. was doing was not relevant.

HARRISON J:

1. By summons filed on 8 May 2009 the Prothonotary of the Supreme Court of New South Wales ("the plaintiff") seeks a declaration that Te Rana Rakete ("the defendant") is guilty of contempt in that in the District Court at Sydney on 17 September 2008, during a criminal trial before his Honour Judge Norrish, he used a digital camera to film a Crown witness giving evidence and

thereby did an act with the intention of interfering with the administration of justice. The plaintiff seeks a declaration in the alternative that the defendant did this in a manner that had a tendency to interfere with the administration of justice. The plaintiff seeks an order in the circumstances that the defendant be punished or otherwise dealt with for contempt.

2. The defendant pleaded not guilty to each charge.

3. In accordance with the reasons that follow, it is my opinion that the defendant is guilty of contempt in that he acted in a manner that had a tendency to interfere with the administration of justice. I am not satisfied in accordance with the required standard of proof that the defendant did any act with the intention of interfering with the administration of justice. This is also explained below.

Background

4. The facts are in small compass and not relevantly in dispute. Commencing on 9 September 2008, and continuing for some weeks thereafter, Hassan Ibrahim, Scott Orrock and Paul Griffin were tried before Judge Norrish and a jury on a series of charges including the malicious infliction of grievous bodily harm, malicious wounding, assault and related matters. The trial was conducted at the Downing Centre in Lower Ground Courtroom 4 ("LG4").

5. It was the Crown case that on 12 September 2004 the accused and a substantial number of other members of the Nomads Motor Cycle Gang were in dispute with the Newcastle Chapter of the gang and attacked the victims of the Newcastle Chapter at their clubhouse. The principal Crown witness was Dale Campton who was one of the alleged victims. The Crown alleged that he had been shot in both knees and beaten by the accused. He was the only witness who provided a statement to the police in the matter. It was considered that Mr Campton was a high risk or vulnerable witness as he had apparently broken some ill defined code of silence for which motorcycle gangs were thought to be notorious.

6. Mr Campton commenced to give evidence on 10 September 2008 and he continued doing so on 11 and 15 September 2008. His evidence in chief was concluded on 16 September 2008 and he was cross-examined thereafter by senior counsel for Mr Ibrahim. That cross-examination concluded on the morning of 17 September 2008 and he was thereafter cross-examined by counsel for Mr Orrock.

7. At about 12.15pm on 17 September 2008 the defendant entered the Downing Centre complex and went briefly into courtroom 4 on the ground floor. He then went to the lower ground floor and entered LG4. John Ibrahim, the brother of Hassan Ibrahim, left LG4 about a minute later. The defendant took a seat in the public gallery in a position from which he had a direct and unobstructed view of the witness box. The defendant was in possession of a digital camera. That camera was tendered and became exhibit B in these proceedings. At about 12.45pm the defendant pointed the camera in the direction of the witness box and recorded audio and visual images of the witness giving evidence. He was approached by a Sheriff's officer and deleted the recorded images. He was escorted from the courtroom and the camera was seized. The defendant admitted filming the witness and deleting the images that he had recorded. The camera still contained images of the witness giving evidence contained within a file in the camera, which the police were later able to recover notwithstanding the deletion. These images were also tendered in the proceedings before me. The defendant had not sought permission to film in court.

The plaintiff's evidence

8. The plaintiff relied upon a series of affidavits sworn by police and Sheriff's officers who were involved in the defendant's apprehension at court. Some of them were cross-examined. In the events that have occurred, this evidence became uncontroversial in all significant respects. This is largely as the result of the defendant's concession that he filmed the proceedings and attempted to delete what he had recorded. His explanation for what occurred is referred to below.

The defendant's evidence

9. The defendant is a steel fixer. On 17 September 2008 he had the day off. He gave evidence that he took a bus from Bondi and alighted at Hyde Park. He went to the Downing Centre court complex. He explained why:

"Q. What did you go in there for?
A. Just to have a look at some court cases.
Q. Why?
A. Just being interested in court cases, like been watching a lot of TV and just wanted to see a real life court cases."

