THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. P 047 of 2017

BETWEEN

WAYNE STURGE

APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

RESPONDENTS

PANEL:

A. Yorke-Soo Hon, JA

R. Narine, JA

M. Mohammed, JA

APPEARANCES:

Mr. R. Clayton, QC, Mr. A. Ramlogan, SC, Mr. L. Murphy, Mr. A. S. Pariagsingh and Mr. J. Sookoo appeared on behalf of the Appellant.

Mrs. J. Honoré Paul, Deputy D.P.P., and Mrs. A. Teelucksingh-Ramoutar, Assistant D.P.P., appeared on behalf of the Respondent.

DATE OF DELIVERY: April 2, 2019

JUDGMENT

Majority Judgment delivered by M. Mohammed, J.A.
A. Yorke-Soo Hon, J.A. Concurring.
R. Narine, J.A. Dissenting.

[1] On October 26, 2017, the appellant, Wayne Sturge, was found guilty of contempt of court. He was fined the sum of $5,000.00 and in default, he was ordered to serve six months simple imprisonment.

[2] The appellant has appealed the judge's decision.

INTRODUCTION[1]

[3] This appeal stems from a murder trial where, during the course of the cross-examination of the prosecution's main witness by the appellant, that witness made what can be termed as certain audacious remarks. Fueled in part, it appears, by some level of frustration, the appellant took to his Facebook page where he expressed his concerns. Those Facebook posts generated commentary by third parties, some of which the appellant responded to. The trial was still ongoing. The Facebook posts came to the judge's attention and it was apparent that he was contemplating proceedings for contempt of court. The circumstances of the contempt of court "proceedings" are the subject of this appeal. The core issue in this appeal is whether the proper procedure was followed and if it was not, whether such a failure constituted a peripheral defect or a material irregularity.

FACTUAL BACKGROUND

[4] In October, 2016, the appellant, an attorney-at-law, represented one of the accused in a murder trial in the High Court before the Honourable Justice Norton Jack. The appellant faced challenges

[1] Judicial Research Counsel – Mr. Pravesh Ramlochan.

in the cross-examination of the prosecution's main witness, Nigel Roderique, also referred to as "Cat", who at certain instances refused to answer some of the questions posed to him.

[5] On October 11, 2016, the judge brought to the attention of counsel in the trial, electronically captured printed posts which appeared to stem from the appellant's Facebook page. The posts were categorized by the judge into two parts. The first post, which was undated, was an extract of the appellant's cross-examination of Roderique. It reflected the difficulty experienced by the appellant in eliciting responses from the witness and the witness's refusal to answer certain questions. The following is an extract of the first Facebook posting[2]:

> *Wayne Sturge*
> *Tuesday at 8:20 p.m.*
>
> *Monday and Tuesday last I cross examined a witness in a murder trial that is being heard for the third time. The witness is now cornered and if he answers, he is doomed…*
> *Then comes this…*
> *Me: What's your answer.*
> *Cat: I not answering…*
> *Me: You have no answer….*
> *Cat: Boy, I not in that life with you. Is woman I like, you like boys, you taking man all over the place.*
> *Me: Ok. That's no secret, I like it in my fobbs, that's not in dispute. So now that we get that out of the way, what is the answer to my question.*
> *Cat: I not answering you. Your Honor, dais it for today, carry me back up in the jail, me en answering no more questions.*
>
> *Since that, every day is a new drama and he is avoiding facing me…*
>
> ***Comments:***
>
> ***J.L.****: So the judge did not make him answer?*
> ***Wayne Sturge****: Nope.*
>
> ***J.L****: That is how it goes now?*
> ***Wayne Sturge****: J.L, that is what we have come to.*

[2] Record of Appeal at pages 19-23.

[6] The second post, dated October 5, 2016, appeared to be comments made by the appellant that the witness Roderique had avoided answering his questions and that the appellant had been unsuccessful in obtaining the judge's intervention. Both posts showed a thread of commentary by third parties, some of which were responded to by the appellant. The following is an extract of the second Facebook posting[3]:

> *Wayne Sturge*
> *October 5th at 11:44 a.m.*
>
> *DAY 4*
> *For the fourth day, the witness has come to court and refused to face me in cross examination. He is able to speak, he is able to answer questions posed by the Court but he refuses to be cross-examined by me…. So I got up and said… "My Lord, he can speak, he can answer questions asked by the Court… How much more of this do I have to take? I have a mortgage to pay…*
>
> *Judge: "The jury is to disregard the outburst of Counsel!"*
>
> *And just like that, the day has ended.*
>
> ***Comments:***
> ***S. M.**: Wayne Sturge, I have asked to have a witness compelled answer the question asked and it did not seem like it was a problem at the time. What is the reason for the reluctance to have things moved along?*
>
> > ***Wayne Sturge**: S.M. I tried asking the judge the same thing.*
> >
> > ***Wayne Sturge**: Adjourned to Tuesday and if it continues I will ask that the judge direct the jury to return a not guilty verdict.*

[7] On October 11, 2016, the judge indicated that he would hear submissions on the matter on October 14, 2016. He invited submissions from counsel on four issues, which he framed in the following way:

[3] Record of Appeal at pages 12-18.

(i) *"Can these publications and the conversations of Defence Counsel, Mr. Sturge on his Facebook page be characterized as calculated to prejudice this trial, to scandalize this Court and be viewed as a breach of duty by an officer of the Court?*

(ii) *Can such publications and conversations on Counsel's Facebook page be viewed as acts calculated to bring the administration of justice into disrepute?*

(iii) *How is Defence Counsel's conduct by the posting of such comments and engaging in discussions and inviting comments to be viewed in the context of an ongoing trial which is at a critical juncture, how is that to be viewed?*

(iv) *Can this Court truly say that the Jury has not been contaminated by this course on social media, given the widespread access of the Facebook page by as many as some 1900 odd persons; this, despite repeated warnings by the Court to the Jury about discussion of the matter on public fora? Has Counsel's conduct truly tainted the trial process so as to bring in question the prudence of the Court continuing this trial?"*[4] (sic)

[8] On October 14, 2016, the judge indicated that he had scheduled the hearing on that day to hear the parties on either side as to whether the postings amounted to a contempt of court. At the start of the hearing, the appellant indicated that he had experienced some difficulty in retaining counsel *"for the reason that upon reading the transcript of the last date of hearing [October 11, 2016], Counsel was not aware of the purpose of attending before the Court today…"* The appellant also enquired as to the manner in which the Facebook posts came into the judge's possession. The judge stated that he was only concerned about whether the appellant was legally represented. The matter was stood down for approximately fifteen minutes in order for the appellant to obtain representation. After twenty-five minutes, the matter was recalled and Mr. Ramdeen appeared on behalf of the appellant.

[4] Transcript of the Proceedings dated October 11, 2016 at page 12, lines 20-38.

[9] Mr. Ramdeen submitted that what was contained in the Facebook posts did not reach the threshold where the judge ought to embark upon a determination of whether it amounted to contempt of court. Mr. Ramdeen submitted that, in light of the fact that the judge had made no orders restricting the reporting of the matter, the appellant's conduct was akin to that of members of the media who are often present during certain court proceedings and who report on what has transpired in those matters.

[10] Mr. Ramdeen contended that the appellant, who was an attorney-at-law and an Opposition Senator, often dealt with matters relating to the criminal justice system. He submitted that in these circumstances, the appellant exercises his freedom of expression with respect to his dual roles and was entitled to express his views with respect to the workings or the non-workings of the criminal justice system. Mr. Ramdeen submitted that the appellant's right to freedom of expression overrides the right of the Court to punish for contempt of court.

[11] Mr. Ramdeen also submitted that if what was contained in the Facebook posts accurately reflected what had transpired in court, there could be no complaint since a fundamental pillar of the justice system was that justice must be open and transparent. He submitted that in those Facebook posts, the appellant did not criticize or challenge any ruling of the Court and neither did he encourage anyone to do so. He also submitted that the courts could not be insulated from good faith criticism.

