47/78

SUPREME COURT OF VICTORIA

R v Dir-Gen SOCIAL WELFARE; ex parte CARPENTER

McGarvie J

15 August 1978

CONTEMPT OF COURT – WILFUL PREVARICATION – FALSE EVIDENCE – PRINCIPLES OF NATURAL JUSTICE CONSIDERED – WITNESS DECLINED TO GIVE EVIDENCE ON THE GROUND THAT HE COULD NOT REMEMBER DUE TO HIS DRUNKENNESS AT THE TIME – MAGISTRATE SATISFIED THAT WITNESS GUILTY OF PREVARICATION – WITNESS SENTENCED TO A TERM OF IMPRISONMENT – WHETHER MAGISTRATE IN ERROR: *MAGISTRATES' COURT ACT* 1971, S46(1)(c).

At a hearing before a Magistrates' Court, a witness deposed that he could not remember whether the contents of a statement made by him were true, due to his state of sobriety. On being satisfied that the witness was not being truthful, he was charged with, found guilty of and sentenced to 14 days for contempt of court by the Magistrate. On appeal—

HELD: Order absolute. Order made quashed.

1. The principles which are to be applied where a person is charged with contempt of court are (1) that there must be material before the Judge that allows him to take cognizance of the alleged contempt; (2) that if there is a *prima facie* case of contempt raised on material properly within the cognizance of the Judge, then the Judge may there and then investigate the matter and deal with it; and (3) that the Judge must afford the person alleged to have committed a contempt an opportunity of defending himself.

***In the Matter of Andrew Quadara*, unrep, VSC, 9 June 1977, Crockett J, applied.**

2. The applicant was never made aware that it was open to him to call evidence upon his sobriety on the evening. Also, the relevance of the evidence of Harris as to the conversation with the applicant on 12th July was not sufficiently brought home to the applicant in the context of the applicant being made aware that it was open to him to give evidence himself or to call evidence to contradict that given by Harris, if such evidence was available.

3. What is emphasized by the cases is whether the applicant had a real opportunity of representing his defence. It is not an arid and formal inquiry, whether in theory he did. It involves the reality of the situation, and it involves the awareness by the applicant that he had an opportunity. In this case, the question is, looking at the evidence, the probabilities and the inferences which arose from the evidence was Carpenter given a real opportunity of defending himself fully in every respect?

4. There was ample evidence on which the Magistrate, when he made his decision, and was entitled to be satisfied beyond reasonable doubt that there had been wilful prevarication. However the difficulty of a court, in a situation such as arose in this case, is all the greater when the court, before charging a person with contempt, has drawn a strong inference from the evidence, that the person has committed the offence. It is particularly in cases where such a strong inference has been drawn, the court needs to be alert to ensure that the right of the person alleged to have committed contempt, to have a full opportunity of defending himself in every respect, be not overlooked, and be not treated as being of lesser importance than in a case where the evidence is more equivocal. A court has to take particular care in a situation such as present where it appeared to the Magistrate that the applicant was flouting the authority of the court, to ensure that the person charged with contempt was accorded in full measure the opportunities of defending himself to which he is entitled. Accordingly, a ground of the order nisi was made out.

McGARVIE J: *[Having disposed of the* habeas corpus *proceedings His Honour then turned to consider the second matter before him]* … When Mulgrew asked him (Carpenter) how the fight started he said he could not remember because he had been at the football and drinking all day and was drunk. Several other questions about the incident received similar answers.

Mulgrew applied to have leave to show Carpenter a statement which he had made. The Magistrate said that before he did that he wanted to refer to a provision in the *Magistrates' Court*

Act 1971. He then gave a summary of s46(1)(c) of the Act and fully explained it to the applicant at some length. During that explanation the Magistrate said, 'I want to point out to you that the court can fine you or imprison you for a number of things, in particular, if in the opinion of the Chairman you are guilty of wilful prevarication. I am not happy that you are telling the truth today and you should be careful to make sure you do so. Do you understand?' Carpenter then said, 'Yes, but I've told you I was drunk.'