10. When he entered the complex he went through security. He placed his possessions in a plastic tray for inspection. This included his camera. He then went to a number of courts in the hope of seeing something in progress. He was ultimately told, "there's a juicy one in LG4". He gave the following evidence about it:

"Q. So you went into LG4 and what did you do, where did you go once you were inside that court room?
A. I went in LG4 and had a seat and I just sat and listened for a little while, like of the guy that just listened to some of the questions and yeah.
Q. When you went in, when you got your seat, were there many people in the back of the court room?
A. Yeah, it was pretty full. Very full.
Q. Were there many seats other than the one you sat on available?
A. No.
Q. So you just sat wherever you could?
A. Yeah.
Q. And listened to the court case?
A. Yeah.
Q. Whilst you were sitting and listening did you do something else after a while?
A. Yes, I started video taping.
Q. How long had you been there?
A. 5 minutes.
Q. Why did you video tape?
A. Just wanted a bit of like memorabilia just to take home, cause I thought like it was a murder trial or something.
Q. At some point you stopped the video?
A. Yeah.
Q. What did you do then?
A. I started watching the stuff that I was video taping."

11. The defendant said that after he had recorded what took place in the court he deleted it. He said this was because "it was so far away, it was like people in the way and couldn't really – wasn't really good quality". The next thing that happened was that police officers sitting in front of him went out and returned with a Sheriff's officer who then asked him to leave the court with her and surrender his camera. This is what he did. He told them that he had been filming and that he had deleted it. He said that he did not see any signs prohibiting filming in court. He did not know anyone involved in the proceedings he filmed.

12. When cross-examined the defendant explained his position further as follows:

"Q. Even if the images had been a little closer and clearer what was going to be the point of keeping this memorabilia?
A. Just intrigued like a murder trial, I thought it was a murder when I was sitting listening to what the case was about, someone getting shot in the legs with some shot gun you know and a big gang war or something like that, I had never been in any court room like that or involved with any trial like that so it was my first time and like seeing anything like that.
Q. You were taking images to show some mates and say I went to a court room and saw a murder trial do you want to see what it looks like, here is the witness, judge and barrister?
A. Just for myself.
Q. So you could keep it and remind yourself?
A. Pretty much.
Q. But you deleted it because you thought the images were too far away?
A. Yes and there was no sound, I just wanted to hear what they were saying because I was pretty interested in what the barrister was asking the witness or the guy in the box."

13. The defendant expressly denied the suggestion when put to him that his purpose in filming the witness was to obtain Mr Campton's image in order that it might be used in some form of retaliatory action against him. The defendant denied that he had gone to the seat in the viewing gallery that had the best view of the witness in the witness box. He also denied that he had ceased filming and had commenced to delete his recorded images only after he had been apprehended as earlier described.

Plaintiff's submissions

14. The plaintiff contended with respect to the first charge that it was an inevitable inference that the defendant intended to interfere with the administration of justice in one or some of the following respects. First, the defendant intended to record an image of the witness giving evidence in order to distribute it to enable some form of reprisal to be taken against him. Secondly, the defendant intended to intimidate or threaten the witness by causing him to think that his image was being recorded to facilitate or enable some form of reprisal against him if he gave evidence adverse to any of the accused, and thereby to deter him from giving evidence or to influence him in the evidence he actually gave. Thirdly, the use of a camera in the courtroom had a tendency to intimidate or threaten the jurors and thereby to deter those jurors from properly discharging their duties at the trial.

15. The plaintiff's case upon the first charge was wholly circumstantial. The plaintiff relied upon the following circumstances to establish the defendant's intention with respect to the first charge.

16. First, the nature of the trial and the stage of the proceedings at which the defendant entered the court and commenced filming. This took place when Mr Campton, a high risk witness, who was formerly a member and President of the Newcastle Chapter of the Nomads gang, was giving evidence about a "kneecapping" by the use of firearms that had occurred in relation to him and another member of the gang.

17. Secondly, the manner in which the filming took place. It was suggested that the defendant held the camera between his legs in an apparently obvious attempt to avoid detection. The evidence reveals, however, that the camera was actually held at the height of his abdomen thereby decreasing the force of this submission.

18. Thirdly, when questioned by the Sheriff's officers, the defendant admitted that he had been filming in court. He also admitted that he had deleted some of the recorded material.

