CITATION:	*Jenkins v Whittington* [2017] NTSC 65
PARTIES:	JENKINS, Trevor
	v
	WHITTINGTON, Robert
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from LOCAL COURT exercising Territory jurisdiction
FILE NO:	LCA 20 of 2017 (21617016)
DELIVERED ON:	21 August 2017
DELIVERED AT:	Darwin
HEARING DATE:	25 July 2017
JUDGMENT OF:	Grant CJ

CATCHWORDS:

PROCEDURE – INFERIOR COURTS – APPREHENSION OF BIAS

Whether trial judge erred in failing to recuse himself on basis of a reasonable apprehension of bias – relationship between trial judge and witness in the matter – no reasonable perception that the trial judge's decision was influenced by a relevant association or acquaintance – apprehension of bias not established – appeal dismissed.

Asciak v Samuels (1976) 15 SASR 265, *Cottle v Cottle* [1939] 2 All ER 535, *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541, *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2008] NSWLEC 318, *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358, *Trustees of Christian Bros v Cardone* (1995) 57 FCR 327, referred to.

PROCEDURE – INFERIOR COURTS – CONTEMPT, ATTACHMENT AND SEQUESTRATION

Whether trial judge erred in convicting the appellant of contempt – contempt in the face of the court – whether contempt can be dealt with by the judge before whom the contempt was allegedly committed – deliberately preventing the determination of criminal charges – urgent and imperative for the trial judge to act immediately – appellant charged with contempt before being remanded in custody – appellant had access to legal representation – appellant had appreciation of the conduct underlying the charge – appellant granted a sufficient adjournment to enable a defence to be prepared – case against the appellant proved beyond reasonable doubt – appellant given opportunity to address the court on penalty – penalty imposed not unreasonable or plainly unjust – appeal dismissed.

Criminal Code Act (NT) s 8
Local Court Act (NT) s 45, s 46, s 47

Consolidated Press Ltd v McRae (1955) 93 CLR 325, *Coward v Stapleton* (1953) 90 CLR 573, *Fraser v The Queen* [1984] NSWLR 212, *Grassby v The Queen* (1989) 168 CLR 1, *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, *Keeley v Brooking* (1979) 143 CLR 162, *MacGroarty v Clauson* (1989) 167 CLR 251, *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186, *O'Brien v Northern Territory* (2003) 173 FLR 455, *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248, *R v Hume; Ex parte Hawkins* (1965) 55 DLR (2d) 453, *R v Metal Trades Employers' Assn; Ex parte amalgamated Engineering Union* (1951) 82 CLR 208, *Re Bennison; Ex parte Fisher SM* (1995) 14 WAR 318, *Re Dunn* [1906] VLR 493, *Sanderson v Lambe* (2005) 193 FLR 318, *Tippett v Murphy* (1982) 62 FLR 183, *Witham v Holloway* (1995) 183 CLR 525 referred to.

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – HEARING IN OPEN COURT AND IN PRESENCE OF ACCUSED

Whether appellant denied natural justice by conduct of hearing in his absence – presence of accused during the conduct of criminal proceedings – no essential principle that any part of a summary proceeding be conducted in presence of accused – appellant made assertions of mental illness and suicidal intent – appellant found to be not mentally ill – appellant fabricated assertions of suicidal intent – appellant's conduct made it impracticable to continue the proceedings in his presence – appellant informed that the matter would proceed in his absence – no risk of a jury reaching an improper conclusion concerning the absence of the appellant – in the public interest to determine the charges within a reasonable time – appeal dismissed.

Criminal Code Act (NT) s 361
Local Court Act (NT) s 38

Local Court (Criminal Procedure) Act (NT) s 62, s 62A, s 62AB

Director of Public Prosecutions v Bakewell (2007) 21 NTLR 171, *Ebatarinja v Deland* (1998) 194 CLR 444, *Hellenic Republic v Tzatzimakis* (2003) 127 FCR 130, *Jones, Planter and Pengelly* [1991] Crim LR 856, *Lawrence v The King* [1933] AC 699, *R v Abrahams* (1895) 21 VLR 343, *R v Berry* (1897) 104 LT Jo 110, *R v Collie* (2005) 91 SASR 339, *R v Ferguson* [2015] NTSC 35, *R v Gee* (2012) 113 SASR 372, *R v Hayward* [2001] QB 862, *R v Jones (Anthony)* [2003] 1 AC 1, *R v King* (2004) 155 ACTR 55, *R v Lee Kun* (1916) 1 KB 337, *R v Sykes and Campi (No 2)* [1969] VR 639, *R v Vernell* [1953] VLR 590, referred to.

CRIMINAL LAW – OFFENCES RELATING TO THE ADMINISTRATION OF JUSTICE – OFFENCES AGAINST PEACE AND PUBLIC ORDER – JURISDICTION, PRACTICE AND PROCEDURE – JUDGMENT AND PUNISHMENT

Whether sentence imposed for counts 2, 3, 4, 5 and 6 was manifestly excessive – appellant's prior and recent history of relevant offending elevated the weight to be attached to considerations of deterrence and protection of the community – appellant has poor prospects for rehabilitation – no remorse or acknowledgement by the appellant of wrongdoing – total sentence did not exceed the total criminality – sentence imposed not unreasonable or plainly unjust – appeal dismissed.

Court Security Act (NT) s 5
Sentencing Act (NT) s 117

Hanks v The Queen [2011] VSCA 7, *Mill v The Queen* (1988) 166 CLR 59, *Namala v Whittington* [2016] NTSC 71, *Richardson v The Queen* (1974) 131 CLR 116, *Truong v The Queen* (2015) 35 NTLR 186, referred to.

REPRESENTATION:

Counsel:

Appellant:	Self-represented
Respondent:	S Geary

Solicitors:

Appellant:	Self-represented
Respondent:	Office of the Director of Public Prosecutions
Judgment category classification:	B
Judgment ID Number:	GRA1711
Number of pages:	89

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Jenkins v Whittington [2017] NTSC 65
No. 21617016

BETWEEN:

TREVOR JENKINS
Appellant

AND:

ROBERT WHITTINGTON
Respondent

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 21 August 2017)

[1] By complaints taken on 8 April 2016 and 13 April 2016 the appellant was charged with the following counts:-

1. Behaving in a disorderly manner in a public place, namely the Supreme Court at Darwin, contrary to s 47(a) of the *Summary Offences Act* (NT). The maximum penalty for that offence was $2,000 or imprisonment for six months, or both.
2. Failing to cease to loiter when required by member of the police force contrary to s 47A(2) of the *Summary Offences Act*. The maximum penalty for that offence was $2,000 or imprisonment for six months, or both.
3. Resisting a member of the police force in the execution of his duty contrary to s 158 of the *Police Administration Act* (NT). The maximum penalty for that offence was eight penalty units or imprisonment for six months, or both.
4. Behaving in a disorderly manner in a police station, namely Darwin police station, contrary to s 47(c) of the *Summary*

Offences Act. The maximum penalty for that offence was $2,000 or imprisonment for six months, or both.

5. Failing to comply with a requirement of a security officer at the Supreme Court, namely failing to leave the court premises, contrary to s 13(2) of the *Court Security Act* (NT). The maximum penalty for that offence was 40 penalty units or imprisonment for 12 months.

