J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 255/77

BEFORE: THE HON. MR. JUSTICE HENRY, J.A.
THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE CARBERRY, J.A.

R. v. ERIC FRATER

Mr. Berthan Macaulay, Q.C., Mr. Bentley Brown,
Mr. Rudolph Francis, Miss Hilary Phillips,
Mrs. M. Macaulay, Mrs. G. Saunders,
and Mr. Lloyd Shackleford for Appellant.

Mrs. M. McIntosh for the Crown.

October 26, 27, December 11, 1978
October 12, 1979.

HENRY, J.A.

The appellant, an attorney-at-law, appeared in the St. Catherine Circuit Court for Michael Miles one of two persons charged with murder. One of the prosecution witnesses was the father of the deceased. During the course of cross examining this witness the appellant asked certain questions designed to show that the deceased and the accused had been friends and had in fact at one time been jointly charged for theft and acquitted. At the close of the re-examination of the witness the learned trial judge asked some questions relating to the association between the deceased and the accused. Finally the following dialogue ensued:-

"His Lordship: The last question I want to find out from you now. After the trial between -- let me write it down and you listen to the question. Listen carefully. After the trial of your son and Miles, did Miles continue to visit your son?

Witness: No.

Mr. Frater: M'Lord, I am objecting to this. I want to put my protest to this trend of questioning.

His Lordship: What are you objecting to?

Mr. Frater: I am objecting to that in open Court before the jury in a matter that you have said that is not relevant; now you are making it relevant.

His Lordship: I said nothing about it. It is not relevant? If you take your seat, please.....

Mr. Frater: I would like you to answer my question.

His Lordship: I am the Judge here.

Mr. Frater: But I am representing two men here and I have to stand up and protect them and I don't want any inference that should go to the jury that should not go and I want it recorded.

His Lordship: Everything is being recorded.

Mr. Frater: And that is why I am saying it. These people will have to come to a decision and I don't think that line of questioning is relevant.

His Lordship: You raised it and therefore I have to know what it is all about.

Mr. Frater: Not to the extent of the chap's Schooling.

His Lordship: Yes, what?

Mr. Frater: What answer would you expect from the person when you asked that?

His Lordship: You take your seat.

Mr. Frater: No, M'Lord, I am not sitting. This is something I would like you to straighten. I am an officer of the Court just as you.

His Lordship: You are obstructing the Court.

Mr. Frater: I am not sitting, I am standing for the men I am defending. You cite me. You can do anything. You lock me up as well; but I am standing up because that is unfair, that is not justice.

His Lordship: I am going to adjourn for ten minutes and when I come back you must show cause why I must not cite you for contempt.

Mr. Frater: You must do that, and I will show no cause for it."

After the adjournment the appellant was convicted of contempt of Court and fined $500.00. He appealed against that conviction.

At the hearing of the appeal three of the six grounds filed were abandoned. Counsel for the appellant placed reliance mainly on the fourth ground filed which was as follows:-

> "The learned trial judge although not required to state with that degree of particularity required by the Indictments Act, of the charge against the Appellant, for Contempt of Court, was wrong in law in failing to inform the Appellant of the specific charge against him and giving him an opportunity for explanation before arriving at his verdict."

In support of this ground he referred to re Pollard (1868) L.R. 2 P.C. 106, Chang Hang Kiu v. Piggott (1909) A.C. 312 Coward v. Stapleton 1953 90 C.L.R. 573, Appuhamy v. R (1963) 1 All E.R. 762, Commissioner of Police v. Wood (1956) 1 W.A.L.R. 71, re Bachoo (1962) 5 W.I.R. 247, Maharaj v. Attorney for Trinidad (1977) 1 All E.R. 411 and re Pershadsingh (1960) 2 W.I.R. 340. These cases all support the principle originally formulated in re Pollard that "no person should be punished for contempt of Court which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him." This principle contemplates two separate requirements (a) the formulation of a specific charge and (b) giving to the person charged an opportunity to answer that charge. Counsel for the appellant submitted that no specific charge had been formulated by the learned trial judge and indeed that upon reading his report and the transcript it is not clear whether the alleged contempt of Court was:-

(a) obstructing the Court,

(b) disobedience of a ruling of the Court or

(c) disobedience of a direction by the learned trial judge to counsel to take his seat.

In addition to the transcript of the dialogue already quoted, reference was made to the following passages in the report and the transcript of the judge's remarks respectively:-

> "At the last answer Mr. Frater sprang to his feet in a rage and said he was objecting to the questions being asked by the Court. He said he was also recording his protest to "this trend of questioning." I told him that the questions were relevant, that his objection was noted and that he should take his seat. He refused. Twice in clear and unmistaken terms he was ordered to take his seat so that the business of the Court could continue. He was given time to comply. Mr. Frater was adamant. He refused to take his seat, invited the Court to cite him for contempt and by his demeanour, indicated that he was going to stand his ground. He was given every opportunity to obey the ruling and to avoid the brand of contumacy in the course of proceedings during a trial. Having made his point that he was objecting to the questions of the trial judge and knowing that it was recorded, his only intention to remain standing thereafter like a statue was to obstruct the proceedings and to prevent any further questions from being asked."
>
> "No cause has been shown in this case. It is a wilful obstruction of the court and a wilful conduct to disobey the ruling of the Court, so I find him guilty of contempt."

In my view the last passage merely indicates the view of the learned trial judge that the disobedience of his ruling was wilful conduct and constituted wilful obstruction of the Court. Counsel for the appellant further submitted that disobedience of a direction by a judge to counsel to take his seat cannot ipso facto constitute contempt of Court if counsel is properly performing his duty of representing his client's interests, and that in the instant case there was no ruling by the learned trial judge or, in the alternative, if there was a ruling, counsel was merely endeavouring to ascertain or clarify the ruling. In my opinion the incident must be viewed in the light of the circumstances obtaining at the time. The appellant was objecting not to a question being put to a witness by opposing counsel but to a question or a line of questioning being put by the trial judge and the ground of the objection was that the questic or line of questioning was not relevant. It must, I think, be assume

that a trial judge will only put to a witness questions which he considers relevant. Where objection is taken to such a question on the ground of its relevance there can hardly be a "ruling" in the ordinary sense as on a determination of issues raised on submissions made by opposing counsel. Counsel making the objection can expect no more than that the judge will consider his objection before deciding whether to pursue the question or the line of questioning as the case may be. If therefore the judge intimates that the objection has been noted and asks counsel to take his seat this is tantamount to a ruling and ought to be an end of the matter unless counsel seeks the permission of the judge to elaborate the ground of his objection or to bring to attention some matter in support of his objection to which he has not previously referred. In the instant case there is no indication from the transcript that the appellant was pursuing any such objective when he refused to sit. In my view his conduct could be regarded as constituting a wilful obstruction of the Court. Counsel for the appellant has conceded that if the sentence "You are obstructing the Court" had appeared after the next sentence spoken by the learned trial judge "I am going to adjourn for ten munutes and when I come back you must show cause why I must not cite you for contempt" that would have been a sufficient specification of the charge of contempt of court being made against the appellant. To my mind the order in which the sentences appear is immaterial if together they specify the charge being made. The sentences are separated by what amounts to an interruption

by the appellant and in my view they ought to be read together. If, as I find, the specific offence charged against the appellant was distinctly stated, there can be no doubt that an opportunity of answering it was given to him. The learned trial judge adjourned the court for this purpose and on the resumption the appellant was represented by Counsel who made submissions on his behalf. In my view this ground of appeal fails.

The second ground argued was to the following effect:-

> "The learned trial judge..... did not cite the Appellant for Contempt of Court, but only required the Appellant to show cause why he should not be cited and proceeded wrongly on the basis that he had cited him for contempt."

The transcript discloses that the learned trial judge adjourned the Court for ten minutes saying....."when I come back you must show cause why I must not cite you for contempt." Upon the resumption he was addressed by Counsel on behalf of the appellant. At the end of that address he reviewed the incident and concluded by saying "No cause has been shown in this case.... I find him guilty of contempt." In my view this was sufficient. Contempt in the face of the court is an offence which may be dealt with summarily and without notice, provided that the person charged is made aware of the substance of the charge against him. In my view this ground of appeal also fails.

Finally it was submitted on behalf of the appellant that the verdict is unreasonable and cannot be supported having regard to the evidence. I have already indicated that under the circumstances in my view the conduct of the appellant could be regarded as constituting a wilful obstruction of the court.

I would dismiss the appeal.

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KERR, J.A.(DISSENTING)

I have had the benefit of reading the draft of the judgment of Mr. Justice Henry, J.A., and I am appreciative of his helpful inclusion of the relevant portions of the transcript and his clear and concise review of the arguments of the Appellant's Attorney. I regret, however, that for the reasons set out herein I must perforce dissent from his conclusion that there "had been a sufficient specification of the charge of contempt of Court being made against the Appellant."

The verbal exchanges between Bar and Bench ended on the following note:-

"His Lordship: You take your seat.