19. Fourthly, the timing of the arrival of the defendant is said to be significant. The defendant arrived within a minute of Mr John Ibrahim, the brother of one of the accused on trial, leaving the court. They did not speak even though they were in the same area as each other.

20. The plaintiff conceded that there was no evidence of motive. For example, there was no evidence of an independent association or connection between the defendant and any of the accused, or between the defendant and any motorcycle gang with which they were or might arguably have been associated.

21. In relation to the second charge the plaintiff made the following submission:

> "What is required in relation to contempt of court is a deliberate act and the deliberate act here is the filming within the court. That is a deliberate act which the plaintiff submits has the tendency to interfere with the administration of justice. The tendency is . . . made out because his deliberate act in filming whilst the witness did not in fact see him filming, there was a clear line of sight between the witness and Mr Rakete and that is evidenced by the recording of the images on the camera. There must have been a clear line of sight between them and there was a real and not remote possibility that the witness could have observed the filming. Had the witness observed the filming or subsequently heard about the filming, and he did, . . . he would have likely concluded he was being filmed by those associated with the accused who were on trial as result of his conduct in informing on them and giving evidence against them so this could be shown to others and used as a means of identifying him for possible reprisals. It is likely that the high-risk witness would have felt intimidated and that he may have been influenced in his evidence and deterred from giving evidence."

22. The plaintiff relied upon what was said by Mason P in *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27-30. His Honour there summarised a series of principles which, with suitable adaptation, can for present purposes be stated as follows:

> 1. This being an allegation of criminal contempt, the charge must be established beyond reasonable doubt.
> 2. Unlike the first charge, intention to interfere with the due administration of justice is not necessary to constitute contempt.

> 3. Successful interference with the conduct of proceedings, or with the part played in the proceedings by a witness, is not necessary for proof of liability for contempt by improper pressure.
>
> 4. The tendency to interfere with the administration of justice is not to be measured against the capacity to withstand pressure of the particular witness involved, but the court need only have in contemplation some hypothetical witness of "ordinary" fortitude who might be capable of influence by similar pressure applied in similar circumstances.

23. The plaintiff also referred to *Y and Z v W* [2007] NSWCA 329; (2007) 70 NSWLR 377. That was a case involving consideration of an alleged contempt in the course of civil proceedings. The contempt there was a proposal to file an affidavit containing scurrilous material not for a *bona fide* purpose but in order to bring improper pressure on one of the parties to settle the litigation. Ipp JA said this at [39]:

> "[39] Fifthly, in a contempt involving obstruction of the administration of justice, the plaintiff must prove, according to the criminal standard of proof, that the material in question has, as a matter of practical reality, a tendency to interfere with the course of justice in a particular case: see *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351 at 372; [1955] ALR 265 per Dixon CJ, Kitto, Fullagar and Taylor JJ; *Harkianakis v Skalkos* (1997) 42 NSWLR 22 at 27 per Mason P; *Resolute v Warnes* [2001] WASCA 4 at [13]. The test was put succinctly by O'Loughlin J in *Willshire-Smith v Votino Bros Pty Ltd* [1993] FCA 138; (1993) 41 FCR 496; 67 A Crim R 261 where his Honour said (at 505) that the court must determine 'whether the conduct complained of amounted to improper pressure to induce a litigant to withdraw from proceedings or to settle them on terms that he regarded as inadequate'".

24. I was also referred to *Parashuram Detaram Shamdasani v King-Emperor* [1945] UKPC 25; [1945] AC 264 at 268 in the following terms:

> "For words or action used in face of the court, or in the course of proceedings, for they may be used outside the court, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted."

Defendant's submissions

25. In relation to the first charge the defendant contended that the plaintiff had to prove the individual inferences and the sum total of the circumstances to the criminal standard of proof, and in the present, circumstantial, case also had to exclude any reasonable hypothesis consistent with innocence. That was said to be the essential problem for the plaintiff in this particular case having regard to all of the circumstances that have been revealed by the evidence.