[12] Mr. Welch, who represented other accused persons in the murder trial, was also invited to make submissions on the issue. He largely adopted the submissions made by Mr. Ramdeen. He in addition submitted that the Facebook posts purported to represent the effect of the exchanges which occurred in court before the jury. He submitted that such conduct did not amount to a contempt of court. He argued that there was nothing to suggest that the appellant had instigated third parties to make the comments which they did. He also argued that nothing said or done by the appellant in those Facebook posts could be characterized as an attack on the court or an attempt to bring it into disrepute.

[13] Counsel for the prosecution, Mrs. Hudlin Cooper, in response, submitted that the Constitution does not permit an individual to use any right to infringe the due administration of justice, the due process of law, or the rights of anyone else. She submitted that prima facie, the appellant was responsible for the posts in question as his name appeared on the Facebook page on which they were posted. Further, in those posts, the appellant had identified that he was cross-examining a witness named "Cat".

[14] On the issue of accessing the Facebook posts, Mrs. Hudlin Cooper submitted that persons could access the posts through third parties, who could "screenshot" the posts and disseminate them. She also contended that from the appellant's conduct in creating the posts, this fulfilled the mental requirement of the offence of contempt, which was to interfere with the administration of justice.

[15] On October 18, 2016, Mrs. Hudlin Cooper indicated to the judge, in emphatic, redolent of imploring terms, that since there was a risk that the Facebook posts and comments had come to the jury's attention, then the judge ought to enquire into that issue or give a robust warning to the jury[5]. The judge declined to conduct a jury enquiry or to give any warning.

[16] On March 16, 2017, the murder trial ended and the jury returned a guilty verdict.

THE JUDGE'S RULING

[17] On October 26, 2017, a little over a year after he had first raised the issue, the judge gave his ruling in the matter and found the appellant guilty of contempt of court. The judge reviewed the Facebook posts in great detail, including the comments by third parties and responses by the appellant. The judge primarily reasoned that having regard to the timing of the appellant's Facebook posts, there was a real risk of prejudice in the substantive trial since the assessment of

[5] Transcript of the Proceedings dated October 18, 2016 at pages 5-9.

the evidence of Roderique was ongoing by the jury and crucial to their evaluation of his credibility. The judge said:

> *"The question stands, having regard to the admitted conduct of Defence Counsel, Mr. Wayne Sturge, during the ongoing criminal trial of The State v Phillip Boodram and Others, did such conduct create a real risk of prejudice to the due administration of justice and by potentially creating unfairness in the trial, and by potentially negatively impacting the tribunal of fact in their deliberations."*[6]
>
> *…*
>
> *"In his postings on his Facebook page and in hosting of comments on his Facebook page from the friends of that page and in his responses to such friends, Mr. Sturge engaged in conduct which had the potential to negatively impact the tribunal of fact in the ongoing trial. Whether or not it did, indeed, have an effect is not in issue, for it is the risk that such conduct creates that may amount to a contempt and not the ultimate effect of such conduct."*[7]
>
> *…*
>
> *"With the Court's warning to jurors not to use the Internet and social media to enquire into aspects of the case in question, came the possibility that the jury might, quite innocently, be included in communications, not by Mr. Sturge, but by his Facebook friends. Here, the inescapable reality is that no one who has befriended a Facebook page is restricted from screen capturing, forwarding and simply communicating the content of that page to someone wholly dissociated with the Facebook page and host. The communication could extend to a juror in an ongoing trial, whether or not such communication was actually solicited."*[8]
>
> *…*
>
> *"…I am of the considered opinion that such conduct undoubtedly created an environment which posed a real risk [of] prejudice to the administration of justice, insofar that the decision of the jury as to the creditworthiness of Roderique stood to be influenced.*

[6] The Judge's Ruling on the Contempt of Court Proceedings at page 14, lines 41-48.
[7] The Judge's Ruling on the Contempt of Court Proceedings at page 16, lines 5-12.
[8] The Judge's Ruling on the Contempt of Court Proceedings at page 17, line 45 to page 18, line 6.

Simply put, the conduct of Mr. Sturge as Defence Counsel risked prejudicing the jury's decision making and, as such, the fairness of the trial. The risk of prejudice to me as presiding Judge in this context was irrelevant to the core issue. Counsel's conduct created a real risk of prejudicing, in the eyes of the jury, the Prosecution's case by its characterization of the main witness as being prevaricating, afraid and unworthy of credit."[9]

…

"In closing, the timing of the Facebook postings of Defence Counsel, Mr. Sturge, loomed large in the risk of prejudice as the assessment of the evidence of Roderique was ongoing by the jury and crucial to the tribunal of fact's evaluation of the witness' credibility. There existed a real risk that a juror on the panel, or the entire panel, being exposed to the contents of such postings, would be influenced as to the witness' credibility. This created a real risk of prejudice to the Prosecution's case which significantly rested on the view the jury took of the witness.

By further extension, there existed a real risk of prejudice to the due administration of justice in the sense that the fairness of the process was put in real jeopardy by the Facebook publications."[10]

THE APPEAL

[18] We have examined the various grounds of appeal and the submissions made on behalf of the appellant. The central complaint made by the appellant, which we find to be dispositive of the appeal, is that the judge's finding of contempt was unlawful since the trial process was unfair. This was because the judge failed to properly particularize the allegations against the appellant, failed to inform himself of the facts and evidence necessary to found the charge, and failed to give him the opportunity to give evidence if he so desired. It is unnecessary for us to traverse the other grounds of appeal which are in effect subsumed in the central complaint.

[9] The Judge's Ruling on the Contempt of Court Proceedings at page 19, lines 30-42
[10] The Judge's Ruling on the Contempt of Court Proceedings at page 21, lines 11-25.

SUBMISSIONS MADE ON BEHALF OF THE APPELLANT

[19] Counsel for the appellant, Mr. Clayton, QC submitted that several crucial questions were left unaddressed in advance of the hearing of October 14, 2016, including:

(i) The nature of the alleged contempt. Was it contempt in the face of the court or scandalizing the court? If it was the former, was it of such a nature which required immediate action or could it properly and safely be dealt with at a later point in time?

(ii) Was the process fair in light of the fact that the appellant was never alerted to the possibility of giving evidence?

(iii) What specific conduct was said to constitute the contempt - was it the appellant's Facebook posts or the comments which followed?

(iv) Since Facebook comments and posts are communicated to Facebook friends, was it being alleged that the postings and comments could have made their way to the jury? If so, specifically how? What was the precise mechanism through which members of the jury could become tainted by the posts? Did the resolution of this issue require expert evidence?

(v) Could a straightforward direction to the jury not have been sufficient to address the situation?

(vi) Could referring the judge's concerns to the appellant's professional body be sufficient?

(vii) Could it be sufficient for the appellant to address his mind to the nature of the posts and comments, and the judge's concerns about them, and to apologise and undertake not to continue or to repeat the conduct?

[20] Counsel indicated that this was the only hearing which the appellant had and was the sole basis for the later finding of guilt. He submitted that the procedure was unfair to the appellant, as he did not know the case which he had to meet.

[21] Further, Mr. Clayton, QC submitted that the lack of particularization of the contempt allegations and the failure to explain fully the nature, scope and purpose of the contempt enquiry resulted *"in confusion"* (sic). Counsel for the appellant has referred this court to several decisions which all revolve around the central theme that while in criminal contempt proceedings, there is usually a need for expedition, that does not warrant an abrogation of the rules of procedural fairness. The most relevant decisions relied on by Mr. Clayton, QC are **Re: Stephen Yaxley-Lennon (aka Tommy Robinson)**[11], **R v Ras Grant**[12], **R v Moran**[13] and **Mirza Zukanovic v Magistrates' Court of Victoria at Moorabbin**[14]**.** In **Yaxley-Lennon**, on the issue of criminal contempt matters, Lord Burnett CJ observed that in such proceedings, which concern the liberty of persons, there is a need for the contempt in question to be identified with precision and the conduct of the alleged contemnor identified with sufficient particularity, to enable him, with the assistance of legal advice, to respond to the criminal charge. Similarly, in **Grant**, Justice Openshaw stated that in contempt of court proceedings, the suspected offender must be distinctly and clearly told what acts or conduct are alleged against him. The decisions in **Mirza Zukanovic** and **Moran** both set out certain established principles which should ordinarily be observed when dealing with contempt cases.