6. Resisting a court security officer in the execution of his duty contrary to s 15 of the *Court Security Act*. The maximum penalty for that offence was 85 penalty units or imprisonment for 2 years.

[2] Following a hearing conducted in the Local Court over the course of 26 and 27 April 2017 the appellant was found not guilty of count 1, but guilty of counts 2, 3, 4, 5 and 6.

[3] During the course of that hearing the appellant comported himself in a manner which led the trial judge to conduct part of the hearing in the appellant's absence. In addition, the trial judge found the appellant guilty of contempt in the face of the court for that behaviour, and on 26 April 2017 sentenced him to imprisonment for two months for that contempt. Ultimately, one month of that sentence was served concurrently with a sentence of two weeks and two months subsequently restored by the Supreme Court.

[4] The sentence restored by the Supreme Court arose out of proceedings that were conducted before Barr J in *Jenkins v Todd*.[1] In the opening two paragraphs of his reasons, Barr J made the following observations:

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1 [2016] NTSC 4.

> [1] This appeal hearing demonstrated the difficulties of doing justice in the case of a self-represented appellant who demands to be tolerated and understood, perhaps even indulged, as a homeless man without resources, but who has an extraordinary sense of entitlement, is obsessed with his perceived artistic and literary greatness, arrogant and unreasonable, extremely disrespectful to the Bench, untruthful in his statements from the Bar table, unreliable and selective in his submissions, and given to vituperative outbursts when questions were asked of him which exposed flaws in his arguments.
>
> [2] The appellant believes that he is a misunderstood genius: "I'm a genius, you know, and so people can't handle that." On another occasion: "I'm not a legend for nothing … I'm one of the greatest artists and greatest thinkers in this Territory. I am. If you don't like it, well, shove it up your arse. That's all I can fuckin' say."

[5] As a result of the appellant's conduct in that matter, Barr J had directed the Registrar to apply by summons or originating motion for punishment of the appellant for an alleged contempt.

[6] The application was heard and determined by Kelly J. On 20 April 2016, in *Jenkins v Todd (No 2)*,[2] Kelly J concluded beyond reasonable doubt that by persistently interrupting and talking over the presiding judge in the manner set out in the particulars, the appellant was guilty of contempt in the face of the court. On 11 May 2016, Kelly J convicted the appellant and sentenced him to imprisonment for three months commencing on 7 May 2016, to be suspended after two weeks on certain conditions.

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2 [2016] NTSC 21; 36 NTLR 203.

[7] Justice Kelly was subsequently called upon to consider whether the suspended sentence she had imposed for the contempt should be restored in whole or in part on account of a breach by the appellant of the conditions of the order suspending sentence.[3] The breach of condition was constituted by subsequent misbehaviour in different proceedings before the Local Court by the appellant continually interrupting the evidence of a Crown witness and failing to comply with numerous directions by the trial judge that he cease doing so. In the event, on 9 May 2017 Kelly J wholly restored the sentence held in suspense.

[8] As already observed, that restored sentence was to be served concurrently as to one month and cumulatively as to six weeks with the two months that had been imposed by the Local Court for the contempt committed on 26 April 2017. Accordingly, the term imposed by the Local Court ran to 25 June 2017, and the sentence restored by the Supreme Court ran to 8 August 2017.

[9] On 15 May 2017, the appellant sent a Notice of Appeal in the present matter by email to the Supreme Court Registry. That notice was in accordance with Form 63 and was lodged before the Local Court had sentenced the appellant for the offences pleaded in counts 2, 3, 4, 5 and 6. The appeal was purportedly bought pursuant to ss 171 and 172 of

3 See *Jenkins v Todd* [2017] NTSC 26 concerning the finding of breach.

the *Local Court (Criminal Procedure) Act* (NT). Section 172 requires relevantly that the notice of appeal shall state the nature and grounds of the appeal.

[10] The notice of appeal contains a handwritten statement running to six pages describing a mishmash of complaints. As best as can be discerned, the purported grounds of appeal recorded in that document are:

- the trial judge failed to recuse himself from the determination of the case;
- the appellant was unable to represent and defend himself on the charges;
- the prosecution failed to call relevant witnesses in the conduct of the prosecution on the complaints;
- the charges were unsustainable because it is illegal to have private security guards in a public courthouse;
- the charges were not properly made out because police and security guards attending on the incident were deliberately threatening to the appellant and escalated the incident; and
- the finding of contempt made against the appellant by reason of his behaviour during the course of the hearing should not stand as a security guard in the Local Court had initiated the dispute

because he was a Muslim who knew the appellant was a devout Christian, and it was that dispute which precipitated the appellant's subsequent behaviour.

[11] On 16 June 2017, the Local Court sentenced the appellant to a total effective period of imprisonment for five months for the offences brought on complaint. That sentence was structured as follows:

- imprisonment for one month in respect of count 5 (failing to comply with a requirement of a security officer);
- imprisonment for two months in respect of count 6 (resisting a court security officer in the execution of his duty), to be served concurrently with the sentence imposed for count 5;
- imprisonment for one month in respect of count 2 (failing to cease to loiter when required by member of the police force), to be served concurrently with the sentence imposed for count 6;
- imprisonment for two months in respect of count 3 (resisting a member of the police force in the execution of his duty), with one month of that period to be served cumulatively upon the sentence imposed for count 6; and
- imprisonment for two months in respect of count 4 (behaving in a disorderly manner in a police station), to be served cumulatively upon the sentence imposed for the other counts.

[12] That total effective period of imprisonment was to commence from 9 August 2017, after completion of the sentence of imprisonment previously restored by the Supreme Court.

[13] The grossly defective nature of the appeal documents notwithstanding, it is tolerably clear from what was said by the appellant during the course of mentions on 11 and 20 July 2017 that he seeks to appeal on the following grounds:-

- that the trial judge erred in failing to recuse himself on the basis that there was a reasonable apprehension of bias arising from a personal relationship between the trial judge and one of the witnesses in the matter;
- that the trial judge erred in convicting the appellant of contempt on 26 April 2017, and in imposing penalty in respect of that conviction;
- that the appellant was denied natural justice by reason of the fact that part of the hearing was conducted in his absence; and
- that the sentence imposed by the trial judge on the convictions for counts 2, 3, 4, 5 and 6 was manifestly excessive.

[14] The appellant confirmed they were the matters which he wished to agitate during the course of the appeal. Although under no obligation to do so, and although entitled to insist on compliance with the

requirement in s 172 of the *Local Court (Criminal Procedure) Act* that the notice of appeal competently state the nature and grounds of the appeal, the respondent agreed to the conduct of the appeal on the grounds recorded in the preceding paragraph.

Consideration of first ground – that the trial judge erred in failing to recuse himself on the basis that there was a reasonable apprehension of bias arising from a personal relationship between the trial judge and one of the witnesses in the matter

[15] It is common ground that an apprehension of bias may arise in the mind of a reasonable observer if the judge hearing the matter has any direct or indirect personal or pecuniary interest in the proceedings; and that a judge must recuse himself or herself in those circumstances.