Mr. Frater: No. M'Lord, I am not sitting. This is something I would like you to straighten. I am an officer of the Court just as you.

His Lordship: You are obstructing the Court.

Mr. Frater: I am not sitting, I am standing for the men I am defending. You cite me, you can do anything. You lock me up as well; but I am standing up because that is unfair, that is not justice.

His Lordship: I am going to adjourn for ten minutes and when I come back you must show cause why I must not cite you for contempt.

Mr. Frater: You must do that, and I will show no cause for it."

Had there been but a single utterance or one Act - then "you are obstructing the Court" could only be referrable to that utterance or act - but here there was dialogue of swift "give and take" as portrayed by the transcript. In any event when those words were used, the question of appellant being cited for contempt had not been

bruited - and it was after that that he indulged in his disconcerting display of heroics. Accordingly, when the learned trial judge said "I am going to adjourn etc." that statement cannot reasonably be interpreted as a citation for contempt or the informing of the appellant of the specific charge against him, but rather as no more than an imprecise statement of an intention. At that stage, the question might have been asked - "What is the contempt in contemplation" Is it the flouting of a ruling of the Court? Is it persisting in an argument on a question of Law upon which the judge had given a final decision and made it clear no further argument would be entertained? Is it preventing the continuation of the proceedings by standing after being directed to take his seat? Is it insulting the Court by saying its ruling is unfair and unjust? Or is it the general conduct of the appellant embracing all facets of his utterances and behaviour?

It is of interest to note that after adjournment on resumption the transcript continues on page 2 with the judge dealing with submissions from the Appellant's Attorney. It is obvious that the record is incomplete and a portion relating to what transpired on resumption is missing. Accordingly, I turn to the judge's report to the Registrar furnished in accordance with the provisions of Section 34(3) of the Judicature (Appellate Jurisdiction) Act.

On page 1 thereof the learned trial judge reviewed the relevant history of the case in which the Appellant was appearing as attorney for one of the accused. On page 2 under the heading - "Genesis of the Contempt" he vividly described the appellant's style of advocacy thus:-

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> "Mr. Frater has his special method of cross-examining a witness. He is tedious, talkative, and irrelevant most of the time. A hint from the bench is generally rejected as being an 'interference.' In order to project his own image and to show his prowess as an advocate he asked questions to show:"

and then illustrative of that style included the type of questions put:-

> "The note of the critical questions is in this form:-
>
> Q. Did you know that your son was in trouble?
>
> A. I heard so.
>
> Q. Was your son and Miles jointly charged with theft?
>
> A. Yes, sir.
>
> Q. Did you ever hear your son and Miles quarrel?
>
> A. No, sir."

The learned judge's report included thereafter his notes of the questions put by the Court to show the manifest relevance and unquestionable fairness of those questions.

The report then described the appellant's conduct thus:-

> "At the last answer Mr. Frater sprang to his feet in a rage and said he was objecting to the question being asked by the Court. He said he was also recording his protest to "this trend of questioning." I told him that the questions were relevant, that his objection was noted and that he should take his seat. He refused. Twice in clear and unmistaken terms he was ordered to take his seat so that the business of the Court could continue. He was given time to comply. Mr. Frater was adamant. He refused to take his seat, invited the Court to cite him for contempt and by his demeanour, indicated that he was going to stand his ground. He was given every opportunity to obey the ruling and to avoid the brand of contumacy in the course of proceedings during a trial. Having made his point that he was objecting to the questions of the trial judge and knowing that it was recorded, his only intention to remain standing thereafter like a statue was to obstruct the proceedings and to prevent any further questions from being asked."

It is clear from this passage that the judge was of the view that prima facie the appellant remained standing with intent to obstruct and did obstruct the proceedings. But did the judge so tell

the appellant? It is not enough for the trial judge to have it in mind, he must unburden to the accused.

There is nothing in the transcript to show that there was such a communication to the appellant although it may be argued that he ought to have so known; but this in my view is not sufficient. There was a clear duty on the judge to tell him specifically so that he may answer specifically. Instead according to the transcript in coming to his verdict he adopted the appellant's Attorney's definition of contempt of Court and convicted the appellant for not "showing cause" and for the offence of a "wilful obstruction and a wilful conduct to disobey the ruling of the Court." But again I ask, "Did he tell the appellant he was being charged with disobeying a ruling of the Court?" and indeed, what "ruling?"

It seems to me that the appellant essayed to imitate the brave stand of Erskine in the case of the Dean of St. Asaph (1778-1784) Vol. 21 - S.T. 847. Valour without discretion is foolhardiness. With no intent to carp or cavil at any aspiring and ambitious attorney seeking the "bubble reputation" may I say in passing that there are examples of the brilliant advocacy of Erskine more worthy of emulation than his defiant stand in the Dean of St. Asaph's case.

Accordingly, while I deprecate the Appellant's conduct as depicted in the transcript and the judge's report, I am constrained to hold that "the specific offence against him has not been distinctly stated." That is an essential requirement as stated and re-affirmed in a number of cases - old as re Pollard (1868) L.R. 2 P.C. p. 106 - modern as Maharaj v. Attorney General For Trinidad and Tobago (1977) 1 All E.R. p. 411.

For these reasons I would allow the appeal.

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CARBERRY, J.A.

I have had the benefit of reading and re-reading carefully the draft judgments of Mr. Justice Henry and Mr. Justice Kerr, and after a long and careful study of the cases cited to us and of several others, I find myself, with some regret, obliged to agree with Mr. Justice Henry that there was here a contempt of court committed by the appellant, and that his appeal should be dismissed.

As there has been disagreement on this matter, I think it will be necessary for me to set out, I fear at some length, why I have reached the conclusion that I have arrived at.

First as to the context of this unhappy incident: two young men, Anthony Isaacs and Michael Miles were being tried at the Circuit Court held at Spanish Town for the murder of a third young man George Cooper on the 26th September, 1975. There was a sole eye-witness, a girl friend of the deceased, aged at the time of the incident about 15 years old, who in effect stated that while she and the deceased were eating an ice cream together at about 8:45 p.m. at night at an isolated spot two men approached, one she recognized as the accused Miles whom she had previously known for about two years before (as a friend of the deceased), and the other whom she pointed out at an identification parade held 5 weeks later as the accused Isaacs, Miles, she said, held her by the shoulders and spun her round away from the deceased, while the other man drew something hidden beneath his shirt, she heard an explosion and when she turned round she discovered that the deceased had been shot. He died shortly after.

There had been two previous trials, in one there had been misdirection and a new trial had been ordered, while in the other there had been a failure by the jury to reach agreement. It appears that the appellant Mr. Frater had represented Miles at the two previous trials, and was doing so (with Miss Tapper) for the third time, while Isaacs was represented by Mr. W. Bentley Brown. Understandably there must have been a great deal of tension on the part of the defence counsel. The appellant Mr. Frater, after a distinguished career in education had joined the Bar somewhat late in life, and we were told by his counsel that he had been admitted in 1974. His colleague Mr. W. Bentley Brown had considerably longer experience, while Miss Tapper was a relative newcomer. The Trial Judge was Hon. Mr. Justice U.N. Parnell, the Senior Puisne Judge, and a Judge of vast experience. But even he must have been affected by the tension of what he realized was the third trial: see his report of January 17, 1978, paragraph 2.

It appears that it was considered vital for the defence to establish that Miles, for whom Mr. Frater appeared, was a friend of the deceased, and hence it was argued, unlikely to take part in the cold blooded murder of the deceased: the eye-witness must have been grossly mistaken in her identification, or worse.

On the second day of the trial (December 6, 1977), it appears from the Judge's report that the Court was late in resuming, and Mr. Frater arrived even later. The father of the deceased was called to give evidence of the identity of the body, and had for all purposes finished his evidence when Mr. Frater arrived (he had had

car troubles). The witness was about to leave the box, but the Judge allowed Mr. Frater to cross-examine him (though his junior Miss Tapper had waived any questions). Mr. Frater directed his questions to establishing the friendship that had existed between the accused Miles and the deceased, to the visiting of the deceased's home by the accused, and to the fact that as recently as 1974, the two young men had been charged jointly with theft but had been acquitted, Mr. Frater having appeared for them at that trial.

At the close of this further cross-examination of the deceased's father by Mr. Frater with the permission of the Court, the learned Trial Judge himself asked the witness a few questions as to the friendship alleged to exist between Miles and the deceased, and more specifically if that "visiting" had continued after they had been jointly tried and acquitted in 1974. The deceased's father answered no.

Mr. Frater took exception to these questions, particularly to the last:-

> "Q: After the trial of your son and Miles did Miles continue to visit your son?
>
> A: No sir."

It was out of this short series of questions, some seven in all according to the Judge's report, that this unhappy incident arose.

I do not repeat the ensuing dialogue which appears in both of the preceding judgments, but I think that I ought to make a few remarks about it generally.

In the normal course of events cross-examination of a witness for the prosecution by defence counsel would be followed

by re-examination. In this case that process had already taken place: Mr. Frater's further cross-examination had been in effect by special leave, and though prosecution counsel would have had a right to re-examine on any further matter so brought out, it may well be that the learned Trial Judge did not see this as necessary, and that he thought it not inappropriate to ask a few questions himself at that stage.