[22] Mr. Clayton, QC submitted that the discussion between counsel and the judge at the hearing was not entirely consistent, since there were numerous references to the purpose of the hearing being to establish whether the posts and comments *"amount[ed] to contempt of court."* Counsel pointed out that the judge himself said that, ***"the question of criminal charges did not, at that stage, arise."***[15] Counsel argued that the inevitable impression given to the appellant was that the hearing would not be determinative of his guilt, and that it would not be the sole opportunity for him to answer the allegations against him.

[11] [2018] EWCA Crim. 1856.
[12] [2010] EWCA Crim 215.
[13] (1985) 81 Cr. App. R 51.
[14] [2011] V.S.C. 141.
[15] Transcript of the Proceedings dated October 14, 2016 at page 2, lines 41-43.

[23] Mr. Clayton, QC contended that the judge erred in law in finding that the appellant's Facebook posts had the potential to taint the jury's deliberations, in the absence of any evidence concerning the appellant's Facebook privacy settings and the identification of a mechanism which explained how the posts could reach the jurors. He submitted that the judge found the appellant guilty of contempt on the basis of a series of factual assumptions or assertions made by prosecuting counsel on key issues, which required the determination of questions of fact. He further submitted that the appellant was deprived of the opportunity to adduce evidence to refute prosecuting counsel's assertions.

[24] Accordingly, Mr. Clayton QC submitted that the failure of the judge to explain fully the purpose of the contempt enquiry, coupled with his failure to follow the proper procedural steps, resulted in irreparable prejudice to the appellant.

SUBMISSIONS MADE ON BEHALF OF THE RESPONDENT

[25] Counsel for the respondent, Mrs. Honoré Paul, submitted that the proposed factual basis of the offending conduct and the suggested nature of the contempt into which it might fall, were advanced with sufficient clarity to the appellant from the inception. The judge indicated that the contempt fell into the category of either scandalizing the court or interfering with the course of justice by prejudicing the jury.

[26] Mrs. Honoré Paul submitted that although, at the outset, the judge intimated that the submissions were preliminary and that he had not reached "the point" of charges, it became apparent during the course of submissions made on behalf of the appellant, that he admitted that he was responsible for the posts which were being attributed to him. Counsel submitted that having thus taken away the need to enquire into the responsibility for the posts by dint of this admission, the sole and limited question to be determined was whether they reached the threshold for contempt. Relying on the decision in **R v Joseph Griffin**[16], she submitted that the

[16] (1989) 88 Cr. App. Rep. 63.

form of the proceedings was a matter for the judge since it is, *"the judge himself who enquires into the circumstances, so for as they are not within his personal knowledge."*

[27] Counsel sought to distinguish the decision in **Re: Stephen Yaxley-Lennon (aka Tommy Robinson)**[17] from the present case. She indicated that in **Yaxley-Lennon**, the court was trying a sexual offence case against certain persons. The judge gave an order indicating that any report of the proceedings should be postponed to the end of the trial. The appellant in that case had proceeded to record a video near to the court room while the trial was going on and he had posted it on a live-stream. In it, he referred to the charges, the ethnicities of the accused and the religion and ethnicities of the victims. He had also spoken of the cost of the prosecutions and had questioned why the judge had made the prohibition order. Mrs. Honoré Paul noted that the appellant in that case did not speak of any of the evidence or how the trial was progressing. In the judge's decision in **Yaxley-Lennon**, regarding the contempt, she referred to matters which related to a more general contempt, that is, contempt calculated to interfere with the course of justice and not an infringement of the ban given. The enquiry into the contempt took approximately four minutes, which was an insufficient time to deal with the issues.

[28] Mrs. Honoré Paul submitted that the judge in this case explored such areas as he found to be relevant in his consideration of the matter before him. She argued that the judge was under no duty to disclose how the posts came into his possession since there was no dispute that they originated from the appellant's Facebook page. In relation to the likelihood of the jurors having sight of the posts, she referred to the submissions of prosecuting counsel in the court below where it was said:

> *"My Lord, when one is looking at the issue of the access, and public access on the page, the Facebook page, if the particular view expressed is one with which one finds agreement, one would see like. So one is able to tell from the page how many persons would have viewed and either approved what is posted there by the like that is ticked off. That cannot be used as a landmark, please, My Lord, in this regard, because it is*

[17] **Re: Stephen Yaxley-Lennon** (n. 11).

not a scenario where the only way you can view the post is if you access the page. In this age of technology persons who can view it or whomsoever they get it through a friend of a friend, they can screen shot the information and send it. So persons who are not friends at all can view the full contents of what is on that page, and they have access to it. And that is not going to be recorded as a like. So one could have only three likes on a page, but 300 persons would have viewed it because somebody screen-shotted it and sent it around."[18](sic)

[29] In referring to the judge's ruling in the matter, Mrs. Honoré Paul submitted that the judge considered how the posts might reach the eyes of the jurors. She contended that such a finding by the judge as to how the information might be disseminated, did not require expert evidence for its proof but rather had its genesis in common sense. She also submitted that the assertions by prosecuting counsel in that regard remained uncontroverted by defence counsel during the arguments before the judge.

[30] Mrs. Honoré Paul further submitted that at common law, liability for contempt is construed strictly. There is no requirement for proof of intention in matters in which the issues complained of represent a substantial risk of serious prejudice, provided that the contemptuous act is done during the course of "active" criminal High Court proceedings. In support of this argument, she relied on the decision in **R v Odham's Press Limited and Others ex parte Attorney General**[19] where Lord Goddard CJ explored the authorities and opined that they indicated clearly that in such circumstances, lack of intention or knowledge was no excuse.

[18] Transcript of the Proceedings dated October 14, 2016 at page 50, lines 29-43.
[19] (1956) 3 All ER 494.

THE LAW, ANALYSIS AND REASONING

[31] A review of the contempt of court "proceedings" in the court below reveals certain deficiencies in the requisite standard of procedural fairness. We have identified four main instances in which the appellant suffered palpable prejudice as a result of these gaps in procedural fairness, namely:

(a) The failure to identify the specific charges against the appellant and the attendant issues;
(b) The absence of a plea from the appellant;
(c) The appellant was deprived of the opportunity of making submissions; and
(d) The appellant was deprived of the opportunity to adduce contradictory evidence.

We shall deal with each of these matters in turn.

[A] The failure to identify the specific charges against the appellant and the attendant issues

[32] In order to provide a full and proper context for the central matter which arises, it is necessary to set out certain aspects of the proceedings in the court below in greater detail.

[33] On October 11, 2016, the judge brought the Facebook posts to the attention of prosecuting counsel and the appellant and raised the question of a possible contempt of court having been committed by the appellant. The judge posed several questions to counsel which concerned whether the publications could be characterized as being calculated to prejudice the trial and whether the appellant's conduct had tainted the trial process and had brought the administration of justice into disrepute. The judge's enquiries are reflected in full at paragraph [5] above.