[16] The appellant's sole basis for the assertion of an apprehension of bias and the application that the trial judge should recuse himself derives from a statement made by another judge during the course of different proceedings on 8 November 2016. Those proceedings took the form of a private prosecution which the appellant had brought against Mr Daniel McGregor, the Sheriff of the Supreme Court, alleging that he had attempted to pervert the course of justice. The private prosecution was ultimately unsuccessful.

[17] During the course of a mention conducted on 8 November 2016 in those proceedings the following exchange took place:[4]

4 Transcript of Proceedings, 8 November 2016, p 17.

MR JENKINS: This is supposed to be before Neill J.

HIS HONOUR: No, it is not. It is now before me.

MR JENKINS: It is supposed to be – how come there's five different people - - -

HIS HONOUR: Because Mr Neill doesn't want to hear it because he's had an association where Mr McGregor did some work for him over a period of time. So, he's not comfortable dealing with the matter. That's why I have it.

[18] No further information was provided in relation to the "work" in question.

[19] The matter was picked up by the appellant during the course of the prosecution with which this appeal is concerned. At the commencement of the hearing on 26 April 2017 the appellant made an application in the following terms:[5]

MR JENKINS: I'd like to make an application, your Honour, for you to be recused from this case because you have a person relationship with Daniel McGregor.

MR ROWBOTTAM: Before we get to - - -

MR JENKINS: And just to establish the recuse I'm asking about, I've written a letter. You have a personal relationship with Daniel McGregor and you've recused yourself before on a case, *McGregor v Jenkins*, and it's on the tape where Carey J had said:

> "Justice Neill is recusing himself from this case because he has a personal relationship with Daniel McGregor who's a witness in this case. He's had personal dealings with him; professionally, in this court and personal dealing with him; and mowed lawns and things."

5 Transcript of Proceedings, 26 April 2017, p 2.

> And Justice Carey said that, so I'm asking you to be recused because you're friends with the man; you're personal friends with the man and I'm asking you to be recused from the case.

[20] It may immediately be noticed that the appellant's recounting of the observations made by Judge Carey on 8 November 2016 is somewhat inaccurate and misleading. There was then an exchange in the following terms:[6]

> MR JENKINS: Well, I'd like my application heard first, so that I can get another judge, because it's obvious that you have a personal relationship with Daniel McGregor, obviously. I've seen you having coffees with him up and down the street. So, you have a personal relationship with the man.
>
> HIS HONOUR: Mr Jenkins, that is not correct.
>
> MR JENKINS: It is correct.
>
> HIS HONOUR: You have not seen that because it has never happened.
>
> MR JENKINS: Really? Is that right?
>
> HIS HONOUR: That is right.

[21] The judge then proceeded to rule on the application, and the appellant to cavil at that ruling, in the following terms:

> HIS HONOUR: Mr Jenkins, one thing at a time. At the moment, Mr Rowbottam, we're going to deal with Mr Jenkins' application that I recuse myself. Then, I will hear your application; because I do not allow the application that I recuse myself. I state for the record that its basis is no basis whatsoever that because as judge - - -
>
> MR JENKINS: Explain - - -

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6 Transcript of Proceedings, 26 April 2017, p 3.

HIS HONOUR: Because a judge might know a witness; that is no basis, in and of itself, that the judge must recuse himself or herself from hearing the case - - -

MR JENKINS: So, you're admitting that you have a personal relationship with him
- - -

HIS HONOUR: And, therefore, I deny your application.

MR JENKINS: Well, I'm asking written – I'm asking written things for this because I'll be applying to the Supreme Court because I want a written statement about what that is and your personal relationship and I'm asking for your personal relationship because he recused himself. He's come over to your house and mowed your lawn. He's come over to your house and had dealings with you. He's come over to your house personally, and don't say I haven't seen you having coffee because I seen you talking on the street, okay.

So, I mean, how can the guy work as a Sheriff - on the record here, he works as a Sheriff here and he's going up and down, up and down, talking to you people every single day and you have personal relationships with the man, you know, and now he's trying to come and get a witness. How come you shouldn't recuse yourself? Write that down.

HIS HONOUR: Mr Jenkins, I have refused your application. You will have access to the transcript in the event that you wish to take that any further at a future time.

[22] For the purpose of making his ruling the judge acknowledged that he knew the witness in question, but sought to correct the appellant's misapprehension that the judge "had coffees" with the witness or that there was a "personal relationship" which would give rise to a reasonable apprehension of bias. The appellant did not seek to call evidence to contrary effect during the course of the appeal.

[23] The appellant was questioned concerning his assertions in this respect in the present appeal. The exchange proceeded in the following terms:[7]

> HIS HONOUR: Mr Jenkins, is your assertion that there's a personal relationship between Judge Neill and Daniel McGregor based entirely on what you say Judge Carey said in this transcript on 8 November [2016]?
>
> MR JENKINS: Yes, because I mean - - -
>
> HIS HONOUR: Alright. No – thank you. Now, during the course of the hearing of these matters before Judge Neill on 26 April 2017, you said to the judge: 'I want to get another judge because it's obvious that you have a personal relationship with Daniel McGregor. I've seen you having coffees with him up and down the street. So, you have a personal relationship with the man.' Judge Neill says: 'Mr Jenkins, that's not correct.' You say: 'It is correct.' Judge Neill says: 'You haven't seen that because it's never happened.'
>
> Now, do you continue to assert that you personally have seen these two people having coffee in the Mall or whatever street it was that you were referring to?
>
> MR JENKINS: I go up to Legal Aid regularly to talk to people in anti-discrimination which is down near the Roma Bar on that area and plenty of magistrates and different people sit there, okay. And I observe them for different people. I feel that at different times, it was my – it's more based on the fact of the situation with the transcript, because I know about that. But it's also because I have seen at different times, people having coffees. I'm not exactly sure if I've ever seen Daniel McGregor there at that time. But I just know that the man has worked in and out of the – in and out with magistrates there. Part of my appeal against - - -
>
> HIS HONOUR: So, it's an assumption and intuition based on what you understand the circumstances to be, rather than any actual knowledge on your part of those two having coffees together? Is that a fair summary?
>
> MR JENKINS: I feel there's just to – in my dealing with Justice Neill, I don't understand – the week before in the case that's got to come up on my Ochre Card, Justice Neill had a situation where he just absolutely – he made comments about me in court, saying: 'We've got to deal with you, Mr Jenkins, you're queer' and I wanted to verify that. And also, suddenly, with the Ochre Card application, he just destroys all the evidence. He said

7 Transcript of Proceedings, 11 July 2017, p 7.

that the – (inaudible) – you might want to know, when I was trying to get all the - Justice Smith said that they needed to provide all the transcripts about what they were going to say alleging what I'd done to children in my cases.

Now, two days before that Justice Neill had a hearing and then said they didn't have to provide that evidence so then I went into the court on that day and I withdrew from that case because I thought I may as well start again because Justice Neill won't give me a fair hearing, I've tried over and over again to get a fair hearing and then the next week I've got him again in this other case and he's saying I don't have evidence again and I feel like what am I supposed to do in my life? I work hard to get evidence and then the day before I can't get evidence.