This is not the first occasion nor is it likely to be the last when a few last minute questions by the Judge have elicited from a witness information deemed to be damaging by the counsel for the defence. This is within the experience of practically every defence counsel who has practised for some time, and it is something that all have had to learn to live with. It seems to me that the witness' answer must have caused some little surprise to all concerned, but the question was both natural and relevant. Experienced counsel would, to use a phrase drawn from boxing, "ride with the punch". He might ask for leave to ask a few further questions arising out of the reply to the Judge, with a view to softening or modifying the answer, or he might ignore it and gloss it over, but it seems to me, with respect, that to quarrel with the Judge in his own court for having dared to ask a question or series of questions was both bad tactics (it had the effect of hightening the significance of the answer) and also exposed counsel to what subsequently happened. Quarelling with the Judge is a tactic sometimes employed by practising counsel who have a bad case, but it is always a risky undertaking, and one in which those who use it have to walk a very tight line to avoid committing contempt of

court and ought to be very sure of the correctness of their ground in fact or law.

As to the right of a Judge to ask questions during the course of a trial, we were referred by Mr. B. Macaulay, Q.C., who appeared for Mr. Frater, to the case of Jones v. National Coal Board (1957) 2 Q.B. 55; (1957) 2 All E.R. 155 and to the judgment of (Lord) Denning L.J. therein. That judgment does set out very clearly and lucidly the role of the Trial Judge in our system of law, based as it is on the contest theory of litigation rather than an inquisitorial theory: but even so, "a Judge is not a mere umpire to answer the question: How's that? His object above all is to find out the truth, and to do justice according to law:....." Per Denning L.J. at p. 59 B, and again at letter G:-

> "The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; and to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a Judge and assumes the robe of advocate; and the change does not become him well....."

These comments were addressed to the role of the Judge in a civil case, but, mutatis mutandis, apply also to criminal cases: perusal of the case cited shows the extent to which the Trial Judge there fell victim to the tendency to intervene, though from the best of motives. It is not suggested that anything of the sort happened here, nor, as I understand it, that the questions asked here by Parnell J. justified the appellant in pursuing the course that he

did in the ensuing dialogue.

It has been argued however that in that exchange counsel was guilty at most of discourtesy to the Judge, and reference was made to Izuora v. The Queen (1953) A.C. 327; (1953) 1 All E.R. 827, in which their Lordships in the Privy Council pointed out that not every act of discourtesy to the court by counsel amounted to contempt. The first question that therefore arises is was the conduct of Mr. Frater conduct that can properly be placed over the line that divides mere discourtesy from contempt?

In addressing my mind to this question I think it useful to refer to the opinions expressed by two of the most distinguished Judges that have expounded the common law on this issue, the one in England, and the other in Australia. The first quotation is taken from the judgment of Lord Denning, the Master of the Rolls, in the case of Balogh v. St. Albans Crown Court (1975) Q.B. 73; (1974) 3 All E.R. 283 (C.A.) Lord Denning at p. 85 (B) - (E) said:-

> 'This power of summary punishment is a great power, but it is a necessary power. It is given so as to maintain the dignity and authority of the court and to ensure a fair trial. It is to be exercised by the judge of his own motion only when it is urgent and imperative to act immediately - so as to maintain the authority of the court - to prevent disorder - to enable witnesses to be free from fear - and jurors from being improperly influenced - and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt: see Reg. v Gray (1900) 2 Q.B. 36, 41 by Lord Russell of Killowen C.J. But properly exercised it is a power of the utmost value and importance which should not be curtailed.

> Over 100 years ago Earl C.J. said that ".....these powers, ... as far as my experience goes, have always been exercised for the advancement of justice and the good of the public": see Ex parte Fernandez (1861) 10 C.B.N.S. 3, 38. I would say the same today. From time to time anxieties have been expressed lest these powers might be abused. But these have been set at rest by section 13 of the Administration of Justice Act 1960, which gives a right to appeal to a higher court.
>
> As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in R.S.C. Ord. 52. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well."

The other Judgment to which I would respectfully refer is that of Dixon, J. in the case of R. v. Dunbabin, ex parte Williams (1935) 53 C.L.R. 434 at page 447. Dixon, J. there said:

> "The jurisdiction which we are called upon to exercise is one which cannot but be attended with some difficulty.
>
> It is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority. But it must be done by judicial remedies, and judicial remedies are necessarily administered by the Courts themselves. The Court must, therefore, undertake the task notwithstanding the embarrassment of considering what it should do in relation to an attack upon itself. There is no practicable alternative. It can but do its best to disregard all considerations except those which strictly relate to the question whether the publication amounts in law to a contempt. That question is whether, if permitted and repeated, it will have a tendency to lower the authority of the Court and weaken the spirit of obedience to the law to which Rich J. has referred."

Was there then in this case the need for the Judge to act immediately and of his own motion? Was it necessary to maintain the dignity and authority of the Court and to ensure a fair trial? To prevent disorder, to prevent jurors from being improperly influenced? Was Mr. Frater's conduct something that if permitted

and repeated, conduct which would have a tendency to lower the authority of the Court and weaken the spirit of obedience to the law? Did it interfere or tend to interfere with the course of justice? I think the answer to all these questions is yes.

As to the first, it would have been possible for the Judge to do what was done by the Trial Judge in R. v. Shumiatcher (1967) 64 D.L.R. (2d) 24; (1969) C.C.C. 272, where the Judge, being of the opinion that the counsel in that case was "needling" the Judge in the hope of provoking a judicial error from which his client in a manslaughter case might benefit on appeal, first continued the case through to the end, and on its conclusion, and on a separate date, had the counsel concerned cited before him for contempt and duly convicted and fined him $2,000.00 (the fine was reduced on appeal). I think that such a course while showing admirable judicial restraint might however be open to the criticism of being too coldly calculating, and that in this present case the incident which suddenly arose had to be dealt with there and then.

As to the necessity of maintaining the authority of the court and preventing the jury from being improperly influenced, much depends not only on the words said but also on the way in which they were said: Cyrus Wilson's case (1845) 7 Q.B. 984; 115 E.R. 759. As to this, the Trial Judge in his Report states that "Mr. Frater sprang to his feet in a rage". ..... "That Mr. Frater was adamant. He refused to take his seat, invited the Court to cite him for contempt and by his demeanour indicated that he was going to stand his ground." This assessment of the situation appears to be borne out in the portion of the shorthand note that is cited

in your Lordship's judgments.

Even if Mr. Frater thought, quite wrongly in my view, that the Trial Judge had erred in asking the questions that he did, it was unpardonable in these circumstances to defy the Judge and tell him "No, M'Lord, I am not sitting. This is something I would like you to straighten. I am an officer of the Court just as you .... I am not sitting, I am standing for the men I am defending. You cite me. You can do anything. You lock me up as well; but I am standing up because that is unfair, that is not justice."

Mr. Frater persisted in standing after having been told to take his seat and that his objection had been noted, and I think quite plainly made it clear that he was standing as a protest against what he regarded as injustice. He was defying the court, obstructing the carrying on of the case, and in effect attempting to silence the Judge in his own Court, telling him that he had no right to ask questions or at least those particular questions of a witness.

I think that Mr. Frater's conduct did cross over the line that divides mere discourtesy from contempt, and that it was deliberate conduct meant to challenge the authority of the Judge in his Court, and conduct for which to the end he remained unrepentant. As your Lordships have not referred to the culminating scene in this "drama" I think that it may be useful for me to do so in this judgment. After Mr. Frater's colleague Mr. W. Bentley Brown had addressed the Judge on his behalf, and the Judge had summed up the matter as he saw it, and was considering sentence, the following dialogue ensued:-

"MR. FRATER: I am prepared to take whatever the court pleases to offer. I am not begging for any mercy. I believe that what I did I did it properly in the interest of my client because of the nature of the information that was being elicited by the court and I have nothing more to say.

HIS LORDSHIP: And you have no .....

MR. FRATER: I was not disrepectful, and I have no intention of being disrespectful to the court, and I never am. But I believe it is my duty to be firm and fearless when it comes to the defence of my client and that is all I am doing; and whatever the court pleases to do I am willing to take it. I don't beat around the bush.

HIS LORDSHIP: And you don't admit that it is a contempt?

MR. FRATER: I don't think it is a contempt M'Lord.

HIS LORDSHIP: Well, that is what I have found.

MR. FRATER: That is what you have found. I agree, you are the Judge in your own cause. I have to accept your finding.

HIS LORDSHIP: I am a Judge in my own cause?

MR. FRATER: Well, that is what it is. You are trying me for contempt.

HIS LORDSHIP: You pay a fine of $500 or thirty days.

MR. BROWN: May he have time, M'Lord, since not even a cheque book is of any use if the cash was available.

HIS LORDSHIP: How much time you want Mr. Frater?

MR. BROWN: May I speak on his behalf because I couldn't recover from a shock like that if I had got one.