[34] The judge informed counsel on both sides that he would hear submissions on the matter on October 14, 2016. He said:

> *"I will hear submissions from both sides. Those submissions could take the form of written submissions only or both written and oral submissions and each side will be given a full and fair opportunity on that day."*[20]

[35] On the scheduled date for submissions on the issue of contempt, October 14, 2016, the judge again indicated that he had scheduled the hearing on the day in question *"to hear from both sides as to whether these comments, these postings amount to contempt of court."*[21] Importantly however, the judge did not elucidate the allegations against the appellant and the particular form of the contempt alleged. The judge also set out his concerns about the posts as follows:

> *"Last week it was brought to my attention that there were Facebook postings and comments that touch and concern this trial. I have provided copies to Counsel on both sides of what I had in my possession…. I intimated and I indicated to Counsel Mr. Sturge that it appeared that from the postings and comments, these emanated from his Facebook page. Of concern to this Court is the fact that we are in the process of completing a trial in which Mr. Sturge, as Defence Counsel for Accused Nos. 2 and 4, is in the throes of cross-examining the State's main witness. Of issue in the trial, and it goes without saying, is the credibility of that witness. Of issue in the trial, is the view that the Jury would take of the witness' evidence-in-chief and in cross-examination. The comments and postings appear to suggest criticisms of the Court, of the witness, and of the process."*[22] *(sic)*

[36] The judge, after hearing preliminary submissions on the issue, reiterated the purpose of the hearing at page 15 of the Transcript of the Proceedings dated October 14, 2016:

> ***"… I will hear submissions from Mr. Ramdeen, on behalf of Mr. Sturge whether – which is the most fundamental question, whether the conduct rises to the level of***

[20] Transcript of the Proceedings dated October 11, 2016 at page 12, lines 13-19.
[21] Transcript of the Proceedings dated October 14, 2016 at page 2, lines 41-43.
[22] Transcript of the Proceedings dated October 14, 2016 at page 2, lines 20-41.

contempt of court. This court has made no finding on that as yet…" (sic) [emphasis added]

[37] In the Transcript of the Proceedings dated October 14, 2016 at pages 21-22, the following exchange occurred between the judge and Mr. Ramdeen:

Mr Ramdeen: *My Lord, can I ask for the Court to guide me as to whether it is that the entire document that was passed to my client is the subject of this inquiry, or more likely, there are certain comments or certain opinions or certain things expressed in this document upon which My Lord has directed his attention and* ***upon which I am to submit to My Lord as to whether it crosses the threshold or not?***

The Court: *Well, it would be the entire document, Counsel.*

Mr. Ramdeen: *The entire document?*

The Court: *Yes.*

…

Mr. Ramdeen: *As you please, My Lord. My Lord, that takes us to the issue that* ***My Lord has signalled this morning, frontally, that the inquiry upon which we are to embark upon is one to determine whether this matter crosses the threshold to be a contempt of court. But what the Court has not indicated, My Lord, is that as My Lord would well know, contempt comes in different species and different forms and we have not been informed as to what is the specific type of contempt that my Lord has considered that these postings and comments and opinions have breached in relation to the actions of my client. And that, My Lord, I consider to be quite serious because we are here to answer a charge*** *that my client has conducted himself in a way that is unbecoming of his status as Defence Counsel in this matter in an ongoing criminal trial.*

The Court: ***Well, we have not yet reached the point of a charge as yet.***

Mr. Ramdeen: ***We are here as an inquiry as to whether or not what this document purports to be represents conduct that may be seen to be a contempt of court.***

[emphasis added]

[38] Mr. Welch also indicated that he understood that the court, on the day scheduled for the hearing, was not embarking on a full enquiry into the contempt. He said:

> ***"It appears as though the Court is really seeking preliminary submissions, and I will be guided if I am wrong, it appears to me that the Court is seeking preliminary submissions on these issues to determine whether the matter warrants going further, into an issue of proceedings involving Mr. Sturge and perhaps possible contempt proceedings. But it appears to me, by the Court's terms of reference, the Court does not consider itself to be at that stage yet."***[23] [emphasis added]

[39] The judge therefore did not indicate to either party, at any point in the proceedings, either on October 11, 2016 or when the court reconvened for the hearing on October 14, 2016, his intentions of holding a full contempt of court trial. The judge in effect articulated that the hearing on October 14, 2016 was merely a preliminary stage of the procedure in order to determine the main issue of whether the Facebook posts rose to the level for them to be deemed a contempt of court. He simply framed certain questions to be considered by counsel. Those questions posed, although very specific, did not represent charges. If a contempt trial was to be embarked upon, in the circumstances of this case, the judge was under a duty to particularise the charges to the appellant.

[40] Mr. Clayton submitted that on October 14, 2016, Mr. Ramdeen indicated that he understood the judge to be requesting preliminary submissions on whether the Facebook posts rose to the level to be considered a contempt of court. On this issue, the recent decision of the Court of Appeal of England and Wales in **R v Naim Khan**[24] is very instructive. For this reason, we refer to the decision in some detail.

[41] In **Naim Khan**, the appellant was found guilty of contempt of court arising out of an incident in the court in which he was being tried, along with other defendants. He was sentenced to seven days imprisonment. During the closing speech of prosecuting counsel, there were a number of

[23] Transcript of the Proceedings dated October 14, 2016 at page 6, lines 28-36.
[24] [2018] EWCA Crim 2641 [Decision delivered on September 14, 2018].

unwarranted interruptions by counsel for one of the other defendants. After the jury had been relieved for that day, the judge raised with that counsel his displeasure at those interruptions and a somewhat heated exchange ensued, at the end of which the judge refused to allow counsel to raise what was said to be a point of law. At the end of this exchange, and as he was about to leave the court, the judge saw and heard the appellant, one of the defendants, clapping his hands about six times. The judge said to the appellant's counsel, *"Mr Grainger, your client it was, I believe, who applauded at the end there. I will leave you to take instructions. I will deal with the matter on Monday."*

[42] When the matter resumed on Monday, the judge said, *"Mr. Grainger, I will deal with the issues arising in relation to your client later on today, at a time of a break."* Later that day, Mr Grainger sought to provide an explanation for the appellant's behaviour. He indicated that the appellant had not meant any disrespect or discourtesy and assured the court that the behaviour would not be repeated. The judge then proceeded to rule that the appellant was in contempt of court. He said that the appellant had been disruptive on a number of occasions during the trial and he had excluded him from court after he saw him throwing something at a co-defendant. The judge found that, notwithstanding what counsel for the appellant had said, it was a clear and now admitted contempt of court.

[43] On appeal, Mr. Grainger explained that although he was aware that summary proceedings for contempt might have been at the forefront of the judge's mind, he proceeded on the basis that the initial discussions were "preliminaries". In other words, there would be the opportunity to provide an explanation and an apology, after which the judge might or might not proceed with a contempt hearing. He submitted that the speed and short-circuited nature of the process was not something that he had anticipated. Mr Grainger submitted that because he and the appellant had not been put on notice that these were contempt proceedings and the appellant had not had the allegation of contempt put to him, he had not had the opportunity to admit or deny the allegation. Mr Grainger further submitted that he was taken by surprise by the sentence imposed and wanted an opportunity to make submissions as to the appropriate sentence.

[44] On behalf of the prosecution, Mr. Gardner submitted that Mr. Grainger's submissions amounted to an admission of contempt. He agreed that the procedure required by Rule 48 of the Criminal Procedure Rules might not have been followed completely, but, nonetheless, the spirit of the rules had been complied with. Mr. Gardner submitted that, in effect, it was to be inferred from all the circumstances, that the judge proposed to proceed with a contempt hearing. He submitted that the judge had afforded counsel sufficient time to take instructions and to prepare submissions, including as to punishment.

[45] In allowing the appeal, Flaux LJ found that the judge erred procedurally in convicting and sentencing the appellant. He said at paragraphs 9 and 10:

> *"9. Notwithstanding Mr Gardner's submissions,* ***we consider that the real difficulty in the present case is that the judge did not at any stage, either on the Friday evening or when the court reconvened on the Monday, or when he dealt with the matter later in the day, say in open court, in front of the appellant and his counsel, that he considered the appellant to be in contempt of court and why, or that he would hold a contempt hearing later that day****, let alone provide the explanation required by rule 48.5(2) and 48.6(3) of the Criminal Procedure Rules. These provide:*
>
> > *48.5(2) Unless the respondent's behaviour makes it impracticable to do so, the court must --*
> >
> > > *(a) explain, in terms the respondent can understand (with help, if necessary)-*
> > >
> > > > *(i) the conduct that is in question,*
> > > >
> > > > *(ii) that the court can impose imprisonment, or a fine, or both, for such conduct,*
> > > >
> > > > *(iii) (where relevant) that the court has power to order the respondent's immediate temporary detention, if in the court's opinion that is required,*
> > > >
> > > > *(iv) that the respondent may explain the conduct,*
> > > >
> > > > *(v) that the respondent may apologise, if he or she so wishes, and that this may persuade the court to take no further action, and*

(vi) that the respondent may take legal advice; and

(b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise.