I work hard to get evidence and the day before I can't get more evidence and then I'm made to get heard. It's like as if I am working hard with the system to try and get better in my life to do the legal thing to be able to get ochre cards and work hard in a society so right from last year from the sentencing of Justice Kelly, I've worked right through community service and doing art exhibitions and standing for government and organising myself out in the society and being respected and then I get to the stage where it all collapses and I'm – there's an unfairness there and so - - -

HIS HONOUR: Yes.

MR JENKINS: - - -I'm just absolutely exacerbated to the end of my time at that so it's – I start - - -

HIS HONOUR: So, Mr Jenkins, the bottom line in relation to the matter we were discussing is that because of what you perceive to be Judge Neill's attitude to you, although you haven't actually seen him and Mr McGregor having coffees together - - -

MR JENKINS: Well okay, I'll say I seen them together socially. I believe I have, that's what I believe but it's more based on the fact of his recuse and then him saying he's done lawns.

[24] For reasons which are obvious from the appellant's responses, his assertions concerning interactions between Judge Neill and Mr McGregor are not compelling. Even had those assertions taken the form of sworn evidence, rather than statements from the bar table, the

appellant's account of seeing them together having coffee or socially – presumably on a number of occasions – had the distinct air of fabrication or invention. Against that background, a number of conclusions may be drawn in relation to this ground of appeal.

[25] First, there is no doubt that Mr McGregor was known to the judge and was to be a witness in the criminal prosecution of the appellant. As the judge observed during the course of the application, that did not in itself compel recusal. The mere fact that the decision-maker may know a witness in the proceedings does not ground a reasonable perception that the decision may be influenced by that association or acquaintance.[8] That depends in every case on the closeness of the association, the time for which it has subsisted, and the incidents of that connection.[9] The appellant brought no evidence in relation to those matters in the face of the judge's indication that there was no personal or social relationship of a degree which disqualified him from hearing the matter.

[26] Secondly, the fact that the judge had previously indicated a disinclination to preside over the private prosecution which had been brought against Mr McGregor by the appellant did not operate as any concession that there were grounds for a reasonable perception that his

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8 *Cottle v Cottle* [1939] 2 All ER 535 at 539; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541; *Asciak v Samuels* (1976) 15 SASR 265.

9 *S & M Motor Repairs Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1988) 12 NSWLR 358 at 369; *Lindon v Commonwealth (No 2)* (1996) 70 ALJR 541; *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2008] NSWLEC 318 at [68]; *Trustees of Christian Bros v Cardone* (1995) 57 FCR 327.

decision in the matter might be influenced by some relevant association. Judge Carey's comment was that Judge Neill was "not comfortable dealing with the matter". Even in the absence of grounds for some reasonable perception of bias, one can well understand why the judge might have felt uncomfortable dealing with proceedings which had as a possible consequence the conviction of Mr McGregor and the imposition of some criminal sanction. One might also understand why there was no similar discomfort in the context of proceedings in which Mr McGregor was simply one of the number of witnesses to a series of transactions involving the appellant.

[27] Thirdly, there are references by Judge Carey to Mr McGregor doing "some work for [Judge Neill]", and by the appellant to the fact that Mr McGregor "mowed lawns and things". There was no evidence or elaboration concerning those references either during the course of the application for recusal or during the conduct of this appeal. It would have been preferable for these references to have been subject to some express disclosure, submission and consideration, although it is possible the matter had already been canvassed during the course of one of the appellant's frequent applications for recusal during the preliminary stages.

[28] On their face, these would appear to be references by the appellant to the generally known fact that prior to taking appointment as Sheriff,

Mr McGregor ran a gardening and landscaping business for a short period of time which punctuated a long period of service with the courts. The references suggest the judge was previously one of his clients in that business. Again, such a relationship would not necessarily ground a reasonable perception that the judge's decision in the present matter might have been influenced by some relevant association. If there was previously a service relationship of that nature, the judge was implicitly of the view that its incidents did not give rise to any reasonable apprehension of bias; and the appellant did not adduce or seek to adduce any evidence to different effect.

[29] The appeal on this ground is dismissed.

Consideration of second ground – that the trial judge erred in convicting the appellant of contempt on 26 April 2017 and in imposing penalty in respect of that conviction

[30] The conduct of the hearing on 26 April 2017 had an unfortunate beginning. Prior to the judge taking the bench there was some form of *contretemps* between the prosecutor and the appellant in the courtroom. The prosecutor asserted that the appellant had been verbally aggressive and physically confronting, and had showered his face with spittle while yelling at him from a distance of only inches.[10] The prosecutor frankly conceded calling the appellant the "pig" and an "animal" in response to that affront.[11] The appellant sought to have the judge

10 Transcript of Proceedings, 26 April 2017, p 5.

11 Transcript of Proceedings, 26 April 2017, p 3.

charge the prosecutor with contempt. Understandably, the judge declined to do so.

[31] There then followed a series of exchanges between the appellant and the bench during which the appellant demonstrated a deep misunderstanding of legal processes and a remarkable lack of courtesy.[12] The judge exercised a considerable degree of forbearance during the course of these exchanges, and sought to bring them to a close by having the prosecutor read the charges. The appellant sought to plead "no case" to each of the charges, and continued to take issue with the judge's ruling on the application for recusal and various other issues in a manner that was again both extremely discourteous and highly ill-informed.[13] The judge took the pleas of "no case" as pleas of not guilty.

[32] There followed an exchange between the judge and the appellant during which the appellant threatened to disrupt the proceedings and accused the judge of dishonesty:[14]

> HIS HONOUR: Mr Jenkins, I'm asking you to stop speaking while I make some directions about the future of this case this morning.
>
> Mr Rowbottam, you'll need to make some arrangements with my orderly here to show the film that you've brought to show Mr Jenkins. If you wish to have the security officer remain in court to meet your concerns that you expressed to me earlier –

12 Transcript of Proceedings, 26 April 2017, p 8-14.

13 Transcript of Proceedings, 26 April 2017, p 14-16.

14 Transcript of Proceedings, 26 April 2017, p 17-18.

Officer, are you in a position to remain here for a while? Thank you for that. We don't ask you to do anything, except to make sure that Mr Jenkins doesn't approach Mr Rowbottam inappropriately closely. Thank you.

Mr Rowbottam, we'll - - -

MR JENKINS: I'd like to make a request that he doesn't touch me, please?

HIS HONOUR: Yes, that's fair, too.

Mr Rowbottam, you, for your part, keep back from Mr Jenkins.

….

HIS HONOUR: Mr Jenkins, I want this matter to proceed.

MR JENKINS: Well, I'm not going to let it proceed, because I'm going down there and I'm taking contempt charges against Ian Rowbottam.

HIS HONOUR: Mr Jenkins, if you leave this court room - - -

MR JENKINS: I'm going to charge him for his behaviour.

HIS HONOUR: Mr Jenkins, if you leave this court room while I am addressing you and while I tell you the matter is proceeding, I will have you arrested. Do you understand?

MR JENKINS: Don't harass me.

HIS HONOUR: I will not harass you, provided that you can comport yourself appropriately.

MR JENKINS: Well, why don't you tell the truth about having a personal relationship with Daniel McGregor? Why don't you tell the truth about that?

HIS HONOUR: Will you comport yourself properly or do we have to take ridiculous steps to have these proceedings continued?