26. This submission was given elaboration in the following way:

> "In a sense, I suppose, one can observe that this is a bit of a collision of two separate and unrelated worlds. On the one hand we have the courts, where lawyers like us, some trial advocates, counsel, seem to think that we are the centre of the universe and everybody understands what goes on here. Certainly on its face the particular trial that Mr Rakete it seems, I would submit, stumbled into was a very serious case, involving a protected witness giving evidence. It was the sort of case where witnesses are routinely, it seems, intimidated and threatened and indeed killed on occasions and on its face it looks sinister. But we have the other world, in my submission, the world where everybody these days seems to run around with a camera in their hands, whether it be on a mobile phone or some other convenient camera, and there are all sorts of inducements for people to film the minutiae of every aspect of one's life."

27. It was conceded that the defendant deliberately and intentionally took the pictures that were taken but without the sinister intent that is alleged by the plaintiff. Moreover, the defendant submitted that in order to give any credence to the plaintiff's circumstantial case there would need to be some realistic connection or comparison between the timing of the defendant's actions in filming the witness and the content of the witness's evidence. Presumably that evidence would be at its most harmful to the interests of anyone wishing to deter the witness when he was giving his evidence in chief. In the present case the defendant came into court at some point during cross-examination when the interests most likely to be associated with the defendant, on the plaintiff's hypothesis, would be attempting to extract helpful concessions or to damage the Crown case. Whatever harm or damage or consequence Mr Campton's evidence might produce had in all likelihood already been produced. There was therefore no logical or apparent connection between

the defendant's appearance in court with his camera and the achievement of any supposed purpose or outcome by doing so. Any inference said to arise in such circumstances was acknowledged by senior counsel for the defendant to be "very weak" and described by her as "too flimsy to sustain the requisite proof".

28. The defendant also submitted that the idea that the film would be used for effecting some form of reprisal is without content. The witness in question was by definition well known to the accused and gave evidence in public and in his own name. It was not as if the opportunity to secure a recorded image of him in court was the only one available to anyone minded to film him. He did not give evidence from a secure location or under a pseudonym. The connection between the need to have film of the witness and the hypothetical motive of some form of reprisal was not made out.

29. The defendant also submitted in any event that if his version of why he did what he did had withstood cross-examination, the plaintiff had necessarily failed to exclude it as an available inference consistent with innocence and has thereby failed at the threshold for that reason. In other words, the plaintiff has failed to exclude the defendant's explanation beyond reasonable doubt as a reasonable explanation for how he came to be there. In this case the defendant was neither successfully challenged on what he said were his reasons for being in the court nor was he confronted with some sort of circumstantial case that was so compelling that it had the effect of destroying the credibility of what he said. Such material might have included the product of intercepted telephone conversations between the defendant and one of the accused or evidence of an association of any kind between him and someone connected to the accused. This evidence was wholly absent. The defendant's position on this aspect emerged in the following exchange:

> "HIS HONOUR: Mr Babb's case is it is so circumstantially compelling that you wouldn't believe his response, even if the defendant has stuck to it.
>
> WELLS: To that I would simply reply that yes, there is some timing, there is Mr Rakete being in an unfortunate place that appears on its face to be somewhat sinister, but it simply isn't enough to amount to the sort of circumstantial case that the Crown requires here, putting aside even Mr Rakete's explanation. Once you add that in, the Crown has failed."

30. With respect to the second charge the defendant did not contest the fact that the test of what amounted to a tendency was an objective test. The defendant also conceded in final submissions that the filming that he carried out would have the tendency for which the plaintiff contends.

Consideration

The first charge

31. I am not satisfied beyond reasonable doubt that the defendant filmed the proceedings before his Honour Judge Norrish and thereby did an act with the intention of interfering with the administration of justice. This is for a number of reasons.

32. First, the nature of the proceedings does not assist the drawing of an inference that the defendant had the intention alleged. The plaintiff emphasises that the proceedings involved significant charges of violence by members of a motorcycle gang that had attracted much public attention. The witness who was filmed had been attacked physically and was said to be vulnerable. His evidence was the only evidence directly implicating the accused. The plaintiff submitted that the very nature of the case carried with it the suggestion that it was likely to attract interference of the type it was alleged the defendant was providing.

33. Apart from the circularity of this argument, it suffers from other defects. The nature of the case cannot of itself advance the proposition that a particular defendant was doing an act with the necessary intention. This would tend to suggest that serious criminal cases are more likely to attract interference than less serious criminal cases or civil cases. The reported decisions show that this is an ill-founded proposition.