HIS LORDSHIP: What he said to me awhile ago is sufficient to send him straight to jail.

MR. FRATER: Well, M'Lord, if you choose to send me to jail you can. I am quite prepared to go in the interest of justice.

HIS LORDSHIP: Having come to this I thought he would recant and that he would .....

MR. BROWN: Beg, he is not a beggar, M'Lord.

MR. FRATER: I am not begging, I will never beg.

HIS LORDSHIP: How much time you want to pay the money?

MR. FRATER: I think I rather choose the sentence, M'Lord. I don't have the money to pay. This is a legal aid case.

MR. BROWN: I don't have the money to pay it.

HIS LORDSHIP: So you want the sentence?

MR. BROWN: M'Lord, I will pay the fine, if it is even for a month, although I am also legal aid.

HIS LORDSHIP: When the adjournment comes you sign a paper with your surety for a month.

MR. BROWN: Much obliged."

This passage took place when the learned Trial Judge was considering the sentence that he should impose for the contempt that he found had been committed. It is not strictly relevant to the issue of whether contempt had been committed before and whether the proper procedure had been followed. But it does I think show very clearly the state of mind of the appellant at the relevant time, and his motive in taking his objection to the Judge's questions.

> "I believe that what I did I did it properly in the interest of my client because of the nature of the information that was being elicited by the Court....."

Mr. Frater's original objection had been on the ground of relevance: it now appears that his real reason was that the information elicited was against the interests of his client. His conduct is understandable, but crossed over the line between permissible conduct of an advocate and contempt of Court. "Games-manship" between advocates may occur in practice, and where to draw the line may on occasion be difficult to determine with precision. But there is in my view no room for "gamesmanship" between the advocate and the Judge, and none for wrongly defying him in the conduct of justice in his court.

Since the passage in Jamaica of the Legal Profession Act (Act 15 of 1971) there has been fusion of the roles and

disciplines of the professions of Barrister and Solicitor: all are now termed "attorneys-at-law" and by Section 5 all are now "officers of the Supreme Court" and when "acting as a lawyer" (which having regard to the definition of "practise as a lawyer" means acting as a barrister or a solicitor or both) are "subject to all such liabilities as attach by law to a solicitor". The extent to which this implies the necessity of observing a more rigorous regimen than that formerly observed at the Bar is something that will have to be worked out over a long period of time, and no doubt on a case to case basis; but it does appear to me that the change must mean something. The Court in common law jurisdictions has always exercised a closer watch over the conduct of "solicitors" who were officers of the Court, than over the barristers who were not. All are now, by statute, "officers of the Court" and should conduct themselves accordingly.

On Friday the 29th December, 1978, acting under Section 12(7) of the Legal Profession Act, the General Legal Council published rules made on the 12th December, 1978, "The Legal Profession (Cannons of Professional Ethics) Rules". Cannon V, entitled "An attorney has a Duty to assist in maintaining the Dignity of the Courts and the Integrity of the Administration of Justice", contains, inter alia, the following:-

> "(a) An Attorney shall maintain a respectful attitude towards the Court, not for the sake of the holder of any office, but for the maintenance of its supreme importance, and he shall not engage in undignified or discourteous conduct which is degrading to the Court.
>
> (b) An Attorney shall encourage respect for the Courts and Judges.

(c) An Attorney shall not wilfully make false accusations against a Judicial Officer and shall support such officers against unjust criticisms.

(d) Where there is ground for complaint against a Judicial officer, an Attorney may make representations to the proper authorities and in such cases an Attorney shall be protected."

I would also draw attention to Cannon III, and Cannon IV. The former provides in (g):-

> "An Attorney in undertaking the defence of persons accused of crime, shall use all fair and reasonable means to present every defence available at law, without any regard to any personal views he may hold as to the guilt of the accused."

The latter provides in (c):-

> "An Attorney shall exercise independent judgment within the bounds of the law and the ethics of the profession for the benefit of his client."

It is praiseworthy that the attempt should be made to formulate cannons of professional ethics. They are not new, and though not officially formulated at the time that Mr. Frater had his "brush" with the Judge, I think that they existed even then. I can find nothing in them that justifies Mr. Frater's conduct in this matter. I would add that reference to "Legal Ethics", by Henry S. Drinker, (the Chairman of the Standing Committee on Professional Ethics and Grievances of the American Bar Association) published in 1953, shows that the American Bar Association's Cannon 1 is to the same effect as that in Jamaica, and a comment that he makes and a quotation that he cites at page 69 bear repetition:-

> "Although it is both the right and duty of a lawyer to protest vigorously rulings on evidence or procedure or statements in the judge's charge which he deems erroneous, nevertheless, when the ruling has been finally made, the lawyer must, for the time being, accept it and invoke his remedy by appeal to the higher court. He has no right to argue to the jury that the judge's charge or rulings do not represent the law, and for him to do so constitutes both a breach of his professional obligation and a contempt of court.
>
> The counsel in any case may or may not be an abler or more learned lawyer than the judge, and it may tax his patience and his temper to submit to rulings which he regards as incorrect, but discipline and self-restraint are as necessary to the orderly administration of justice as they are to the effectiveness of an army. The decisions of the judge must be obeyed, because he is the tribunal appointed to decide, and the bar should at all times be the foremost in rendering respectful submission."

It appears that in Canada, where the professions are also fused, the Cannons of Legal Ethics approved by the Canadian Bar Association are also in similar terms: see page 25 of "Legal Ethics, a study of professional conduct," by Mark M Orkin published in Canada in 1957. At page 23, by way of a preliminary to his review of the Canadian advocate's "Duty to the Court" Mr. Orkin cites Crompton, J. in The Queen v. O'Connell (1844) 7 I.L.R. 261 at p. 313:

> "He (the advocate), is a representative but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law, he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the Advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice, and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."

I would respectfully adopt these words. What was stated in 1844 appears still to be correct one hundred and thirty five years later.

I do not think that Mr. Frater was justified in his conduct in this matter. Not only was he not justified, he failed in his duty to himself and to the Court, and not only failed but his conduct constituted a contempt of the Court. It appears that the object of his outburst was because he thought it "in the interest of my client because of the nature of the information that was being elicited by the Court." An advocate's duty to his client does not extend to trying in this way to prevent the Trial Judge from asking pertinent questions in his Court with respect to a matter that he is trying. Mr. Frater, however, went further, shortly put, he defied the order of the Judge to sit, and invited him to cite him, if he dared. The Judge accepted this invitation. Mr. Frater's conduct did interfere or tend to interfere with the course of justice.

As I read your Lordship's judgments, there is agreement that Mr. Frater's conduct constituted contempt of Court, and what had divided your Lordships is the answer to the question "<u>were the proper procedures employed by the Trial Judge in citing Mr. Frater?</u>" This question can be perhaps be narrowed down still further: as I understand it, your Lordships are in general agreement that Mr. Frater was given an opportunity to answer to the Judge. He had the benefit of an adjournment and the assistance of a counsel of far longer and greater experience, who had witnessed the entire incident from start to finish. <u>What is said to be in issue is was he sufficiently specifically charged?</u> With the greatest deference and diffidence I suggest that <u>the real issue is did he have an adequate opportunity of defending himself</u> from the exercise of what Lord Denning, in the ~~passage~~ earlier cited, has termed this great but necessary power given

to maintain the dignity and authority of the court and to ensure a fair trial.

The answers given by your Lordships appear to me to reflect the two principal grounds of appeal that have been so ably argued before us for three days by Mr. B. Macaulay, Q.C., on behalf of Mr. Frater. These two grounds have been set out in full in the Judgment of Mr. Justice Henry and I do not repeat them here. They are based on a series of cases which I will review as shortly as I can, and which are said to derive from the judgment or opinion of the Privy Council in re Pollard (1868) L.R. 2 P.C. 106. It is said that contempt cases involve two quite separate requirements, the formulation of a specific charge (or charges), and secondly, the opportunity to answer to those charges. As at present advised, an anxious study of the cases seems to me to indicate that there is but one issue, was an adequate opportunity given to the contemnor to answer the charge, and that as a subsidiary proposition, that the opportunity cannot be said to be adequate if he was not aware of the pith and substance of the charge he was to meet and for which he was being punished.

It is I think conceded that the Trial Judge is required only to make it clear to the appellant what is the gist of the accusation, and that it need not be stated with the particularity required of counts in an indictment. But what if the gist of the charge is abundantly clear to the contemnor? How specific must be the statement of the charge to him? It appears to me that what has happened in these cases is that (a) many of them have involved a provision that appears in some colonial statutes to the effect that giving of false evidence in a case can be punished summarily as a species

of contempt of court, rather than by the more normal prosecution for perjury; and secondly (b) that in some of the other cases there existed in the circumstances genuine doubt and ambiguity as to just what the Trial Judge had considered to be the contempt for which he inflicted the punishment.