MR JENKINS: Why am I being charged with rubbish charges that absolutely mean nothing because I'm good at arguing? I'm winning my cases and Rowbottam can't handle it. I win my cases against the DPP - - -

HIS HONOUR: We haven't heard any evidence yet, Mr Jenkins.

MR JENKINS: - - - and I walk all over people. Pardon?

HIS HONOUR: We haven't heard any evidence about these charges yet?

MR JENKINS: Ian Rowbottam hates my guts, has kept me in gaol. He's actually lied against me in court. He's taken charges against me.

HIS HONOUR: Mr Jenkins - - -

MR JENKINS: No, he hates my guts - - -

HIS HONOUR: - - - you are to comport yourself properly - - -

MR JENKINS: I'm not letting him win this case - - -

HIS HONOUR: - - - while the court is sitting - - -

MR JENKINS: I am not letting him win this case because there's situations where these people are just pushing me and pushing me and pushing me, and I get sick of it. Every time I come in here, they push me and they push me and they push me and I'm getting sick of it. I don't want it.

[33] Again, the judge demonstrated commendable forbearance and adjourned the matter to allow the appellant to view video footage which was to be played in the prosecution case. Upon resumption of the hearing, the appellant sought by persistent interruption to prevent the prosecutor from calling witnesses and to disrupt the particularisation of the charges. It was at that point the judge first raised the matter of contempt in the following terms:[15]

MR ROWBOTTAM: The count 5, the failure to leave, is the direction by the Sheriff under - - -

MR JENKINS: They don't occur first, your Honour.

15 Transcript of Proceedings, 26 April 2017, p 25-26.

HIS HONOUR: Mr Jenkins. Be quiet.

MR JENKINS: They don't occur first. He's lying. They don't occur first. I haven't been asked to - - -

HIS HONOUR: Mr Jenkins, if you do not sit down - - -

MR JENKINS: Your Honour, this is - - -

HIS HONOUR: If you keep speaking over Mr Rowbottam when it's his turn to speak, if you keep speaking over me, if you keep interrupting - - -

MR JENKINS: This is a lie.

HIS HONOUR: - - - the proceedings of the court, accusing people of lying and colluding in the way you have been, I will have no option but to charge you with contempt of court.

MR JENKINS: Well, I think you better do that because - - -

HIS HONOUR: No, Mr Jenkins, that's not what I wish to do. That will not assist the running of your case.

MR JENKINS: He's lying to you because five and - - -

HIS HONOUR: Mr Jenkins, enough of accusing Mr Rowbottam of lying.

[34] Lest there be any doubt about the matter, the prosecutor was entirely correct in his particularisation of the charges in saying that the conduct constituting count 5 occurred first in time. The appellant's claim that this was a lie was unfounded.

[35] The appellant then turned his attention to the court security guard:[16]

MR JENKINS: Get this guy away from me.

HIS HONOUR: No, I will not.

MR JENKINS: I'm standing – get this guy away from me, harassing me.

16 Transcript of Proceedings, 26 April 2017, p 26.

HIS HONOUR: Officer, if you'd just be kind enough to stand back a little bit, but - - -

MR JENKINS: I don't want an Indian standing near me, harassing me.

HIS HONOUR: Mr Jenkins, I will not tolerate your racist outbursts.

MR JENKINS: I'm not being a racist.

HIS HONOUR: Yes, you are.

MR JENKINS: He's called me an – he called me an Aussie, get away from me, I don't want him near me.

HIS HONOUR: Mr Jenkins - - -

MR JENKINS: No, I don't like him.

HIS HONOUR: Mr Jenkins, sit. Sit down. Do not interrupt Mr Rowbottam again while it is his turn to introduce the charges.

[36] This exchange presumably formed the basis of the assertion in the handwritten notice of appeal that during the hearing on 26 April 2017 a security guard had initiated the dispute because he was a Muslim who knew the appellant was a devout Christian. The passage from the transcript which has been extracted above provides no support for that allegation. Even had it done so, that would have provided no explanation or excuse for the appellant's subsequent behaviour.

[37] Despite the judge's request that the appellant permit the prosecutor to introduce the charges, there followed an extended period (occupying some 14 pages of transcript) during which the appellant repeatedly interrupted proceedings and accused the prosecutor of corruption

despite repeated directions from the judge that he refrain from doing so. At p 29 of the transcript the judge warned the appellant that if he continued to behave in that fashion he would be charged with contempt of court. The appellant's interruptions and abuse continued unabated. At p 34 of the transcript the judge again warned the appellant that if he continued to interrupt the proceedings he would be charged with contempt of court. The appellant was warned again at p 38 of the transcript. The following exchange then took place:[17]

> HIS HONOUR: Mr Jenkins, I've just directed you, I've ordered you in this courtroom not to interrupt any further.
>
> MR JENKINS: Okay, I'll go outside and then when he's finished - - -
>
> HIS HONOUR: No, you will not, Mr Jenkins. You're here on bail.
>
> MR JENKINS: I don't want – I don't want to listen to the lie.
>
> HIS HONOUR: If you go outside, you'll be in breach of your bail and you'll be arrested for that too.
>
> MR JENKINS: I'm not bailing – this is a court proceeding, I'd like to go to the toilet. Is that okay with you?
>
> HIS HONOUR: No, Mr Jenkins, not while court is sitting.
>
> MR JENKINS: Well, do you want me to pee on the ground then?
>
> HIS HONOUR: Mr Jenkins - - -
>
> MR JENKINS: I'd like to go to the toilet please.
>
> HIS HONOUR: No, Mr Jenkins.
>
> MR JENKINS: I'd like to go to the toilet please?

17 Transcript of Proceedings, 26 April 2017, p 39-40.

HIS HONOUR: At the end of Mr Rowbottam giving the particulars, you'll be - - -

MR JENKINS: It's been going on forever.

HIS HONOUR: - - - we'll give you a break.

MR JENKINS: I'd like to go to the toilet please?

HIS HONOUR: Mr Jenkins, it's only been going forever because you persist in interrupting.

MR JENKINS: Because this is corrupt and I'm going to interrupt every single second because I'm sick of this.

HIS HONOUR: Very well. Very well.

MR JENKINS: I'm not being stood over like some – I'm some kind of idiot.

HIS HONOUR: Trevor Jenkins, I charge you with contempt of court pursuant to s 46 of the *Local Court Act* because of your continual interruption of the court proceeding and your failure to comply with my directions and orders that you remain seated and be quiet while Mr Rowbottam gives his evidence.

Please bring up a court officer?

A PERSON UNKNOWN: (Inaudible) Your Honour, they're on the way.

MR JENKINS: I'm sick and tired of it, you know. The whole thing's corrupt.

HIS HONOUR: Mr Jenkins, be seated.

MR JENKINS: Rowbottam's corrupt and you're corrupt, it's got to come out.

HIS HONOUR: Mr Jenkins, be seated.

MR JENKINS: Rowbottam's corrupt and you're corrupt and the whole thing's a setup, you know. I'm an artist and I'm free and you guys don't even want to talk and you want to stand over me and belittle me as a person. Belittle me as a person in the system and that's what happens. Belittle me and belittle me and belittle me.