The Magistrate then gave leave to Mulgrew to show the statement to Carpenter which he did. Mulgrew asked whether the signature on the statement was his and he said that it was. He was asked whether the statement was true and said he could not remember. His attention was directed to a passage in the statement that he had been punched a number of times in the face and he was asked whether he had said that to the policeman who took the statement. He replied that he could not remember, he was too drunk.

Mr Mulgrew then asked that Carpenter be declared an adverse witness and the Magistrate gave leave to cross-examine him as a hostile witness. Under that cross-examination he said he could remember leaving the hotel just after 10.00pm to go to the pizza shop. He also agreed that Komjenovick entered the shop while he was there and that he was in a fight but said that he could not remember other incidents or whether he had made to the police afterwards the statements which were put to him in cross-examination. The witness' excuse for his inability to remember was that he had been too drunk at the time.

The Magistrate then asked Carpenter where he had been that day and he said that he was at a hotel from 12 to 2, then went to the football with a friend where they drank cans of beer all the afternoon, and then went to a hotel until 10. Carpenter gave the Magistrate some details of those who had been his companions that day. He said he remembered going to the pizza shop but could not remember anything that happened in the shop because he had been too drunk. He said he remembered the policeman walking up to him after the fight and remembered walking back to the police station. The Magistrate then said, 'Do you remember making the statement?' Carpenter said, I might have made the statement but I can't remember signing it. Look at the signature, it's all over the place. The policeman who rang up my grandmother said I was drunk and I was lying on the floor.' After conferring with the informant, Constable Harris, Mulgrew put it to Carpenter that the policeman who telephoned the grandmother had not said that. Carpenter said that that was what she had told him was said. In answer to Mulgrew, Carpenter said he had been talking to the defendant outside court that morning and appeared very friendly.

Mulgrew then told the Magistrate that he was prepared to prove the statement and wished to call evidence as to the state of sobriety of Carpenter on the evening in question. The Magistrate then asked Carpenter some further questions about the events of the evening and his recollection of them.

The Magistrate then said, 'Step down from the witness box.' Carpenter said, 'Can you tell me just who is on trial here?' The Magistrate told him that he was not satisfied that he had been telling the truth and said, 'I am charging you with contempt of court. Just take a seat for the moment.'

The Magistrate then said to Mulgrew, 'You can now call your witness.' Mulgrew then called the informant, Constable Harris who said that Carpenter appeared to understand what was going on when he took the statement from him and that after the statement was read aloud, Carpenter said it was true and correct and signed it. He said that Carpenter that evening had obviously been drinking but was not drunk. Harris then gave evidence that on the 12th July, prior to the case being adjourned, he had spoken at the court to Carpenter who said that he had read his statement, that that was what happened, and that if he did not say so Harris would get him for perjury.

The Magistrate told Carpenter to stand, and said to him: 'You have heard the evidence given by Constable Harris. Do you wish to ask the constable any questions about his evidence?' Carpenter said 'No'. Carpenter asked the Magistrate to look at his signature on the statement, Carpenter then said: 'Who's on trial here; 'The Magistrate said: 'I've already told you, you are.'

As to what next occurred, I read from the affidavit of the Magistrate: 'Referring to paragraph 17 of the Mulgrew affidavit, I do not agree that I said: "Do you wish to say anything to the court in your defence before I deal with you?" It is my recollection that I said: "Is there anything you wish to say in answer to the charge?" and Carpenter said, in effect, that he was too drunk to remember. It is my recollection that I then said: "Do you wish to say anything before I impose a penalty?" and he said: "No". I said: "I find you guilty of contempt of court and you will be imprisoned for fourteen days." He said: "Fourteen days?" I said: "Yes". He said: "Alright," and sat down in the body of the court.' Mulgrew then said: 'We are unable to proceed with the case against Kimjenovick, so it must fail for want of prosecution.' The Magistrate said: 'I will mark it dismissed.'