The power to punish for contempt is a great and necessary power, and, on occasion, summary. It was at one time the general view that each court was best qualified to decide whether what had taken place before it was contempt, and so far as England was concerned, appeal was not allowed until the passage of the Administration of Justice Act, 1960. In practice the only way of reviewing such decisions there was by use of the writ of certiorari or by moving for a new trial. Possibly because of the numbers of appeals to the Privy Council by way of reference from the Secretary of State for the Colonies, appeals were admitted much earlier from Colonial Courts, though the Privy Council's own jurisdiction as opposed to acting on a reference from the Secretary of State was first clearly asserted in Amband v. Attorney General of Trinidad (1936) A.C. 322; (1936) 1 All E.R. 704. Be that as it may, so far as Jamaica is concerned, it appears that the jurisdiction to review contempt proceedings and to entertain appeals therein was established at least as early as the first setting up of a Court of Appeal here by Law 9 of 1932. The history of appeals in such contempt proceedings shows, I think, that normally there was reluctance to allow appellate review in such matters, and that it has required special statutory jurisdiction to give this power.

I turn now to review the cases generally and particularly those said to establish the proposition that the proper procedure in contempt

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cases necessarily involves the two separate and distinct stages said to be set out in Re Pollard.

Of the many earlier cases, prior to Pollard's case I refer to three only.

In R v. Davison (1821) 4 B & Ald 329; 106 E.R. 958, the Defendant was being tried for the publication of a blasphemous libel, and was defending himself in person. In the course of this he made several derogatory and blasphemous remarks for which he was warned by the Trial Judge, Best, J. Warned to confine himself to what was relevant to his defence or the Judge would restrain him, he replied: "My Lord, if you have your dungeons ready, I will give you the key". For that expression the learned Judge fined him £20. Other such incidents followed. The Defendant having applied for a new trial, the matter was reviewed.

I cite a few passages from the Judgments of the King's Bench Division:

Abbott C.J. at page 959 said, inter alia:-

> "The question, indeed, is a momentous one. It is absolutely a question, whether the law of the land shall, or shall not continue to be properly administered. For it is utterly impossible that the law can be so administered, if those who are charged with the duty of administering it, have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the Judges, not for their personal protection, but for that of the public. And a Judge will depart from his bounden duty, if he forbears to use it when occasions arise which call for its exercise. I quite agree that this power, more especially where it is to be exercised on the person of a defendant, is to be used with the greatest care and moderation. But if the publication of blasphemy and irreligion can not in any other way be prevented, in my opinion, a Judge will betray his trust who does not put it in force."

Bayley, J. at page 960 expressed himself thus:-

> "I entirely agree with my Lord Chief Justice, that in this case there ought not to be a new trial."

> The question is shortly this, whether, for the future, decency and decorum shall or shall not be preserved in Courts of Justice; or whether, under colour of defending himself against any particular charge, a defendant is at liberty to introduce new, mischievous, and irrelevant matter upon his trial. I agree that a defendant, in all cases, should have every facility allowed him in his address to the jury, provided he confines himself within those rules which decency and decorum require. In every case, the subject of discussion before the jury is to be considered, and a Judge is bound to see that the arguments which are adduced, are such as are consistent with decency and decorum, and not foreign to the matter on which the jury have to decide. When a case is conducted by counsel, they know perfectly well what the rules of law are, and they have that regard for their own character which generally prevents them from doing any thing which may break in upon the rules of decency and decorum. They have also sufficient knowledge (arising from their experience and education) to form a judgment whether the matter be relevant or not. But defendants are not in the same situation in which counsel are; they have not the same character to maintain, and are not always so well informed as to know what is relevant or irrelevant. But every man who comes into a Court of Justice, either as a defendant or otherwise, must know that decency is to be observed there, that respect is to be paid to the Judge, and that, in endeavouring to defend himself from any particular charge, he must not commit a new offence. Of the power of a Judge to fine for a contempt of Court, I have not the least doubt, and I am of opinion also, that the Judge alone is competent to determine whether what is done, be or be not a contempt; and that neither this Court, nor any other co-ordinate Court, has a right to examine the question, whether his discretion, in that respect, was fitly and properly exercised."

Apart from the view expressed as to there being then no appeals on the merits, this case shows a simple response by the Judge, free of the formality of stating a charge and then providing opportunity for answer.

Another pre-Pollard case that I would refer to is R v. Sheriff of Surrey (1860) 2F. & F 234; 175 E.R. 1038. The case, a reported decision of Blackburn J., is so short that I set out the report in full.

"Crown Court, Surrey Summer Assizes, 1860,
coram Blackburn, J. In re THE SHERIFF
OF SURREY

(While the Judge under the commission of assize, the high sheriff has no right to address the grand jury, and his doing so against the prohibition of the Judge held, a contempt of Court.)

The grand jury, having concluded their business, came into Court with the remainder of the bills; and,

Blackburn, J., dismissed them, thanking them in the usual form for the assistance they had rendered to the administration of justice.

It appears that the high sheriff of the county, W.J. Evelyn, Esq., had requested the learned Judge to pay the compliment to the gentlemen who had attended, but who had not actually served on the grand jury, of thanking them for their attendance as many of them had come a considerable distance to perform the duty, but the learned Judge said he considered it unnecessary to do so, and it was understood that the high sheriff expressed his intention of thanking them himself.

When the learned Judge had addressed the grand jury he was about to proceed with a trial that was before the Court.

The high sheriff rose, and, addressing a number of magistrates who were on the bench, began to speak.

Blackburn, J., interposed, and said that he could not allow the high sheriff to proceed, and must request him to desist.

The high sheriff still seemed determined to go on, when the learned Judge laid his hand on his shoulder, and said he could not permit him to speak, and he must request him to sit down.

The high sheriff still persisted.

Blackburn, J., threatened that if he did not desist he would fine him.
Still the high sheriff would not sit down, and, Blackburn, J., said:- "Mr. High Sheriff, I feel myself called upon to fine you 500£." - (His Lordship then directed Mr. Avory, the deputy clerk of assize, to record the fine, which was done.)

The high sheriff still would not desist and,

Blackburn, J., then threatened to commit him for contempt of Court if he did not sit down.

The high sheriff then resumed his seat.

Later in the day, the high sheriff came into Court and read a written apology in which he expressed his sorrow for having committed any act which might bear the semblance of a contempt of the Court.

> Blackburn, J., stated that he had no personal feeling, but must protect the dignity of the Court, and could not allow any improper interruptions to the business of the assize. - (His Lordship then remitted the fine.)"

It will be noted that in this case Blackburn, J. did not find it necessary to either formulate charges, or to provide an opportunity for a formal reply, before fining the sheriff. This case is cited in Halsbury's 4th Edition Vol. 9 - Criminal Contempt, paragraph 6, note 8, as authority for the proposition that:-

> "To disturb court proceedings by continuing to address the court in defiance of the direction of a judge may also constitute a contempt of court."

(I should add that though the fine was remitted, the case next reported shows that the Sheriff was shortly after in trouble again, for declining to carry out an order by Blackburn, J. to clear a portion of the Court room so that the court might conduct its business in relative quiet).

It has been suggested that as an officer of the Court the learned Judge had a peculiar summary jurisdiction to fine the Sheriff for disobedience without employing the proper procedure. Nothing of the sort however appears on the face of the report, and in any event it should be observed that the contemnor in the present case, Mr. Frater, is also an officer of the Court, as are all Attorneys-at-law since the Legal Profession Act, 1971.

Finally in Ex parte Fernandez (1861) 10 C.B. NS 3; 142 E.R. 349 an accused was being tried for bribery at a Parliamentary election. Prior to the case there had been a Royal Commission which had enquired into the matter, and had taken evidence from Fernandez amongst others, issuing to him a certificate of immunity from any

future prosecution. Called on to give evidence at the bribery trial Fernandez on being asked whether he had received any money from the accused on a certain date refused to answer, stating that any answer he might give would tend to incriminate him. Despite assurances from the Trial Judge that his certificate of immunity offered full protection, and an order from the Judge to answer, the witness refused to answer. The Judge thereupon committed him to prison for six months and fined him £500 for having wilfully and in contempt of court refused to answer the said question. Fernandez now applied for a writ of habeas corpus. The Court of Common Pleas refused his application. Erle C.J. observed that the Court was not a Court of appeal and that the commitment was made by a competent tribunal in respect of a matter within its jurisdiction, and that a Judge sitting in the assizes was competent to make an order committing a person for contempt of court. It is interesting to note that at page 37 (p. 363 E.R.) Erle C.J. states:-

> "Now the presumption is that all has been rightly done, and that the imprisonment has taken place in due course of law. The commitment being the act of a lawful court acting within its competency, there can be no invasion of the liberty of the subject in the sense in which the phrase is used. To issue a habeas corpus for the purpose of reviewing the decision of the judge, would be to my mind a gross abuse of the process....."

Willes J. at p. 40 (364 E.R.) cited Blackstone:-

> "I need only cite 4 Blackstone's Commentaries, 281, 283, to show that a witness refusing to be examined commits an offence for which, as being a contempt in the face of the Court, he may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination....."