Well, I'm a bit smart for you and don't care and I'm free as a person. I'm sick and tired of it. You guys belittle me as a human being. Belittle me every day because I'm free. You do like it. I make art every day. I'm not doing anything up in that court, I'm self-representing myself. Do you know what I did? I went up to the literary awards and I went there and two security guards lied. Now you got the other people to lie just to put me in goal. That's what you want.

[38] The appellant was subsequently arrested and arrangements were made for a lawyer from the Northern Territory Legal Aid Commission to attend on him in relation to the contempt charge. Although it did not form part of the behaviours for which he had been charged with contempt, the appellant's conduct as he was being taken from the courtroom is illustrative of his attitude and the fraught nature of the proceedings:[18]

MR JENKINS: Fuck the bullshit. All they want to do is put me gaol - - -

THE ORDERLY: I know - - -

MR JENKINS: Put me in gaol, put me in gaol, I'm an artist. Put me in goal - - -

THE ORDERLY: We're going to go downstairs, he's going sentence you later.

MR JENKINS: Who gives a fuck? No, fuck you. Fuck you cunts. You know (inaudible) fuck your fucking bullshit, you know.

THE ORDERLY: Officer - - -

MR JENKINS: How long's it going to go on for? Put Trevor Jenkins in gaol. Put him in goal, put him in goal. Well, go and get your ABC, you know, put me in gaol, that's all you want to do.

THE ORDERLY: No, (inaudible).

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18 Transcript of Proceedings, 26 April 2017, p 42-43.

MR JENKINS: Put me in gaol, put me in gaol, put me in gaol, put me in gaol, for (inaudible), I don't know.

HIS HONOUR: Mr Rowbottam, we'll adjourn the court.

MR JENKINS: You'll never fucking win, Rowbottam, hey. You'll never fucking win, Rowbottam. Fuck, put me in gaol, get these guys as witnesses because all they want to do is put me in fucking gaol. All you cunts just want to put me in gaol.

You're corrupt as hell, Neill. You're fucking corrupt as hell you fucking cunt. You're corrupt as fucking hell. You (inaudible) cunt.

[39] When the matter resumed there was an appearance by a lawyer from the Northern Territory Legal Aid Commission to advise that she had spoken with the appellant and provided him with some legal advice. She indicated she had instructions to apologise on the appellant's behalf, and to say by way of explanation that the appellant had not slept well the previous night and had not eaten any breakfast. The judge noted the apology but was not satisfied it was a genuine or candid expression of remorse. The judge expressed the view that the appellant had been manipulating the proceedings "knowingly, deliberately and contumeliously", and was not prepared to discontinue the proceedings for contempt.

[40] The lawyer from the Northern Territory Legal Aid Commission then advised the court that unless and until the appellant indicated otherwise, her instructions did not extend beyond proffering the apology. The appellant did not seek to extend the retainer. The

appellant then purported to speak on his own behalf in relation to the charge of contempt. He submitted variously and erroneously (as will be seen) that the charge of contempt had to be heard by another judge; that the prosecutor's conduct operated as some form of defence to the charge; and that the judge's refusal to allow him to make a "no case" submission at the time of plea had somehow precipitated and excused his conduct. The submissions then descended into further accusations of corruption, vitriol and self-aggrandisement, which included the appellant comparing himself to Mahatma Gandhi and Nelson Mandela.[19]

[41] The appellant did not seek any adjournment in order to prepare his defence to the contempt charge. Rather, he asserted that the contempt had to be dealt with by a different judge, that the presiding judge harboured some bias against him, and that he needed to be out on bail as he had to represent himself in another matter before the Supreme Court. The appellant also made some reference to the need to call witnesses,[20] although it is unclear whether that was a need arising in the conduct of the defence to the charges contained in counts 1 to 6, or arising in the contempt proceedings. It is difficult to see how or why there was any occasion or need to call witnesses in the defence of the contempt charge in circumstances where that

19 Transcript of Proceedings, 26 April 2017, p 45-48.

20 Transcript of Proceedings, 26 April 2017, p 45.

charge related exclusively to matters which had transpired in the court room over the previous hour.

[42] The judge then determined, applying the decision of this court in *Sanderson v Lambe*,[21] that the usual course for dealing with contempt in the face of the court was for the matter to be dealt with by the judge before whom the contempt was allegedly committed. There was no separate trial of the charge of contempt, and the judge found the offence proven. The appellant then made further submissions which, if anything, aggravated the contempt.[22] The judge then delivered his decision in the matter, with some interruption, in the following terms:[23]

> HIS HONOUR: The decision to proceed to a charge for contempt of court is a power to be used sparingly and only in serious cases. It's the duty of the court to protect the public against every attempt to over or intimidate the courts by insult or defamation.
>
> Mr Jenkins' behaviour was not merely scurrilous abuse. It was deliberate, designed in advance and contumelious. It was intended to - - -
>
> MR JENKINS: That wasn't designed in advance.
>
> HIS HONOUR: - - - and it did prevent - - -
>
> MR JENKINS: That wasn't designed in advance.
>
> HIS HONOUR: - - - the court from hearing the charges against Mr Jenkins from - - -

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21 [2005] NTSC 44; 193 FLR 318.

22 Transcript of Proceedings, 26 April 2017, p 49.

23 Transcript of Proceedings, 26 April 2017, p 50-51.

MR JENKINS: That wasn't designed in advance. How was it designed in advance?

HIS HONOUR: - - - proceeding. These powers to punish for contempt are of great importance to society - - -

MR JENKINS: Why?

HIS HONOUR: - - - because it's by [their application] that law and order prevail
- - -

MR JENKINS: No one outside even gives a damn now. No one outside except you guys.

HIS HONOUR: - - - that have nothing to do with the personal feelings of the judge.

MR JENKINS: Yes it has. It's actually to do with the feelings of the judge.

HIS HONOUR: Proceedings for contempt of court are not used to prevent free speech.

MR JENKINS: You're abusive in yourself, Neill.

HIS HONOUR: They are to preserve - - -

MR JENKINS: You're abusive and you know Daniel McGregor.

HIS HONOUR: - - - the administration of justice.

MR JENKINS: You know Daniel McGregor.

HIS HONOUR: They are not to protect the individual person.

MR JENKINS: You're friends with Daniel McGregor.

HIS HONOUR: Trevor Jenkins, you are convicted. You are sentenced to two months' prison from today. Take him down - - -

MR JENKINS: You can only do three weeks in the Local Court, sorry. You can only do three weeks. It's the maximum and I'd like to apply for bail, please. I'd like to apply for bail, please. I'm self-representing. I'd like to apply for bail. I'm self-representing and you can't give me two

months because it's only three weeks you can possibly give me in the Local Court, Neill.

Sorry, you can only give me three weeks, Neill. Why don't you say something? I'd like to apply for bail, please. I want to put in an appeal. I want to put in an appeal. I want to put in an appeal. I want to put in an appeal.

How full of shit. Rowbottam, hey, call me a pig.

You can only give me three weeks, Neill. You can only give me three weeks.