Grounds 1, 5 and 6 of the order nisi to review are to the effect that the Magistrate was in error in holding that the giving of false evidence, whether deliberate or not, amounted to prevarication within the section and that his finding of prevarication was against the evidence and the weight of the evidence. *[His Honour then referred to s46(1)(c)) and continued]* ... In my opinion, if the applicant remembered the relevant facts but falsely stated that he did not remember them in order to avoid placing the evidence before the court he was guilty of wilful prevarication within that section; *Morriss v Withers* [1954] VicLawRp 15; (1954) VLR 100 at p103; [1954] ALR 233. See also the unreported decision of Brooking J *In the matter of the Contempt of Court Proceedings re David Joseph Hinkler Keeley*, given on 9th May 1978. Further, there was, in my view, ample material on which it was open to the Magistrate to be satisfied beyond reasonable doubt that in that sense the applicant was guilty of wilful prevarication. Accordingly grounds 1, 5 and 6 are in my view not made out.

Ground 4 was not supported by the evidence and was not argued. The remaining grounds, 2, 3 and 3a, allege, in effect, a failure by the Magistrate to comply with the principles of natural justice. In the end, there were three respects in which it was submitted on behalf of the applicant that the Magistrate had not complied with the rules of natural justice; (1) that he failed to inform the applicant that he could call witnesses relevant to the issue as to whether or not he was guilty of wilful prevarication; (2) that he failed to warn or inform the applicant of the significance of Constable Harris's evidence which tended to show that the applicant had not been drunk at the relevant time and did remember the incidents; (3) that he failed to give the applicant an opportunity to present a plea in mitigation of sentence.

I commence by referring to the principles stated by the High Court in *Coward v Stapleton* [1953] HCA 48; (1953) 90 CLR 573 at p579; [1953] ALR 743; 17 ABC 128. That was a case where the applicant had been convicted by the Federal Court of Bankruptcy of contempt of court for refusing to answer questions. Certain of the High Court rules applied to the proceedings before the Court of Bankruptcy. In the joint judgment of the High Court it was said:

> 'Rule 1 of Order 49 of the relevant High Court Rules provides for bringing before the court a person alleged to be guilty of contempt of court, committed in the face of the court or in the hearing of the court, and provides further that the court shall cause him to be informed orally of the nature of the contempt with which he is charged, and shall require him to make his defence to the charge, and shall after hearing him proceed, either forthwith or after adjournment, to determine the matter of the charge, and shall make such order for the punishment or discharge of the accused person as is just. Even apart from any such express provision, however, it 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: *In re Pollard* (1968) LR 2 PC 106 at p120; *R v Foster; ex parte Isaacs* [1941] VicLawRp 16; (1941) VLR 77 at p81; [1941] ALR 89. The gist of the accusation must be made clear to the person charged, though it is not always necessary to formulate the charge in a series of specific allegations: *Chang Hang Kiu v Piggott* (1909) AC 312 at p315. The charge having been made sufficiently explicit, the person accused 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.
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> Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon. While it is clear enough that a refusal to answer may be inferred from the giving of what purports to be an answer, the power to commit summarily for a refusal so inferred is a power attended by obvious dangers, and extreme caution is required in its exercise. Not only does the charge place the liberty of the individual in jeopardy in proceedings of a summary character which do not surround his with the safeguards of a jury trial; but the issue whether statements offered

> as answers not only are false but imply a refusal to answer may well depend upon considerations of degree, which may strike different minds in different ways. The court, especially when it had itself preferred the charge, must be alert to see that it withholds judgment on the issue until it has considered everything which the witness may fairly wish to urge in his defence.'

More recently, in dealing with a question of contempt of court, but in a context different from the rules of natural justice, Gibbs ACJ giving the judgment of the High Court said:

> 'When a man's liberty is at stake, the law must be strictly complied with: *Ferraro v Woodward* [1978] HCA 7; (1978) 143 CLR 102; (1978) ALR 188 at p190; 52 ALJR 528.