48.6(3) On the review, the court must--

(a) unless the respondent is absent, repeat the explanations required by rule 48.5(2)(a); and

(b) allow the respondent a reasonable opportunity to reflect, take advice, explain and, if he or she so wishes, apologise."

10. ***We do not consider it sufficient that the appellant's counsel was aware that summary contempt proceedings may have been at the forefront of the judge's mind, as he candidly accepts in his Advice. In particular, we accept Mr Grainger's explanation that, whilst this was the case, he thought that what was taking place on the Monday were "preliminaries" - in other words, an opportunity for the appellant, through his counsel, to apologise for his behaviour, after which, if the judge nonetheless considered that there had been a contempt which should receive a sanction, he would hold a formal contempt hearing. Had the judge stated at any point prior to that hearing that he proposed to hold a contempt hearing on the Monday and explained the nature of the contempt, as he saw it, Mr Grainger would have had the opportunity to give advice to the appellant, to make submissions as to whether there was a contempt, including whether the clapping had been intended to be sarcastic and disrespectful of the judge, and as to mitigation, including the appropriate punishment if it was a contempt.***" [emphasis added]

[46] A point of distinction between the factual scenario in **R v Naim Khan**[25] and the present case is that in this case, the judge went into great detail in explaining the appellant's conduct and the possible consequences arising therefrom (see paragraph 5 above). More importantly however, the decision in **Naim Khan** bears an uncanny resemblance with respect to the misapprehension of defence counsel that they were at the preliminary stage of a possible contempt matter. In this case, this is evident from the transcript of the proceedings where Mr. Ramdeen and Mr. Welch both framed the matter to be discussed at the hearing, in accordance with their understanding, namely, that the judge had requested preliminary submissions on the issue of whether the

[25] Ibid.

Facebook posts were sufficient to be considered a contempt of court (see paragraphs [29] and [30] above). In **Naim Khan**[26], this procedural shortcoming was sufficient for the Court of Appeal to set aside the judge's orders.

[47] Most critically, the judge, at no point throughout the initial proceedings, sought to correct the impression held by both Mr. Ramdeen and Mr. Welch. Even if the judge had considered the hearing on October 14, 2016 to be a formal contempt hearing/an actual contempt of court trial, at the point where Mr. Ramdeen and Mr. Welch indicated that they believed the hearing to be one on preliminary issues, to determine the scope of the alleged contempt of court, the judge, at that stage was obligated to correct such a misapprehension and inform them of his intention. Indeed, Mr. Welch had explicitly stated on this issue, **"*It appears as though the Court is really seeking preliminary submissions, and I will be guided if I am wrong…*"** In the absence of any contrary indication by the judge, the result was that the October 14 hearing was the sole hearing upon which the appellant's guilt was determined.

[B] The absence of a plea from the appellant

[48] Due to the failure of the judge to articulate the contempt of court charges against the appellant, he was not given an opportunity to enter a plea. However, Mrs. Honoré Paul has submitted that there was an admission of the acts on the part of Mr. Ramdeen on behalf of the appellant.

[49] Mr. Ramdeen, in the Transcript of the Proceedings dated October 14, 2016 at page 30, lines 15-28, said:

> *"Now My Lord, once cannot get a clearer expression of someone accepting the authority of the Court over these proceedings. Because what this does is that it is an expression by my client that if what the witness continues to do continues, then he will invoke the jurisdiction that undoubtedly My Lord has over these proceedings to do what he considers to be right and just in the circumstances.*

[26] Ibid.

So far from being a criticism or an affront, or a challenge to the authority of the Court, what my client has simply done in this case, My Lord, is to express the frustration that every single citizen of this country who is a litigant before the Court expresses as to the pace at which the justice wheels turns in our country." [emphasis added]

[50] In our view, even if it could be accepted that what Mr. Ramdeen said constituted an admission of the appellant's conduct, which we do not, the judge had the responsibility to ensure that the appellant was accorded the essential elements of procedural fairness. Such a statement by Mr. Ramdeen, although on the face of it capable of narrowing the scope of the enquiry into the alleged contempt, could not have negated the judge's responsibility to hold a full contempt hearing, to formally articulate the charge and to take a plea to the charge. We are of the view that Mr. Ramdeen's statements did not constitute an unequivocal admission of guilt on the appellant's part. His statements must be interpreted in the context of the general preliminary discussion which was ongoing at the time. Those statements could not amount to an unequivocal guilty plea by the appellant in a formal contempt hearing.

[51] It is well accepted that where a defendant is present in court, a guilty plea must be entered by the defendant personally and not by a legal representative acting on his behalf. In **R v Roy Williams**[27], Shaw L.J., in referring to the decision in **R v Ellis**[28], said:

"There the critical issue was whether a plea of guilty tendered by counsel and not by the accused himself could be regarded as an effective and binding plea. It is of course plain to see why it cannot and should not be so regarded. It is a plea which is self-incriminatory and self-incrimination cannot be vicariously accomplished. Any contrary view would be fraught with manifest dangers. Injustice rather than justice would be the likely products of a principle which permitted indirect delegated confessions of guilt.

No qualification of or deviation from the rule that a plea of guilty must come from him who acknowledges guilt is thus permissible. A departure from the rule in a

[27] [1978] Q.B. 373.
[28] (1973) 57 Cr. App. R. 571.

> ***criminal trial would therefore necessarily be a vitiating factor rendering the whole procedure void and ineffectual.*** *The court so affirmed in Reg. v. Ellis where counsel had assumed the function of pleading guilty on behalf of his client."* [emphasis added]

[52] Accordingly, in criminal trials, a departure from the rule that a guilty plea must come from the defendant himself would necessarily impair the validity of such proceedings.

[C] ***The appellant was deprived of the opportunity of making submissions***

[53] The October 14 hearing was the sole hearing upon which the appellant's guilt was determined, without him being afforded the opportunity to respond to the complaints against him. In this case, the contempt of court proceedings were criminal in nature and accordingly, the full range of safeguards available to a defendant in a criminal trial existed. This proposition has been referred to in Commonwealth cases.

[54] In the Canadian decision in **United Nurses of Alberta v The Attorney General for Alberta**[29], McLachlin J, in delivering the majority decision of the court, on the limited issue of cross-examination in criminal contempt cases, said:

> *"**The contempt proceeding is a criminal proceeding, and the full protections availing an accused on a criminal trial are available**. This includes the right of cross-examination…"* [emphasis added]

[55] In the Australian decision in **Sidebottom v The Queen**[30]**,** the Supreme Court of Victoria heard proceedings which revolved around the appellant's failure to comply with certain Court orders. On appeal, the appellant contended, inter alia, that he was denied procedural fairness with respect to the finding that his contempt was 'contumacious', in circumstances where that

[29] [1992] 1 S.C.R. 901.
[30] [2018] VSCA 280.

allegation was not put in cross-examination, and the judge in an earlier interlocutory hearing had indicated that the relevant contempt was 'civil' in nature. The Court said:

> ***"Although the contempt in this case arose in the course of a civil proceeding, since it was punishable by imprisonment, the safeguards similar to those appropriate in criminal proceedings applied. So much is clear from Doyle v The Commonwealth (1985) 156 CLR 510, 516, where it was observed that:***
>
> > ***... a proceeding for committal may result in a very serious interference with the liberty of the subject — indefinite confinement. Safeguards similar to those appropriate in criminal proceedings therefore apply. Speaking generally ... the charge must be distinctly stated in the notice of motion or other application and the person sought to be committed must be given a proper opportunity to answer the charge. Some aspects of the general principle were mentioned in the judgment of Williams ACJ, Kitto and Taylor JJ in Coward v. Stapleton in the following passage:***
> >
> > > ***... 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 (1868) LR 2 PC 106; R v Foster; Ex parte Isaacs [1941] VLR 77. 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. 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.***
>
> ***Resting as it does upon accepted notions of elementary justice, this principle must be rigorously insisted upon.***

> ***In our view, the judge unfortunately punished the appellant for a charge of contempt that he had not been called upon to answer. We consider that the exercise of the judge's sentencing discretion was vitiated as a result…***
>
> *…*
> *…*
>
> ***Given the nature of proceedings — and the safeguards that should ordinarily attend a criminal contempt — we are of the view that procedural fairness dictated that, had the judge thought to discount the appellant's apology on the basis that it was lacking in bona fides, that possibility should distinctly have been raised with the appellant so that he could address it."*** [emphasis added]

[56] In this case, no formal evidence of the actions attributed to the appellant were adduced by either party. What the judge had before him were the Facebook posts and the submissions on both sides as to whether those posts rose to the level of contempt of court. Had the judge indicated that he intended to hold a formal contempt hearing, the appellant would have been better placed to respond to the allegations against him. An ineluctable consequence of not knowing the true nature of the proceedings was that the appellant was deprived of the opportunity of making submissions on fact and/or law on the adequacy of the material referred to by the judge.

[D] The appellant was deprived of the opportunity to adduce contradictory evidence

[57] In a proper contempt of court hearing, one of the protections afforded to the appellant would have been that of entering a plea to the charge. If he had entered a plea of not guilty, he would have had the opportunity to adduce contradictory evidence, if he so desired, for example, the privacy settings which were engaged on his Facebook profile at the times when the posts were made. Such evidence might have factored in to his culpability, and/or to the issue of mitigation.

The safeguards to ensure procedural fairness in the summary procedure in criminal contempt of court proceedings

[58] The principal justification for the adoption of the summary procedure is the urgency or "practical necessity" of proceeding immediately[31] in order to protect the due administration of justice. Lawton LJ in **Balogh v St. Albans Crown Court**[32] stated that this summary jurisdiction should only be used for the purpose of ensuring that a trial which is in progress or which is about to commence can be brought to a proper and dignified end without disturbance and with a fair chance of just verdict or judgment. In the decision in **R v Joseph Griffin**[33], Lord Mustill LJ said that the form of summary criminal contempt of court proceedings is a matter for the judge himself. At page 67, Mustill LJ said:

> *"In proceedings for criminal contempt* ***there is no prosecutor, or even a requirement that a representative of the Crown or of the injured party should initiate the proceedings. The judge is entitled to proceed of his own motion. There is no summons or indictment, nor is it mandatory for any written account of the accusation made against him to be furnished to the contemnor. There is no preliminary enquiry or filtering procedure, such as a committal. Depositions are not taken. There is no jury. Nor is the system adversarial in character. The judge himself enquires into the circumstances, so far as they are not within his personal knowledge He identifies the grounds of complaint, selects the witnesses, and investigates what they have to say (subject to a right of cross-examination), decides on guilt and pronounces sentence.*** *This summary procedure, which by its nature is to be used quickly if it is used at all, omits many of the safeguards to which an accused is ordinarily entitled and for this reason it has been repeatedly stated that the judge should choose to adopt it only in cases of real need."* [emphasis added]

[59] Several other authorities illustrate an equally compelling point which is that the offence of contempt of court, being a criminal offence, has attached to it safeguards to ensure procedural

[31] See **R v S** [2008] EWCA Crim. 138 at para. 19.
[32] [1975] 1 Q.B. 73.
[33] **Griffin** (n. 16).

fairness. Although triable by way of summary procedure, a primary consideration must be to ensure the rights and interests of defendants.

[60] In the decision in **Balogh v St. Albans Crown Court**[34], the defendant, a solicitors' clerk who had attended a trial, set out to release laughing gas into the court. He was caught before he achieved his end. The defendant appealed his committal for contempt. Lawton LJ said at page 91:

> *"For nearly the whole of this century those accused of contempt of court, which is a common law misdemeanour, have been tried and sentenced in a way which is far removed from the ordinary processes of the law. The last reported case of a trial on indictment was in 1902: see* Rex v. Tibbits *[1902] 1 K.B. 77**. No precise charges are put; sometimes when the judge has himself seen what happened, the accused is asked to explain his conduct, if he can, without any witnesses being called to prove what he has done; often the accused is given no opportunity of consulting lawyers or of an adjournment to prepare a defence; and there is no jury. The judge, who may himself have been insulted or even assaulted, passes sentence. Some aspects of proceedings for contempt of court, in Blackstone's phrase, are "not agreeable to the genius of the common law": see* **Commentaries***, 16th ed. (1825), Book IV, p. 287. Yet judges have this unusual jurisdiction."*

[61] Lawton LJ also said at pages 92-94:

> *"**In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or judgment. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with by a motion to commit under R.S.C., Ord. 52, or even by indictment.***
>
> *…*
> *…*
>
> *I know from my own experience as a trial judge that conduct amounting to contempt of court can happen, indeed usually does happen, unexpectedly. If the judge is to*

[34] **Balogh** (n. 32).

protect effectively the proper administration of justice, he has to act at once. He may have no time for reflection and he seldom has time to consult colleagues. He has to act on his own assessment of the situation. In my judgment, if he does decide to act summarily, this court should be slow to say that he should not have done so."

[62] In the decision in **Re: Yaxley-Lennon**[35], Lord Burnett of Maldon CJ in giving the judgment of the court said at paragraph 27:

*"**It has long been the case that a judge may, but not must, deal with a contempt committed in the face of the court summarily, albeit after ensuring a fair hearing.** So too may a judge deal summarily with a contempt which amounts to an interference in the course of the proceedings he or she is conducting. The power to punish such contempt arises under the common law in addition to statute. Its purpose is to equip the court with the means to protect its processes and penalise those who seek to impede to subvert them. Common examples include noisy and intemperate interruptions from the public gallery and witnesses improperly refusing to answer questions during the course of giving oral evidence. Because of the need to respond quickly and decisively in such cases, the court is empowered to act summarily and, if necessary, impose a term of immediate imprisonment…*

[63] However, as Lord Burnett of Maldon CJ went on to say at paragraph 29:

*"**Procedural fairness has always been a requirement in contempt proceedings, including the need to particularise the alleged contempt at the outset. An alleged contemnor must know what it is he has done which is said to amount to a contempt of court so that he can decide whether to accept responsibility or contest the allegation.** Whilst that is a common law requirement, it chimes with article 6(3) of the European Convention on Human Rights which requires, amongst much else, that anyone charged with a criminal offence must '(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; and (b) to have adequate time and the facilities for the preparation of his defence."*

[35] **Re: Stephen Yaxley-Lennon** (n. 11).

[64] Two main themes emanate from the authorities highlighted above. The first is that the nature of the proceedings in summary contempt of court cases is a matter for the judge and generally ought to be expeditiously carried out. Second, although summary contempt of court proceedings may take any form, it is crucial nonetheless for the judge to meticulously adhere to the core elements of procedural fairness.

[65] In our view, the judge omitted to set out the procedure of the contempt hearing in a way which met with the cardinal principles of fairness. The gaps in the general contempt proceedings constituted material irregularities. The contempt proceedings transitioned from a debate between counsel as to the nature and scope of the alleged actions to a finding of guilt just over one year later. The appellant was not afforded a trial, no evidence against him was formally led and he was not given an opportunity to advance submissions or to give evidence.