Byles, J. gave judgment to like effect. This case was cited with approval by Lord Denning M.R. in Balogh v. St. Albans Crown Court

(1975) Q.B. 73 at p. 84, as "an older case, too, of great authority."

These three cases, and there are others, show that for contempt committed in the sight of the Court, the contemnor may be committed to prison at once, summarily and not on motion. In Balogh's case, at p. 84, Lord Denning states:-

> "Gathering together the experience of the past, then, whatever expression is used, a judge of one of the superior court or a judge of Assize could always punish summarily of his own motion for contempt of court whenever there was a gross interference with the course of justice in a case that was being tried ..... whenever it was urgent and imperative to act at once."

I turn now to Re Pollard (1865) 2 L.R. P.C. 106. This was a case or petition referred to the Privy Council by the Secretary of State, and in which at the end of the argument the Privy Council thus expressed its views:-

> "..... their Lordships do agree humbly to report to your Majesty that, in their judgment no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and that in the present case their Lordships are not satisfied that a distinct charge of the offence was stated, with an offer to hear the answer thereto before sentence was passed."

I would observe that in this case no one has ever learned what was the reason that moved the learned Chief Justice of Hong Kong to fine Mr. Pollard for contempt of court. In that situation it could not be said that he had had an adequate opportunity to answer: he did not know and had no means of knowing what was the contempt for which he was fined.

The cases previously cited had shown instances of the Trial Judge exercising summarily the power to commit for contempt of court, without the need for any special formula before so committing.

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Re Pollard however is said to be authority for the introduction of a new concept, and a new line of cases that require as two separate and independent pre-conditions the formulation of a charge and the giving of an opportunity to answer it, and only when this has been complied with can the summary power be deemed to have been properly exercised. It seems to me, as at present advised, that this can lead to the introduction of far too rigid a formula for the exercise of this necessary power by Trial Judges.

On an appeal, now that appeal is allowed, the inquiry is: has an injustice been done? This will usually, depending on the circumstances, raise the questions: did the conduct complained of interfere or tend to interfere with the course of justice? and did the contemnor have an adequate opportunity of defending himself? A requirement based on the rule of natural justice: audi alteram partem. Formulation of the specific charges may or may not arise in considering the second/main question.

Cases of contempt of court, not using the Pollard formula continued to be reported. See for example: Watt v. Ligertwood (1874) L.R. 2 Sc. & Div. 361. This case contains a short headnote:-

> "When a Judge, in the legitimate exercise of his jurisdiction, is defiantly disobeyed, he may commit the offender instantly to prison for Contempt of Court."

In this case the "offender" was an advocate practising in Aberdeen, who had presented a certain petition before the court on behalf of a client. It was opposed and when, after hearing the issue and refusing the application, the Judge was about to endorse the papers, the advocate seized them from the clerk of the court, and on being told to restore them or be treated as in contempt of court, he walked out of court

carrying the papers, and later when the Court functionary attended at his office and demanded them, he threw them into the fire. He was at once seized and lodged in prison, but was released the following day. He now brought action against the Judge, and the Clerk, seeking to recover damages for false imprisonment. The advocate persisted in this claim through to the House of Lords, where Cairns, L.Ch. termed his conduct a gross and unjustifiable contempt of court, and observing that on its commission the Judge might at once "have vindicated the dignity of the Court by ordering the offender to be committed without more, leaving the contempt to be purged in the usual way." There is no suggestion here that the Court should have employed any special formula, requiring specified charge followed by opportunity to answer. This case is cited in Halsbury's 4th Edition Vol. 3: Barristers, para. 1133: punishment for contempt.

This case illustrates then that even after Pollard's case, depending upon the circumstances, Courts continued to exercise the power to commit summarily for contempts committed in the face of the court, without necessarily employing the Pollard formula.

I think that R v. Jordon (1888) 36 W.R. 589 (Divisional Court) and 797 (C.A.), (also reported as to the Court of Appeal decision sub nom R v. Staffordshire County Court Judge (1888) 57 L.J.K.B. 483) further illustrates this point. A solicitor had been sued in the County Court by a client to recover from him a sum given to him to get the opinion of counsel. He had not got the opinion. The jury found for the client. The solicitor after verdict threatened to prosecute the client for perjury. The Judge, giving his judgment stated he agreed with the jury's verdict. The solicitor then said

"That is a most unjust remark." The Judge committed him for contempt. The solicitor now brought certiorari proceedings before the Kings Bench Divisional Court (Cave and A.L. Smith JJ.) and failing there appealed to the Court of Appeal (Lindley and Lopes L.JJ.) where he also failed.

In the Divisional Court Cave J. after remarking that in the certiorari proceedings they did not sit on appeal, but could only interfere where there was no evidence to support the conviction, observed of the solicitor's remark:-

> "However said, such an observation is a gross insult to any court of justice. To accuse a judge of corruption might be a worse insult, but a charge of injustice is as gross an insult as can be imagined short of that; and justice can not be administered with respect if every disappointed suitor is to be allowed to indulge in such observations to the court ....."

The Court of Appeal gave judgment to like effect. There was here no suggestion of the need for any particular pre committal formula.

Not until 1909, in another Privy Council case, again from Hong Kong, was the Pollard formula mentioned. Chang Hang Kiu v Piggot (1909) A.C. 312 was the prototype of the series of cases already mentioned in which the local statute allowed cases of perjury to be dealt with summarily by the Trial Judge as a species of contempt of court. In this case the Court in Hong Kong had been examining whether a named person was or was not a partner in an indebted bank. It was found that he was not, as the jury did not accept the evidence given against him. The Chief Justice then had the witnesses who had given the rejected evidence called before him, told them that they had each been guilty of the most corrupt perjury, and sentenced them

to prison for 3 months acting under the statute. The appeal of the convicted witnesses to the Privy Council was allowed. Lord Collins, giving the judgment of the Court at page 315 noted that two points had been argued, (a) that they had not been specifically told which of their statements were considered false, and (b) they had been given no opportunity to answer. Their Lordships allowed the appeal on the second ground. At page 315 Lord Collins remarked:-

> "Their Lordships think that, having regard to the nature of the charge he was making against the appellants, it did not admit of being formulated in a series of specific allegations of perjury, and that the gist of the accusation he was making ought to have been sufficiently clear to them from the language he employed to express it..... But though, in their Lordship's opinion, the language,used by the Chief Justice was quite sufficiently specific to make the appellants aware of the pith of the charge against them, they think that the Chief Justice should, before sentencing them, have given them an opportunity of giving reasons against summary measures being taken ..... it would have given an opportunity for explanation and possibly the correction of misapprehension as to what had been in fact said or meant. The report of this Board in In re Pollard treats the giving of such opportunity as essential in cases of committal for contempt of court....."

I would respectfully make the following comments: (a) that in a case of this sort it can not be seen with any real certainty what was the real cause of the committal so as to be able to see whether in fact contempt had been committed or not, and so answering the question "was any injustice done here?" (b) That their Lordships stressed that the ratio decidendi for allowing the appeal was that there had been failure to give any opportunity for the contemnors to answer the charge; (c) that their Lordships were of the view that the very general language used by the Chief Justice (they have each been guilty of the most corrupt perjury) was sufficiently specific

to make clear to them the gist of the accusation, and that this was sufficient. There had in short been a failure to meet the natural justice rule of audi alteram partem, in a situation which demanded it. Where however the cause of the committal is sufficiently clear from the nature of the case, as for example a wilful insult to the Trial Judge, then a formulation of the charges would appear to be unnecessary, and possibly even the opportunity of explanation may be unnecessary also. After all, if you intentionally and obviously insult the Trial Judge in his court, what explanation can you possibly give?

Mr. Macaulay referred us to two cases from West Africa where the use of the provision treating perjury as a form of contempt of court was also in issue, and in which Chang Hang Kiu v Piggott was followed. The first was Deutsche L. Gesellschaft v Attorney General (1911) 1 Nigerian Law Reports 122. Osborne C.J. cited the passage cited above from Chang Hang Kiu's case and noting the additional difficulty that the court was operating through the medium of interpreters suggested a working formula to deal with the situation. That formula does envisage a "condescension to particulars" in that the witness so charged is to be told the substance of the particulars of perjury, and that this and his answer should be recorded in the notes of the presiding Judge. The report adds that the decision to set aside the conviction should not deter the Trial Judge from calling the same persons before him and repeating the summary trial, using the correct procedure this time!

The second case, from the West African Court of Appeal, was Commissioner of Police v Wood (1956) 1 W.A.L.R. 71. This case also involved the use of the statutory provision whereby perjury could be treated as a species of contempt of court, and it follows Chang Hang Kiu v Piggott, and the Gesellschaft case. The West African Court of Appeal decided that the scanty record did not show that the

contemnor had been told in what respect his evidence was perjured, nor given the opportunity to show cause why he should not be dealt with summarily. The court declined to apply the presumption of omnia rite esse acta, or to "speculate" outside of the record. They interpreted Chang Hang Kiu as laying down two requirements, (a) the formulation of a sufficiently specific charge (though it noted that in its own prior decision of In re Nunoo a charge of having committed wilful and corrupt perjury had been held to have sufficiently informed the contemnor of his offence); and (b) the giving of an opportunity to show cause why he should not be so committed, and held that both requirements had been broken in the instant case. They went further and stated "that it is wrong for the court to assume that he (the contemnor) must have know what the charge is." With great respect, I have indicated that I do not think that this last remark holds good in all cases, and that it appears to me that the two requirements are not two but one: was there an adequate opportunity to answer.