I have been referred to and had the advantage of considering the judgment of Crockett J in an unreported decision given on 9th June, 1977, *In the matter of Andrew Quadara*. His Honour was there dealing with what he described as a statutory contempt. It arose under ss54 and 54A of the *County Court Act* 1958. His Honour referred to the decision in *Balogh v St Albans Crown Court* (1975) 1 QB 73; [1974] 3 All ER 283, a decision to which I was also referred. That decision, and other decisions, point out that proceedings in the nature of proceedings for contempt of court are far removed from the ordinary processes of the criminal law. In the judgment of Crockett J a number of principles are stated as flowing from the authorities and, with respect, I adopt those principles. The first principle stated by His Honour is that there must be material before the Judge that allows him to take cognizance of the alleged contempt. The second principle is that if there is a *prima facie* case of contempt raised on material properly within the cognizance of the Judge, then the Judge may there and then investigate the matter and deal with it. In that event it is necessary for the Judge to inform the person alleged to be in contempt both of the nature of the offence that he is alleged to have committed and also of the fact that the Judge is contemplating dealing with it. A disclosure to the person concerned of the nature of the offence alleged does not require precise definition in legalistic terms of the particular breach being alleged. It is sufficient if the pith and substance of the matter of the breach alleged have been conveyed in general terms to the person whose behaviour is under scrutiny.

In dealing with that principle His Honour said at pp11 and 12 of his judgment:

> 'The gravamen of the complaint made on behalf of the applicant is, however, this: it is not sufficient to inform the applicant of the true nature of the offence and that it is an offence which, if found proved, can be visited with criminal penalties. What is required is that unless the full gravity of the offence in question is brought home to the mind of the applicant, the applicant is denied a complete opportunity to deal with that offence. Furthermore, it is essential that the nature of the offence alleged should be communicated to the applicant at a time which will permit him to be given a full opportunity to deal with it.'

His Honour later said:

> 'The question of the nature and extent of the explanation which the Judge is called upon to give the alleged offender will depend upon the circumstances of each particular case. Many of the authorities deal with alleged contempt on the part of barristers, solicitors and others who, by reason of their professional training and experience, must irresistibly be assumed to have full knowledge of the implications of the alleged contempt with which the Court if concerned to deal. However, in the present case, no such assumption, I think could properly have been made and much, I think, is able to be said in support of the view that the seriousness with which the Judge undoubtedly rightly regarded the alleged offence was never brought home to the mind of the applicant. It would follow that, to the extent that it was not so brought home, he was lulled into a false sense of lessened risk in which he was placed and commensurately was disadvantaged as to the fullness of the opportunity granted him to deal with the risk to which he was then exposed.' (p12).

The third principle mentioned by His Honour was that the Judge must afford the person alleged to have committed a contempt an opportunity of defending himself. His Honour said at p12:

> 'This question concerns the degree of opportunity which was afforded the applicant to defend himself in the action which was being taken and in respect of which he was vulnerable to punishment.'

Later at pp14 to 15 His Honour said:

> 'The authorities make it plain that the person allegedly in contempt of the court is to be given an

> opportunity to be heard both in defence and in mitigation ... Mitigation, in my opinion, involves matters both touching on the gravity of the contempt itself and also matters disconnected directly with the offence, but which might properly be taken into account in relation to the penalty to be imposed upon the contempt being established.'

His Honour then referred to an argument which had been advanced before him in that case, that there was no lack of natural justice attaching to the proceedings unless it was shown that the applicant had in fact been denied an opportunity that he would have employed, had he been given that opportunity in the court below.

Of this His Honour said:

> 'In my opinion that is far too restrictive a view. The principle is that justice must not only be done but manifestly be seen to be done, and an argument to such an effect was expressly rejected by the Court of Appeal in *R v Thames Magistrates'* Court (1974) 1 WLR 1371; [1974] 2 All ER 1219;. It does not matter, in my opinion, if the Judge has good reason for believing that if he is to extend to the applicant the opportunities which natural justice require should be extended to him, that such an extension is no more than an empty formality and will prove to be such upon the opportunity being given to the contemner. Natural justice, in my opinion, requires that the opportunity be given to the persons concerned notwithstanding the Judge's belief as to the outcome of adopting such a course.' (pp15-16)

On p17 His Honour said:

> 'Again, as I have indicated, the question is not whether the Judge can anticipate what the applicant might do if given a full opportunity to defend himself in every respect, but rather that the full opportunity be granted, the requirements as to the fullness of the opportunity being determined by the particular circumstances.'