[66] We also wish to make reference to what we respectfully consider to be a rather curious feature of this case. The judge, in inviting submissions on the issue of contempt, was primarily concerned with the possibility of jurors becoming contaminated as a result of the Facebook posts. However, the judge gave his ruling on the matter on October 26, 2017, just over a year later, after the substantive murder trial had long ended. The judge in his ruling also spoke of the urgency of the matter. He said*, "At the time of the Court's enquiry, there was indeed a sense of urgency in the Court's embarkation upon addressing an intervening event which had the potential to negatively impact the fairness of the trial."*[36] The judge went on to say that, *"It was imperative and appropriate that the issue of the possible contempt of court by Defence Counsel and this Court's decision on the matter, should be delayed until well after the sentencing of the five accused. It would have been wholly inappropriate and untenable to seek to adjudicate on this matter during the currency of the trial.*" The time gap between the submissions and the ruling stands in sharp contrast to the procedure which the judge adopted, given his articulated concerns as to the possible effect of the Facebook postings on the jurors.

[36] **The Judge's Ruling on the Contempt of Court Proceedings** at page 9, lines 41-49.

GUIDANCE

[67] This is one of the rare cases that has come on appeal on the issue of contempt of court. We accordingly take this opportunity to highlight certain procedural safeguards in adjudicating contempt of court cases by summary procedure, the importance of which cannot be gainsaid. We are mindful that the United Kingdom currently has in place certain safeguards relevant to contempt of court proceedings which are contained in Section 48 of the Criminal Procedure Rules (see paragraph [37] above). These rules represent "best practice" and spell out the minimum standard required.

[68] Several cases have highlighted the relevant principles which trial judges ought to adhere to when dealing with summary contempt of court proceedings. We have highlighted three cases below.

[69] In the decision in **R v Ras Grant**[37], the appellant was summarily convicted of contempt of court. On appeal, Justice Openshaw said at paragraphs 10-11:

> *"10. We turn then to examine the relevant principles which the judge should have applied.* ***There are currently no procedural rules dealing with summary contempt, but over the years the courts, particularly in R v Moran 81 Cr App R 51, have established certain principles which should ordinarily be observed when dealing with contempt cases. These include that: (a) a judge has the power to order the immediate arrest and detention of the suspected offender; (b) the decision to try a suspected offender summarily should be taken only when it is necessary to do so to preserve the integrity of the trial or the dignity of the court; (c) such a decision should never be taken too quickly and that time should always be allowed for reflection, if necessary overnight; (d) the suspected offender must be distinctly and clearly told what acts or conduct are alleged against him; (e) he should be allowed the opportunity of legal representation; (f) he should be allowed a reasonable opportunity properly to investigate the circumstances; and (g) the contemnor should be given an opportunity to apologise, which in an appropriate case might obviate the need for further action. We add that no-one should be convicted of***

[37] **Grant** (n. 12).

contempt unless they distinctly admit it, or if they do not unless it be proved against them beyond reasonable doubt.

11. We turn to apply these principles to this case. The judge was here faced with a disruption of the trial as the jury were delivering their verdicts. It was imperative that he acted urgently and decisively to restore order, which he did. ***We have no doubt that he was right to deal with this incident summarily. However, we think that he was wrong not to have enquired from the appellant himself whether he admitted the conduct alleged against him and the fact that the conduct amounted to contempt of court. In effect, he assumed his guilt and proceeded accordingly. It was also unfortunate that the judge did not mention the fact that he apologised until during the course of his sentencing remarks****…*

…

…

. ***It may be that even if those procedural safeguards had been in place the judge would have found him guilty, but in the absence of these safeguards we do not consider the finding of guilt to be safe and the conviction for contempt of court must be and is quashed…"*** [emphasis added]

[70] In **R v Moran**[38], Lawton LJ said:

"The following principles should be borne in mind. ***First, a decision to imprison the man for contempt of court should never be taken at once. The judge should give himself time for reaction as to what is the best course to take. Secondly, he should consider whether that time for reaction should not extend to a different day because overnight thoughts are sometimes better than thoughts on the spur of the moment. Thirdly, the judge should consider whether the seeming contemnor should have some advice.*** *…* ***Giving a contemnor an opportunity to apologise is one of the most important aspects of this summary procedure, which in many ways is Draconian. If there is a member of the Bar in court who could give advice, a wise judge would ask that member of the Bar if he would be willing to do so."*** [emphasis added]

[38] **Moran** (n. 13).

[71] In the decision in **Mirza Zukanovic v Magistrates' Court of Victoria at Moorabbin**[39] the Supreme Court of Victoria at paragraph 11 set out the following steps to be taken by a Magistrate prior to the determination of a charge for contempt of court:

> *"**First, to set out the charge. This could be done either orally or in writing. What was essential was that Mr. Zukanovic understood the charge the Magistrate was laying**.*
>
> ***Second, to afford Mr. Zukanovic the opportunity to consider the charge and if necessary, to seek further advice, or an adjournment or, perhaps, further particulars of the charge.***
>
> ***Third, to give Mr. Zukanovic the opportunity to state whether he pleaded guilty or not guilty to the charge.***
>
> ***Fourth, in the event that Mr. Zukanovic pleaded not guilty to the charge, to give him the opportunity to present evidence and to make submissions relevant to the determination of the charge.***
>
> *Then, having adopted this procedure, the Magistrate was required to be satisfied beyond reasonable doubt that Mr. Zukanovic was guilty of the charge. In doing so, he was required to consider carefully all the evidence and keep at the forefront of his mind the unusual role he was undertaking in this process."* [emphasis added]

[72] The general principles emanating from these cases, which are context sensitive, are:

(i) In contempt proceedings, the decision to try an alleged contemnor summarily should only be taken in order to preserve the integrity of the trial and/or the dignity of the court;

(ii) The decision to proceed summarily should not be made hastily and it is important in appropriate circumstances to allow time for reflection on the alleged acts;

[39] **Mirza Zukanovic** (n. 14).

(iii) The alleged contemnor should be allowed a reasonable opportunity to properly investigate the circumstances;

(v) The alleged contemnor should be given an opportunity to apologise to the Court;

(vi) The charge must be put to the alleged contemnor and he must understand the charge;

(vii) The alleged contemnor should be allowed, as the context and the circumstance of the case dictates, the opportunity to obtain legal representation and advice;

(viii) The alleged contemnor must enter a plea;

(ix) If the alleged contemnor has pleaded not guilty, he must be afforded the opportunity to present evidence, if he wishes, and to make submissions of fact and of law; and

(x) Where applicable, if the alleged contemnor is an attorney-at-law, the judge should at least consider ***the possibility*** of whether a reference to the Disciplinary Committee of the governing legal body might be a viable option[40].

CONCLUSION

[73] In this case, the contempt of court procedure adopted by the judge was undoubtedly sanctioned to serve the due administration of justice. Inherent in such a procedure is the reasonable expectation by an alleged contemnor that the process would adhere to the underlying principles of natural justice, more particularly, that of a fair hearing. The judge's approach in these contempt of court proceedings did not meet the requisite standard of procedural fairness. Accordingly, the appeal in respect of the finding of contempt and in respect of the sentence imposed are allowed.

[40] See **R v Tamworth Justices Ex parte Walsh** [1994] C.O.D 277; [1994] T.L.R. 116.

DISPOSITION

[74] The appeal is allowed and the conviction and sentence as well as the order made by the judge are set aside.

RETRIAL

[75] The Facebook postings were made during the course of an ongoing trial, which has long been completed. The major risk posed by virtue of the offending act, which was uppermost in the judge's mind and a predominant feature of his reasoning process, that is, the possibility of the jury being influenced by the Facebook posts, no longer exists. The ordering of a retrial in this case would, in essence, be devoid of context as the factual scenario which led to these proceedings would be difficult to recreate. In light of this, we are of the view that the ordering of a retrial would be an academic exercise and one in futility.

[76] We are not unmindful that prima facie, the appellant's alleged conduct was potentially detrimental to the administration of justice, more so in the modern environment where the use of social media is prolific. We accept that this sort of conduct, prima face, cannot be countenanced and that there is a public interest in deterring it.