Appahamy v R (1963) A.C. 474; (1963) 1 All E.R. 762 was like, the cases mentioned above, another case involving a statutory provision enabling perjury to be treated as a contempt of Court. A Privy Council appeal from Ceylon, it followed Chang Hang Kiu and Re Pollard. In this case the jury returned a verdict with a rider that the appellant should be dealt with for giving false evidence. The Trial Judge thereupon called the appellant and pointing out that the jury had suggested he be dealt with for giving false evidence asked him to show cause why he should not be dealt with. He replied by begging the Court's pardon, and was thereon sentenced to 3 months imprisonment.

Giving the judgment of the Privy Council, Lord Dilhorne L. Ch. after referring to Re Pollard and Chang Hang Kiu v Piggott said at p. 483 (p. 765):-

> "It is not, in their Lordships' opinion necessary when proceeding under section 440 (1) for the accusation of giving false evidence to be stated with the particularity required in a count of an indictment. If the court is of the opinion that the whole of a witness's evidence was false, it may be sufficient, as in the case of Chang Hang Kiu v Piggott, just to say that. But when it is not suggested that the whole of a witness's evidence is false, it is essential that the witness should be left in no doubt as to which parts are alleged to be false. Unless he is so informed, he is deprived of the opportunity of explanation and possibly of correcting a misapprehension as to what had been in fact said or meant.
>
> It cannot, in the opinion of their Lordships, be said that the observations made by the commissioner to the jury in the course of his summing-up were sufficient if the appellant was present and heard what was said - and there is no evidence that he was - to leave him in no doubt as to the matters on which, in the opinion of the court, he had given false evidence. It was not suggested that the whole of the appellant's evidence was false. It clearly was not; and no doubt the prosecution sought to attach some importance to his evidence of identification. In their Lordships opinion the appellant was not informed by the commissioner of the gist or substance of the accusation against him and accordingly was given no opportunity of dealing with it."

It appears to me that while their Lordships referred to both limbs of the Pollard formula, the need for a charge and the opportunity of replying to it, that their principal concern was with the latter, did the "contemnor" have an adequate opportunity of defending himself, and that in the circumstances of this case the failure to sufficiently communicate the charge resulted in depriving him of the opportunity of dealing with it. The question of how specific the charge must be will vary with the circumstances of the case: these may on occasion require much more than a general remark or indication, but on occasion it may be sufficient to do no more than

give a very broad indication and sometimes even this may be unnecessary. What is at issue always is in the particular circumstances did the "contemnor" have an adequate opportunity to answer, to explain or meet any misapprehension that might exist as to his conduct. Further there are cases where even this may be unnecessary.

Pollard's case was considered by the Trinidad Court of Appeal in the case of Re Bachoo (1962) 5 W.I.R. 247. In that case Bachoo who was being tried for loitering, was conducting his own defence, and had called his wife as a witness on his own behalf. While she was giving evidence the magistrate "in view of what had transpired previously during the trial" asked her whether her husband was quite sound in mind. The appellant objected to the question and in a loud tone of voice told his wife not to answer it. The magistrate warned him not to interrupt and repeated the question, whereupon the appellant in a similar voice again told his wife not to answer it. The magistrate, in effect, then proceeded to commit him for contempt of court. The committal was set aside by the Court of Appeal. Wooding C.J. who gave the judgment of the Court referred to Re Pollard and Chang Hang Kiu v Piggott, held that the appellant had not had an opportunity of answering the charge or showing cause why he should not be committed. Though both limbs of the Re Pollard formula are referred to, it appears to me that the learned Chief Justice attached weight to the question of whether the appellant had had an opportunity to answer, following Chang Hang Kiu v Piggott (ante). No suggestion is made as to formulating a specific charge, nor is it easy to see just how it would have been formulated, other than by merely referring to what had just transpired.

Two years earlier, our own pre-independence Court of Appeal, in Re Pershadsingh (1960) 2 W.I.R. 340 also considered Re Pollard. In this case the appellant, a barrister, appearing before the Resident Magistrate's Court in Clarendon, had been involved in a noisy quarrel with counsel on the other side. The Magistrate warned both to desist or he would fine both for contempt of court. One desisted, but the other did not, and was promptly fined £10 for contempt. It appears that the appellant had then sought from the Magistrate an opportunity to show cause why he should not be fined, only to be told that he had already been fined. The conviction was set aside. Giving the judgment of the Court, Cools-lartigue Ag. C.J. (on behalf of Duffus J.) said:-

> "In the instant case, no opportunity having been afforded to the appellant to answer or to explain, it appears to us that the procedure followed by the resident magistrate was wrong. What explanation may have been given it is not for us to speculate on, sufficient to say that the opportunity to explain or to show cause why the order should not have been made was not given."

It will be noticed that the Court's emphasis was on the question of whether there had been an adequate opportunity to explain or to show cause. There is no suggestion that charges should have first been formulated, or any indication as to what those charges might have been, other than by referring to what had just transpired. It should also be noted that the Court did not have the assistance of those cases which did not use the Pollard formula.

In the subsequent case of R v Alphanso Harris (1968) 11 J.L.R. 1 the Jamaican Court of Appeal was again faced with the problem of contempt of court arising out of a clash between a defence counsel and the Resident Magistrate who was trying the case in which he was

appearing. In that case there had been an adequate opportunity to answer the contempt charge, so the point under discussion did not arise, and my respectful comment would be that the Court of Appeal seems to have taken a surprisingly charitable view of the matter in its ruling that the Resident Magistrate should have accepted the explanation proffered.

Contempt in the case of the court next arose in England in the case of Morris v Crown Office (1970) 2 Q.B. 114; (1970) 1 All E.R. 1079. A group of Welsh students invaded one of the law courts where an ordinary civil case was being tried and there staged a demonstration, apparently in favour of Welsh nationalism, which entirely disrupted the hearing and forced the court to close down. When the court resumed three of them were brought before Lawton J. who sentenced them to three months imprisonment for contempt of court. At a later stage another nineteen were brought before him, given the option to apologize; eight who did so were fined £50 each, and the others who refused were similarly sentenced to three months imprisonment. On appeal the question canvassed was the propriety of sentencing them to imprisonment in view of the provisions of Section 17(2) of the Criminal Justice Act 1948, and those of Section 39 of the Criminal Justice Act, 1967. It does not appear from the record what was the exact procedure adopted by the Trial Judge. It is clear that the students had an opportunity to say something, as they apologized or refused to apologize, but there is no suggestion that they were charged within the Re Pollard formula, and that it was specified that they interrupted the court, assaulted those in it, (by throwing of pamphlets), persisted in standing or singing etc. when told to be quiet. What they had done

was indeed obvious and clear, and their conduct was dealt with without the necessity of "categorizing" or "labelling" it with any particular label. The circumstances clearly indicated that there had been contempt, that it was intentional, and the case seems to support the view that I have previously tried to formulate that in such circumstances the necessity for stage one of the Re Pollard formula, i.e. the formulation of charges, does not arise, and indeed that case and the line of authorities springing from it was not referred to in either argument or judgment.

In this respect it appears to me that the case of Balogh v St. Alban's Crown Court (1975) Q.B. 73 is to like effect, and I have already referred to some of the observations therein of The Master of the Rolls, Lord Denning. In this case a temporary clerk in a solicitor's office attending the trial of a case which he thought boring, decided to enliven the proceedings by introducing nitrous oxide (N_2O) (laughing-gas) into the court's air conditioning system. He went so far as to climb on the roof to discover where the vents for the system were, to steal a cylinder of gas and to take it in a brief case to court. He was detected at that stage. Brought before the senior Judge sitting next door to the court he had planned to disrupt, the police gave evidence of what he had done, he admitted it and pleaded that it was intended as a practical joke. Remanded in custody overnight with a view to sentencing, after hearing his background and further from the young man, the Judge sentenced him to six months imprisonment. The points argued were whether this was a contempt in the face of the court, whether the Judge had jurisdiction to hear it

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(summarily as it did not involve his own court), or whether he should have left it to the Attorney General to prosecute in the normal way, and finally was this a contempt of court or an attempted contempt? Had it passed from the stage of preparation to that of an attempt? The appeal was eventually allowed on this last ground.

We are not concerned with these difficult and interesting points, but it is to be noted that the report once again does not disclose any formulation of the exact charges in keeping with the suggested stage one of the Re Pollard formula. The young man was given an opportunity to defend himself, (though Stephenson L.J. was of the view that he should also have been allowed counsel). What the court was principally concerned with appears to have been was there contempt here? Did he have an opportunity to defend himself? It is of interest to cite a passage from the judgment of Lawton L.J. at page 91 dealing with such contempt cases:-

> "No precise charges are put; sometimes when the judge has himself seen what has 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 cannon law" ..... Yet judges have this unusual jurisdiction....."