I turn to the first two respects in which it is submitted that the Magistrate failed to comply with the rules of natural justice. That is, the allegation that he failed to inform the applicant that he could call witnesses relevant to the question whether he was guilty of wilful prevarication, and that he failed to warn the applicant of the significance of Harris' evidence tending as it did to show that the applicant had not been drunk at at the time and that he did remember the relevant incident.

There has been no debate before me as to whether the various submissions put forward come within the grounds of the order nisi to review. After giving the matter some thought I have come to the conclusion that the two aspects to which I have referred to come within ground 3 which alleges that the Magistrate failed 'to afford to the applicant any or any reasonable opportunity to formulate a defence to the charge.' In the context I think it is appropriate to interpret the words 'to formulate a defence' as meaning, to plan and present a defence to the charge.

The material before the Magistrate showed that the applicant was an apprentice plumber. In the judgment of Crockett J reference is made to the difference between the approach which is appropriate when the person alleged to have committed contempt is a person such as a lawyer and the approach which is appropriate in other cases. There is nothing in the material to indicate any likelihood that the applicant was a person familiar with court procedures or a person with any forensic experience. The material indicates that the applicant was a person who was unlikely to know that he could meet the charge of contempt by calling witnesses and unlikely to know that he was entitled to ask for an adjournment in order to do that. The fact that he was expressly given an opportunity of asking questions of the witness Harris and of placing before the court anything that he wished to say in answer to the charge or in respect of penalty did not, in my view, present him with a real opportunity of defending the charge. He in fact asked no questions and made no statement apart from repeating that he had been too drunk to remember. It is to be borne in mind that in the circumstances in which the charge was made, the witness had no opportunity to prepare for or to contemplate the position in which he was placed. In that respect he was in a different position from the ordinary person who is brought to a court on a charge some days after a court process has been served on him which notified him of the charge. As was made clear by Crockett J in *Quadara's case*, the important inquiry is not whether in fact the applicant would have taken steps to call witnesses before the court, or would have given evidence himself, but whether he had a reasonable opportunity of doing so.

The applicant was never made aware that it was open to him to call evidence upon his sobriety on the evening. I take the view also, that in this case the relevance of the evidence of Harris as to the conversation with the applicant on 12th July was not sufficiently brought home to the applicant in the context of the applicant being made aware that it was open to him. to give evidence himself or to call evidence to contradict that given by Harris, if such evidence was available.

The Magistrate, in his affidavit, said that if the applicant had sought legal representation, he would have adjourned the hearing of the charge against him in order to allow him to be represented. I accept that that was the position. It is not necessary for me to consider whether or not it was appropriate for the Magistrate to have inquired whether the applicant desired legal representation or not.

What is emphasized by the cases is that the inquiry for me to make is whether the applicant had a real opportunity of representing his defence. It is not an arid and formal inquiry, whether in theory he did. It involves the reality of the situation, and it involves the awareness by the applicant that he had an opportunity. In each case it depends on the circumstances whether the full opportunity required by the rules of natural justice was given or not. In this case, the question is, looking at the evidence, the probabilities and the inferences which arise from the evidence was Carpenter given a real opportunity of defending himself fully in every respect?

As I have said, there was ample evidence on which the Magistrate, when he made his decision, and was entitled to be satisfied beyond reasonable doubt that there had been wilful prevarication. However the difficulty of a court, in a situation such as arise in this case, is all the greater when the court, before charging a person with contempt, has drawn a strong inference from the evidence, that the person has committed the offence. It is particularly in cases where such a strong inference has been drawn, the court needs to be alert to ensure that the right of the person alleged to have committed contempt, to have a full opportunity of defending himself in every respect, be not overlooked, and be not treated as being of lesser importance than in a case where the evidence is more equivocal. A court has to take particular care in a situation such as present where it appeared to the Magistrate that the applicant was flouting the authority of the court, to ensure that the person charged with contempt is accorded in full measure the opportunities of defending himself to which he is entitled. Accordingly, I am satisfied that a ground of the order nisi is made out, to the extent which I have intended.