[43] An inferior court of record has an implied power to deal with contempt in its face.[24] That common law power may be displaced or varied by statutory provision. That displacement is said to arise on the basis that "having received the particular attention of the legislature and specific statutory provisions having been made for the purpose of giving a guarded summary remedy, it must be taken to exclude recourse to the summary jurisdiction belonging at common law".[25] In particular, where one or more statutory offences have been created in relation to conduct which falls within the general description of contempt in the face of an inferior court of record, the court's implied common law power to impose sanctions for such conduct under the law of contempt will generally be taken to have been ousted.[26]

[44] Contempt in the face of the court possesses a special procedural feature at common law by which trial, and the imposition of a criminal penalty

24 *Grassby v The Queen* (1989) 168 CLR 1 at 16.

25 *R v Metal Trades Employers' Assn; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208.

26 *Re Dunn* [1906] VLR 493; *Re Bennison; Ex parte Fisher SM* (1995) 14 WAR 318.

where appropriate, may be conducted summarily by the judge presiding in the court at the time of the alleged contempt. Statutory provisions may either modify or incorporate the procedure at common law. Where the relevant statutory provision creates one or more offences in relation to conduct in the nature of contempt in the face of the court, and empowers a judicial officer to try summarily and punish persons who breach the provision, the statute governs both the substantive and procedural elements of the law of contempt in the face of the court and supersedes the procedure at common law.

[45] The *Local Court Act* (NT) makes both substantive and procedural provision in relation to contempt, including contempt in the face of the court.

[46] Section 45 of the *Local Court Act* establishes and defines the various species of contempt. Subsection (5) is a general provision in the following terms:

> A person commits a contempt of the Court if the person:
> (a) wilfully prevaricates in the face of the Court; or
> (b) engages in any other conduct that, under a law of the Territory, constitutes a contempt in the face of the Court.

[47] It may be noted that the subsection does not create statutory offences in relation to conduct in the nature of contempt in the face of the court. Rather, it makes conduct that would constitute contempt of court at common law a contempt of the court for statutory purposes. It is quite

a different model to that previously subsisting under s 46 of the *Justices Act* (NT), which created a number of specific statutory offences constituted by specific species of conduct, *viz* wilfully interrupting the proceedings of the court, disrespectful conduct to the Justice, obstructing or assaulting any person in attendance, and wilfully disobeying an order made by the court.

[48] Section 46 of the *Local Court Act* establishes a regime for dealing with contempt of court, including contempt in the face of the court. It provides relevantly:

> **Dealing with contempt of Court**
>
> (1) If it appears to the Court that a person has committed a contempt of the Court, the Court may:
>
> (a) for a contempt in the face of the Court – orally order that the person be arrested and brought before the Court; or
>
> (b) for any contempt:
>
> (i) issue a warrant to have the person arrested and brought before the Court; or
>
> (ii) issue a summons requiring the person to appear before the Court.
>
> (2) When the person is brought or appears before the Court, the Court:
>
> (a) must inform the person of the contempt with which the person is charged; and
>
> (b) may deal with the person in accordance with any procedure the Court thinks fit.
>
> (3) The *Bail Act* applies in relation to the person as if the person were accused of an offence and were being held in custody for that offence.
>
> (4) ….
>
> (5) The Court constituted by a Judge may exercise those powers in relation to the alleged contempt.

[49] So far as is relevant for these purposes, that section stipulates that the court must inform the person of the contempt with which he or she is charged before any further dealing, but may then deal with the person by any procedure it thinks fit. Subject to the overarching requirements of natural justice (discussed further below), the Local Court clearly has power to punish contempt of this nature in a summary fashion and without need for a separate trial. Section 8 of the *Criminal Code Act* (NT) expressly preserves the authority of the court for that purpose.

[50] Section 47 of the *Local Court Act* provides for punishment for contempt in the following terms:

> **Punishment for contempt**
>
> (1) If the Court finds a person guilty of a contempt of the Court, it may order that the person be imprisoned for not more than 6 months or be fined not more than an amount equal to 100 penalty units.
>
> (2) A person cannot be punished, in respect of the same conduct, for a contempt and for an offence against another Act.
>
> (3) If the Court orders that the person be imprisoned, the Court may order that the person be discharged before the end of the term of imprisonment that was ordered.
>
> (4) If a person who has been found guilty of a contempt apologises to the Court for the contempt, the Court may amend or cancel any order imposing punishment for the contempt, and if it does so may order the refund of all or part of any fine that has been paid.

[51] Even where the legislature has enacted a contempt regime, statutory provisions dealing with misconduct in a courtroom are frequently interpreted with reference to common law contempt, and courts

frequently cite and apply common law contempt cases, including as to procedure, as if they governed the matter.[27]

[52] The High Court has cautioned that in the common law context the summary procedure "should rarely be resorted to except in those exceptional cases where the conduct is such that 'it cannot wait to be punished' because it is 'urgent and imperative to act immediately' to preserve the integrity of 'a trial in progress or about to start'".[28] That caution has no necessary application in circumstances where the statutory regime permits the adoption of a summary procedure. Even in those circumstances, however, the caution draws attention to the difficulties which may present with the adoption of that procedure.

[53] It is apparent from a careful reading of the transcript of proceedings in this matter, however, that the very conditions of which the High Court spoke presented in this case. The appellant was making a mockery of the trial process. His conduct was such as to undermine the integrity of that process and effectively to prevent the determination of the criminal charges which he was then facing. The trial judge considered this was a deliberate and contumelious strategy on the part of the appellant. It was open to the trial judge to form that view. The matter had already been delayed on many occasions by reason of the particular challenges presented by the appellant, and it had been the subject of

27 See, for example, *Tippett v Murphy* (1982) 62 FLR 183.

28 *Keeley v Brooking* (1979) 143 CLR 162 at 174.

mention or preliminary hearing on some 18 prior occasions. This case was exceptional and it was urgent and imperative to act immediately to prevent the appellant from achieving his purpose of undermining the integrity of the trial process.

[54] In *O'Brien v Northern Territory*,[29] the Court of Appeal found that the magistrate's order to take the plaintiff into custody was unlawful because the magistrate had neither charged the plaintiff with, nor convicted the plaintiff of, contempt. Mildren J observed that a person could be remanded in custody: on the order of a judicial officer after the laying of a charge; or where the person's behaviour in court was such that he or she should be remanded in custody after being informed that he or she was remanded for contempt of court even if no charge had been formulated at that stage.[30]

[55] Section 46 of the *Local Court Act* has been enacted since that time. It may be that the express words of that provision displace the principle expressed in *O'Brien*. In particular, the provision would appear to empower arrest if it appears to the court that a person has committed a contempt in the face of the court; and to require the person to be informed of the contempt with which they have been charged after that time but perhaps before the court proceeds further.

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29 (2003) 173 FLR 455 at [31], [48], [49] and [62].

30 *O'Brien v Northern Territory* (2003) 173 FLR 455 at [50].

[56] Even if there has been some change in that respect, there can be no doubt that procedural and evidentiary safeguards must be applied in the summary conduct of contempt proceedings. Failure to observe those safeguards may constitute a denial of natural justice, providing grounds for a contempt conviction to be set aside on appeal or review.[31] Those safeguards required that the appellant be given due notice of the charge. As stated, the judicial officer charged the plaintiff before remanding him in custody. That charge was framed in the following terms:

> Trevor Jenkins, I charge you with contempt of court pursuant to s 46 of the *Local Court Act* because of your continual interruption of the court proceeding and your failure to comply with my directions and orders that you remain seated and be quiet while Mr Rowbottam gives his evidence.