Lawton L.J. added at page 93:-

> "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 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....."

Once again it is to be noted that the Re Pollard formula, and particularly stage one of it, was not referred to in either argument or judgments, save possibly by inference as to the enquiry as to whether there had been an adequate opportunity given to the accused to explain his conduct. Certainly the observation by Lawton L.J. "No precise charges are put..... the accused is asked to explain his conduct" appear to represent the current practice in England, is consistent with the cases that do not employ the Re Pollard formula, and if I may respectfully say so with common sense. The necessity to use stage one of the Re Pollard formula and to formulate charges is one that may arise in the circumstances of a particular case, when it is not clear on the face of the record exactly what constituted the contempt of court complained of by the Trial Judge.

This was the situation that arose in the most recent contempt of court case that we have had cited to us: Maharajh v Attorney of Trinidad (1977) 1 All E.R. 411 (P.C.). The appellant had been engaged to conduct two different cases before a Judge, but was unable to be present as a case in which he was currently appearing before the Trinidad Court of Appeal lasted several days longer than was expected. He passed these two briefs on to other counsel who asked for adjournments on his behalf, these were refused and the cases completed and decided against the appellant's clients without their being heard, though they were in court. Next day a similar situation arose before the same Judge, and the appellant's counsel to whom he had passed the brief again sought an adjournment, which was refused and the case commenced without the client being

represented. It appears that the appellant, not surprisingly, regarded the Judge as being personally prejudiced against him, and on an intervening day when he was present on an application in chambers before the Judge, he urged him to disqualify himself and not to take the matter, on the ground that he had "acted unjudicially" in the previous cases. The Judge refused to disqualify himself and entered on the hearing. On a later date, the part heard case already referred to came on again before the Judge, and the appellant made an application for the recall of the doctors who had given evidence for the other side, these not having been cross-examined. The application was refused. The appellant thereupon intimated in effect his intention to appeal against what he again referred to as "unjudicial conduct". The Judge on this occasion took exception to the remark, writing down the following question which he put to the appellant: "Are you suggesting that this Court is dishonestly and corruptly doing matters behind your back because it is biased against you?" The appellant replied to the effect that he had complained that the Judge had entered judgment against his clients without giving them any reasonable opportunity to be heard, so indicating that this was what he meant by "unjudicial conduct."

The Judge then told the appellant that he was formally charging him with contempt of court and calling on him to now answer. The appellant's request for an adjournment to engage counsel on his behalf was refused. He then observed that he had not imputed any bias or "anything" against the Judge. Called on on the question of sentence he again sought an adjournment, which was refused and the Judge sentenced him to seven days simple imprisonment.

The Privy Council, in its judgment given by Lord Salmon, observed that in point of fact the appellant had not imputed any corruption or dishonesty to the Judge. That "unjudicial conduct" covered a very wide spectrum ranging from excessive zeal on the part of a Judge too anxious to dispose of his list to instances of actual dishonesty and corruption. That the Judge had mistakenly persuaded himself that the appellant meant to impute corruption and dishonesty. In effect the Privy Council found that there had in fact been no contempt committed in this case. And this after a careful review of the entire history and the record in this case. Such a finding was of course decisive of the matter.

However, in his Judgment Lord Salmon added at page 416:-

> "In charging the appellant with contempt, Maharaj J. did not make plain to him the particulars or the specific nature of the contempt with which he was being charged. This must usually (underlining mine) be done before an alleged contemnor can properly be convicted and punished. Re Pollard. In their Lordship's view, justice certainly demanded that the judge should have done so in this particular case. Their Lordships are satisfied that his failure to explain that the contempt with which he intended to charge the appellant was what the judge has described in his written reasons as a "vicious attack on the integrity of the Court" vitiates the committal for contempt.
> Had the judge given these particulars to the appellant, as he should have done, the appellant would no doubt have explained that the unjudicial conduct of which he complained had nothing to do with the judge's integrity, but his failure to give the appellant's clients a chance of being heard before deciding against them."

It appears to me that there were in this case two grounds for the decision: (a) that no contempt of court had in fact been committed: the allegation of "unjudicious conduct" covered so wide a field that it did not necessarily amount to contempt; and (b) that assuming the Judge thought it meant an imputation of corruption

and dishonesty, he had not sufficiently put this interpretation to the accused, before convicting him of contempt. As I understand it, (b) involves both aspects of the Re Pollard formula, a failure to sufficiently formulate the charge, and a consequential deprivation of the opportunity to answer it. A careful reading of the passage from the judgment of Lord Salmon suggests to me that it was the failure to give an adequate opportunity to meet and explain that the words were not intended to impute what the Judge thought they did that was in issue, and that this constituted the second ground of the decision.

It appears to me that the Maharaj case is in fact very similar to that of Re Pollard. The words "unjudicial conduct" were on the face of them ambiguous, and did not necessarily impute corruption and dishonesty. There was therefore no conduct that was obviously "contemptuous". Had the more sinister meaning which the Judge gathered from the words and the situation been more clearly put, then either the Judge would have been confirmed in his view that they were meant in that sense, or the appellant would have made it clear that he used the words in a less sinister sense. The judgment makes clear that the exchange that did take place was inconclusive, and did not resolve the sense in which the appellant had used those words. In the circumstances then (a) there was no obvious contempt committed, and (b) the appellant had not had the opportunity of explaining what he had meant, because the exchange between himself and the Judge had not in fact clarified what he had meant. It is precisely where it is not clear whether or not a contempt of court has been committed that it becomes necessary to ask not only the main question was an adequate

of defending himself given
opportunity/to the accused, but the subsidiary question of whether it could be said to be adequate if the situation was ambiguous and the alleged offence was not clearly put to the accused. As I understand the cases, the necessity of first precisely formulating the alleged contempt, or putting to the accused "the gist" or "pith" of the offence arises only in those cases where it is not clear what is the nature of the offence. This clearly arises in those cases where perjury is being summarily dealt with, and it is not clear that everything that the witness has said is false. It also arises in those cases where the matter is ambiguous, and it is not clear what the Trial Judge has regarded as constituting the contempt, or where he has failed to communicate that to the accused and so deprived him of the opportunity of defending or answering the charge. Lord Salmon in the passage cited used the word "usually." Clearly there are cases in which the contempt is of such a nature that it is not necessary to use any part of Re Pollard formula at all.

I do not regard this instant case as being one in which it was not clear from the circumstances that a contempt of court had been committed or of what the contempt consisted - and it was intentional. As I understand it, both your Lordships agree that there was here a contempt of court committed, and as it appears deliberately done, though with a view to or the motive of assisting the client whom Mr. Frater was defending.

I find myself unable to accept either of Mr. Macaulay's arguments (a) that there was a failure to sufficiently inform Mr. Frater of the specific charge (or the pith and substance of it), resulting in a denial of the opportunity to answer or explain his

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conduct, or (b) the alternative argument that Mr. Frater was committed ostensibly for failing to take his seat and obstructing the Court, but that when the Judge came to give his reasons in his report he purported to commit him for matters not put to him originally, that is, wilful disobedience and disobeying the ruling of the Court. I am unable to accept these arguments, though they have found favour with one of your Lordships and are therefore worthy of careful consideration. As to the first (a) - it involves the proposition that stage 1 of the Re Pollard formula was necessary here: in my view it was not. As to the second (b) it appears to me to involve only the question of the application of the correct "label" or the categorization of the conduct that was in issue: a matter of semantics.

It does not seem to me that the applicant was in any doubt as to the nature of the contempt with which he was being charged. The Judge's note of the address made by his counsel shows that he argued that:-

> "No disrespect of the Court was intended by Mr. Frater who was merely defending his client and to treat it in that light.
>
> No obstruction intended.
>
> No disobedience intended."

In my view there was no need in the circumstances of this case for the application of what I have termed stage one of Re Pollard, i.e. the formulation of the charges constituting the alleged contempt. Even if I were wrong as to that, and this formulation of changes is essential in all contempt cases, I find myself in agreement with Henry, J.A. that there was a sufficient formulation here, and that the appellant was made sufficiently aware of the "gist"

or "pith and substance" of the charge against him, and I would therefore, regretfully, dismissed this appeal.

I make one last comment. The appellant through his counsel specifically withdrew his appeal against sentence, a fine of $500.00. This was a serious case of contempt, involving an advocate, an "Officer of the Court", deliberately indulging in what may be termed "gamesmanship", or more charitably as "seeking the bubble of reputation in the cannon's mouth". But having regard to the sentences previously imposed in our Courts and others and even making allowances for inflation, I am sorry not to have had the opportunity of considering this aspect of the case.

HENRY, J.A. - By a majority this appeal stands dismissed.

Mr. Macaulay by leave having addressed the Court on sentence, the sentence is varied by substituting a fine of $200.00 for the fine of $500.00.