34. Secondly, the filming was said to be surreptitious or clandestine. In the course of the showing of the actual footage exposed by the defendant his own image is fortuitously reflected in a perspex (or similar) panel positioned between the public gallery and the well of the court. The defendant is shown by this reflection to be holding the camera roughly at low chest height, but

in any case not low down between his legs as first suggested. The apparent ease with which he was observed filming the proceedings is perhaps one indication of the guileless way in which the activity was carried out.

35. Thirdly, the fact that the defendant admitted that he had been filming and that he had deleted what he had filmed is at least as consistent with innocence as with guilt. It presented the plaintiff with an admission of the *actus reus* but is arguably consistent with an innocent intention. The circumstance is in my opinion neutral at the very least.

36. Fourthly, the fact that the defendant's arrival and Mr Ibrahim's departure appear to coincide is not relevantly probative in my view. The defendant gave evidence that he went to LG4 because he had been told in colloquial terms that the proceedings were potentially very interesting. He was not shown to be an acquaintance of Mr Ibrahim and the CCTV footage of their passing in the corridor does not suggest that there was any recognition of one by the other. People were no doubt coming and going from the court on that day, as in all courts on most days. The coincidence to which the plaintiff draws attention is simply that, and not something that alone amounts to evidence of anything.

37. The plaintiff conceded that there was no evidence of motive. Although not necessary in a strong circumstantial case, the establishment of a motive, or at least the suggestion of one by reference to proved facts, often operates as the glue by which otherwise apparently unconnected or disconnected facts are held together. The defendant has not been shown to be connected in any way with the proceedings, the activities behind the proceedings or the participants in either of them. He had denied that he intended to interfere with the administration of justice or that he had any intention other than the arguably curious intention of filming what occurs in a legal proceeding for his own reasons. Whatever one might think about such an explanation, and many views come to mind, it has not been shown to be untrue, and the defendant has cautioned against the wholesale rejection of it simply because it might appear incredible to those who are regularly and intimately involved in the litigious process.

38. The plaintiff's case theory was based upon the proposition that the film was to be used in the course of some form of reprisal against the witness. This is stated with ease but explained only with difficulty. I am somewhat troubled by the unadorned notion that there is some available connection between the filming of a witness giving evidence and the fact or suggestion of reprisals against that witness for so doing. It would be different perhaps if the name and image of the witness were unknown or in doubt. In this case, somewhat counter-intuitively, the witness was so well known to the accused that they were standing trial for having shot him in the legs for transgressing some code by which they were all bound. He had not been intimidated before that happened and his position in the witness box rather suggested that he remained unintimidated. It also remains unexplained in such circumstances what relationship there is to be found between the hypothetically foreshadowed reprisals against him for giving evidence and the need for film of him in the witness box as he did so.

39. Nor is there some reasonably arguable case that the defendant's target was the jury. The evidence does not suggest that they were filmed by the defendant, as opposed to the witness giving evidence before them. The plaintiff did not enthusiastically emphasise this aspect of the defendant's conduct in support of the first charge. This is not surprising.

40. The first charge is not made out.

The second charge

41. The test that applies to the second charge permits me to be satisfied beyond reasonable doubt that the defendant's act in filming the witness was an act done in a manner that had a tendency to interfere with the administration of justice. That test is objective. As was said by the High Court of Australia in *Lane v The Registrar of the Supreme Court of New South Wales (Equity Division)* [1981] HCA 35; (1981) 148 CLR 245 at 258; (1981) 35 ALR 322; 7 Fam LR 602; 55 ALJR 529:

> "An intention to interfere with the administration of justice is not necessary to constitute a contempt; the critical question is whether the act is likely to have that effect, but the intention with which the

> act was done is relevant and sometimes important (*Attorney-General v Butterworth* (1963) 1 QB at pp725-726; [1962] 3 All ER 326; [1962] 3 WLR 819; and see at pp722-723; *John Fairfax & Sons Pty Ltd v McRae* [1955] HCA 12; (1955) 93 CLR 351, at p371; [1955] ALR 265)."