[77] With that in mind, we consider that on the face of it, the alleged acts on the part of the appellant were quite serious and warrant a referral to the Disciplinary Committee of the Law Association of Trinidad and Tobago. We accordingly so order.

_____

A. Yorke-Soo Hon, J.A.

_____

M. Mohammed, J.A.

DISSENTING JUDGMENT

Delivered by R. Narine J.A.

[78] I have read the lucid and erudite judgment of my brother Mohammed JA, who has taken the time to review the cases on contempt of court and to suggest certain guidelines for the benefit of trial judges to ensure a minimum standard of procedural fairness in dealing with cases of contempt of court. I endorse the guidelines as suggested by my learned brother.

[79] I agree with Mohammed JA that best practice should include the following:

- an identification of the specific charge(s) with sufficient particularity so as to inform the contemnor of the case he has to answer;
- an opportunity to plead to the charge(s);
- an opportunity to make submissions;
- an opportunity to give evidence in his defence and to cross-examine witnesses; and
- an opportunity to apologise to the court for his conduct.

The failure to identify the charge and enter a plea

[80] It is not in dispute that the trial judge did not formulate a charge and call upon the appellant to plead to it. However, it is clear on the record that the judge identified the specific conduct of the appellant which formed the basis of the contempt. It was not in dispute that the posts which were identified by the judge emanated from the appellant's Facebook page. Indeed, it would have been futile to do so, since the content of the Facebook postings clearly identified the appellant, the witness and the complaints of the appellant with respect to the witness' refusal to answer questions in cross-examination.

[81] In his invitation to counsel to make submissions, the judge particularized the contempt when he framed his inquiry to include whether the publications and conversations were calculated:

(i) to prejudice the trial,

(ii) to scandalize the court, and

(iii) to bring the administration of justice into disrepute.

[82] The purpose of formulating a charge in criminal proceedings, and in providing sufficient particulars of the charge, is to inform the defendant with sufficient clarity and precision, of the case that he has to answer. There could have been no doubt in the mind of the appellant of the case he was required to answer. The precise conduct which formed the basis of the charge was clearly brought to his attention. Whether such conduct was calculated to prejudice the trial, scandalize the court, or to bring the administration of justice into disrepute, was a matter of inference to be drawn from the publication itself, and all the circumstances of the case in the context of an ongoing murder trial in which the main witness for the prosecution was in the witness box being cross-examined.

[83] As a legal practitioner practicing in the criminal courts for some twenty years, the appellant could have been left in no doubt as to the case that he had to answer. The trial judge scheduled an entire day to hear the parties on the issue as to whether the appellant's conduct amounted to contempt. At no time was there any denial that the publications emanated from the appellant's Facebook page. In fact through his counsel the appellant appeared to take responsibility for the publications and offered an apology, though framed somewhat guardedly by counsel. The following extracts from the submissions of Mr. Ramdeen are relevant:

> *"Now, My Lord, I want to direct My Lord to the last post which I read, which is "Adjourned to Tuesday, and if it continues I will ask that the judge direct the jury to return a not guilty verdict." Now, My Lord, one cannot get a clearer expression of someone accepting the authority of the Court over these proceedings. Because what this does is that it is an expression by my client that if what the witness continues to do continues, then he will invoke the jurisdiction that undoubtedly My Lord has over these proceedings to do what he considers to be right and just in the circumstances.*
>
> *So far from being a criticism or an affront, or a challenge to the authority of the Court, what my client has simply done in this case, My Lord, is to express the*

frustration that every single citizen of this county who is a litigant before the Court expresses as to the pace at which the justice wheels turn in our country.

…

My Lord, if it is that My Lord has taken the view that anything that has been posted, whether it be by my client or My Lord comes to the view that it has been posted by my client, or any of responses or opinions or expressions by persons who would have responded to what my client has posted is in any way, or in any way cause My Lord concern as to the effect it may have on the trial, I, My Lord, on behalf of my client, express the view that that is very unfortunate, and I apologize if that has been the position of my client - - if that has been the position held by My Lord of the actions of my client."[41]

[84] It is not in dispute that the appellant was afforded an opportunity to get legal advice and to make submissions to the court through his counsel.

[85] In this case, as earlier noted the appellant did not deny the conduct which formed the basis of the contempt. The issue as to whether there was a risk of prejudice to the fairness of the ongoing trial, or to the administration of justice, was a matter of inference. The admission of the conduct was tantamount to a plea of guilty of the contempt. What remained could be dealt with through submissions made on behalf of the appellant. In this regard Mr. Ramdeen sought to persuade the court that the appellant was exercising his constitutional right to freedom of expression, and in so doing he did not criticize or challenge any ruling of the court, nor did he encourage anyone to do so.

[86] The fact of the Facebook postings having not been disputed, it is difficult to see what evidence the appellant would wish to call to contradict the case against him, or what witnesses he would wish to cross-examine. He was in fact represented by counsel, who appeared to admit the conduct and offered an apology, albeit qualified, on his behalf. In the context of this matter, it is not surprising that there was no request to call evidence on the appellant's behalf.

[41] Transcript dated October 14, 2016 at page 30 lines 12 – 28 and page 30, line 50 to page 31, line 10.

[87] While it is true that the judge did not follow best practice in dealing with the issue of contempt, it is clear on the evidence that the appellant suffered no prejudice or unfairness as a result.

It follows that I would have dismissed this appeal.

RETRIAL

[88] A further issue arises on the decision of the majority not to order a retrial on the basis that a retrial would be merely an academic exercise, and "devoid of context" since the contempt occurred during the course of a criminal trial which has since been completed. The rationale appears to be that the risk of the jury being improperly influenced, no longer exists. What the majority opinion does not consider is the risk to the administration of justice and to the fairness of trials in the future, if this type of conduct is not firmly addressed.

[89] The matters which an appellate court should consider in deciding whether to order a retrial were set out by the Privy Council in **Reid v R**[42]. In setting out the considerations Lord Diplock was careful to note that the list of considerations identified is not exhaustive. The considerations include:

(i) the public interest in ensuring that persons who are guilty of serious crimes should not escape from justice because of technical errors made by judicial officers;
(ii) the seriousness and prevalence of the offence;
(iii) the expense and length of time involved in a fresh hearing;
(iv) the length of time that will have elapsed between the offences and the new trial;
(v) whether the evidence would be available at the retrial; and
(vi) the strength of the case for the prosecution.

[42] (1978) 27 WIR 254.

[90] The application of these considerations to this case clearly supports a retrial for the following reasons:

(i) The public clearly has an interest in ensuring that this matter is retried. The potential risk to the administration of justice, particularly in jury trials, by the use of social media to attack the credibility of witnesses, is enormous. The use of social media is now so widespread, that the court must act decisively to ensure that this type of conduct does not become prevalent.

(ii) The offensive conduct in this case is serious, and poses a substantial risk to the administration of justice, if left unchecked.

(iii) A retrial will not involve a disproportionate use of the court's time and resources, having regard to the fact that the offending conduct has not been denied.

(iv) Just over two years have elapsed since the matter was concluded. By local standards this is a comparatively short period of time.

(v) There is no question that the evidence will be available at a retrial.

(vi) There is no doubt that the case against the appellant is strong. No issue has been raised as to the origin of the Facebook postings. What remains will probably be issues of mitigation.

[91] In **Reid**, Lord Diplock noted that a retrial should not be ordered merely to give the prosecution an opportunity to cure evidential deficiencies in its case. The Board allowed the appeal, on the basis that there was a serious deficiency in the evidence of the sole identifying witness. No retrial was ordered in the circumstances. In disposing of the appeal Lord Diplock noted at page 258:

> *"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury."*

[92] The issues in this appeal involve purely procedural errors of the judge. They do not go to the substance of the case against the appellant.

[93] For these reasons in my view, a retrial should have been ordered by the majority.

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R. Narine, J.A.