42. At one level there is evidence in the present case that the defendant's actions did in fact interfere with the administration of justice, even though the evidence has not satisfied me that the defendant intended that his actions should have that result or effect. The defendant was escorted from the court following a request by a Sheriff's officer that he leave. Even if on one view that is only at the lower end of the scale of seriousness, it must clearly be regarded nevertheless as an interference with the administration of justice. It was at least potentially and probably actually disruptive to the court process and to the smooth and efficient running of the trial.

43. More particularly, the use of a camera in the courtroom during this trial would have been something that none of the jurors would be likely to have observed at any time before in the course of this particular trial up to that point. It is also a reasonable inference that none of the jurors would have experienced the use of a camera by an apparently unauthorised private person filming from the public gallery at any time previously in other similar circumstances either. A distraction of this sort, potentially interfering with the concentration and focus of jurors and diverting their attention from the very important task confronting them, would clearly have a tendency to interfere with the administration of justice.

44. The evidence does not deal with the question of whether or not Mr Campton was actually intimidated by what the defendant did. Indeed, the evidence does not reveal whether or not Mr Campton even became aware of what the defendant was doing. It does not matter in any event. It is not difficult to accept that a witness giving evidence against an alleged assailant in the particular circumstances of the case before his Honour might have been distracted at least, if not frightened and intimidated in fact, by the activities of an unknown person seeking to record evidence he was giving on potentially sensitive issues. This would in my opinion be likely to follow in the case of a witness of the presumed fortitude of Mr Campton, let alone a hypothetical witness of "ordinary" fortitude.

45. I was referred by senior counsel for the plaintiff to a passage from *The Registrar v Unnamed Respondent* (Supreme Court of the Australian Capital Territory, Miles CJ, 16 March 1994, unreported), a case dealing with a charge of contempt involving an ASIO officer attempting to take covert photographs within the precincts of the court. His Honour said this:

> "24. I conclude then that the ASIO officer was in contempt of court in covertly attempting to photograph inside the court building a person or persons there for a legitimate purpose connected with proceedings being conducted, or about to be resumed, in the adjoining courtroom. The conduct of the officer was close enough in time and space to be regarded as contempt in the face of the court although it did not occur within the view or hearing of the Judge presiding over those proceedings. Contempt in the face of the Court need not involve the actual disruption of the hearing, nor does the absence of an intention to interfere with the administration of justice mean that no contempt has been committed. Otherwise it might be said that the only thing the ASIO officer did wrong was to be found out. In truth the very need for him, as he saw it, to carry out his activities surreptitiously meant that he was using the facilities of the Court for an improper purpose. That in itself is only a starting point. The ASIO officer must have known by any proper objective standard that there was a risk that his activity would become known to his target and to others in the vicinity. Accordingly, by the objective standard, his conduct had a real tendency to put pressure on litigants, witnesses and other persons who must be left to come and go in connection with court business free from threat or harassment. Moreover the public nature of the court process in this country, and the public interest in securing the freedom to attend and observe court proceedings in which the observer has no personal stake at all, is fundamental. That freedom is put at risk when it is to be exercised in the knowledge, or with the apprehension, that representatives of a governmental agency are likely to be within a court building secretly attempting to photograph those persons present whom it considers should be so photographed in the interests of national security."

46. His Honour later commented as follows:

> "26 . . . It is hardly necessary to add that it must be obvious that if a representative of the media whilst within the court building had taken photographs of persons connected with the trial that would have been regarded as a serious contempt. There is little difference, in my view, between that hypothetical situation and the situation in the present case."

47. The fact that the relevant activity in the present case occurred within a courtroom during the running of an ongoing criminal trial only adds to the strength of these remarks and to their applicability to the issues I am required to consider.

Conclusion

48. I find the defendant Te Rana Rakete not guilty of contempt on the first charge.

49. I find the defendant Te Rana Rakete guilty of contempt on the second charge in that I am satisfied beyond reasonable doubt that he performed an act that had a tendency to interfere with the administration of justice.

50. I will hear the parties on the question of the costs of the proceedings to date and of what penalty, if any, to impose upon the defendant. These issues should be dealt with at some time convenient to the parties and to the Court to be arranged in consultation with my Associate.

APPEARANCES: For the plaintiff Prothonotary of Supreme Court of NSW: L Babb SC with A Mitchelmore counsel. Crown Solicitor. For the defendant Rakete: L Wells SC, counsel. Legal Aid New South Wales.