[57] Accepting that the appellant was given that notice of the charge, *MacGroarty v Clauson*[32] is authority for the proposition that a charge for contempt under a statutory regime must be framed with reference to the elements of the relevant statutory offence, and the failure to satisfy this requirement has the consequence that the conviction for contempt cannot stand. In considering charges for statutory offences which broadly replicate the common law concept of contempt in the face of the court, the High Court held that absent some clear legislative intent to the contrary, a charge will necessarily be inadequate if it fails to

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31 *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186.

32 (1989) 167 CLR 251 at 255-256.

identify the particular statutory offence with which the accused is charged.

[58] Although the High Court found that the relevant provision evinced a legislative intent that the presiding judicial officer should be able to deal promptly and effectively with the statutory offences which the section created without being unduly impeded by formal procedural requirements, there was nothing in the section that dispensed with the fundamental requirement that a person should not be punished for a statutory offence of contempt of court unless the particular offence was distinctly identified. That was the case even though the presiding judge had made it clear to the accused the conduct which, in his view, constituted the contempt of court. The High Court concluded that the failure to identify the particular offence alleged had the result that the appellant was not properly charged and that the conviction could not stand.

[59] The statutory provision there under consideration was in terms similar to s 46 of the *Justices Act*, which has now been repealed and replaced by s 46 of the *Local Court Act*. As already noticed, that new provision renders conduct that would constitute contempt of court at common law a contempt of the court for statutory purposes. It does not create specific statutory offences such as "wilfully interrupting the proceedings of the court". As a consequence, there was no failure in

this case to identify the particular offence alleged, and the charge as framed clearly put the appellant on notice of both the statutory provision pursuant to which it was brought and the conduct said to constitute the offending.

[60] The principle enunciated in *MacGroarty* appears directed to matters of form rather than substance. That is, the charge for a statutory offence of this nature must take a particular form regardless whether or not the accused has a general comprehension of the conduct giving rise to the charge. The principle would not have presented the same difficulties in that case had the court in question been dealing with the contempt under the common law power, or described in common law terms, rather than a specific statutory offence. As the High Court observed in *MacGroarty*, "[w]hen what is involved is a charge of common law contempt, it may, depending on the circumstances, not be necessary to formulate the charge in a series of specific allegations, provided that the 'gist of the accusation' is made clear to the person charged".[33]

[61] If it is accepted that the appellant was properly charged, in the application of the summary procedure it will generally fall to the presiding judge to determine whether the conduct in question constitutes contempt in the face of the court in a given case. That is reflected in the provisions of s 46 of the *Local Court Act*. In the course

33 *MacGroarty v Clauson* (1989) 167 CLR 251 at 255.

of making such a determination, the person charged with contempt must be given an adequate opportunity to prepare and present a case in reply. In *Coward v Stapleton*, the High Court explained this requirement as follows, with reference to the special summary procedure for contempt in the face of the court:[34]

> The charge having been made sufficiently explicit, the person accused must then be allowed a reasonable opportunity of being heard in his own defence, that is to say a reasonable opportunity of placing before the court any explanation or amplification of his evidence, and any submissions of fact or law, which he may wish the court to consider as bearing either upon the charge itself or upon the question of punishment.

[62] That requirement will obviously have application whether the matter is being dealt with pursuant to statute or under the common law. In either case, the requirement to provide a reasonable opportunity to be heard imports a number of incidents.

[63] First, the court should ideally try to ensure that legal representation is available to an accused facing a charge of contempt in the face of the court. As detailed above, an adjournment was granted to provide to the appellant with legal advice and representation. The appellant only availed himself of that opportunity for the purpose of having the legal practitioner convey an apology on his behalf. The appellant did not seek to continue the retainer or procure an adjournment once the court indicated that the apology would not purge the contempt.

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34 *Coward v Stapleton* (1953) 90 CLR 573 at 580.

[64] Secondly, an accused must have an appreciation of the conduct underlying the charge. The appellant was at all times present in court during the course of events leading to and the subject of the charge. In fact, he was central to those events. The appellant was privy to the judge's repeated and explicit indications that he should desist from such conduct.[35] As already observed, the content of the appellant's apology, and his legal representative's short discourse with the bench, disclosed an appreciation of the matters under consideration. At no stage did the appellant or his legal representative seek further particulars of the relevant conduct.

[65] Thirdly, there must be the grant of a sufficient adjournment to the accused to enable a defence to be prepared.[36] At no stage did the appellant indicate that further time was required in order to prepare his case or to seek further legal advice and representation. The appellant was clearly committed to representing himself. The appellant did not seek to give evidence on oath or to call his or her own witnesses (and, for the reasons already detailed, it is difficult to see how that course could usefully have been pursued in the circumstances). To the extent that the appellant took opportunity to address the court on the question of guilt, that address was nothing more than a confection of poor excuse and inadequate rationalisation. It might even be inferred that

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35 *R v Hume; Ex parte Hawkins* (1965) 53 DLR (2d) 453.

36 *Fraser v The Queen* [1984] 3 NSWLR 212; *Magistrates' Court at Prahran v Murphy* [1997] 2 VR 186 at 205–206.

the apology proffered by the appellant after opportunity to confer with his legal representative constituted an admission of guilt.

[66] Fourthly, the case against the alleged contemnor must be proved by the instigating party beyond reasonable doubt.[37] This proposition is necessarily qualified by the fact that under the summary procedure the accused "is required to meet, not a case which is presented against him by evidence given at his trial, but a case which exists in the mind of the judge at the commencement of the trial".[38] The observations of the presiding judicial officer, both in this case and generally, constitute the principal material on which a conviction might be based. These are not subject to challenge in cross-examination, and do not require any other witness to be called in establishing the commission of the offence.

[67] The judge in this case had observed the conduct said to constitute the contempt over the hours leading up to his determination. He was in a unique position to determine whether the contempt was established beyond reasonable doubt, and a reading of the transcript gives rise to no doubt concerning the judge's determination in that respect.

[68] Finally, a person found guilty of contempt should be given the opportunity to address the court on the matter of penalty. The appellant was afforded that opportunity. However, by reason of his

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37 *R v Fletcher; Ex parte Kisch* (1935) 52 CLR 248 at 258; *Consolidated Press Ltd v McRae* (1955) 93 CLR 325 at 333; *Keeley v Brooking* (1979) 143 CLR 162; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15; *Witham v Holloway* (1995) 183 CLR 525.

38 *Keeley v Brooking* (1979) 143 CLR 162.

general disposition, lack of legal training and misplaced conviction as to his innate abilities, that address did not assist the appellant's cause.

[69] That loss of opportunity notwithstanding, it could not be said that the penalty imposed by the judge was unreasonable or plainly unjust. The appellant's assertion that the Local Court was restricted to the imposition of a maximum penalty of imprisonment for three weeks was clearly unfounded; and the penalty of imprisonment for two months must be considered in light of the appellant's recent prior conviction in the Supreme Court for similar conduct for which a penalty of imprisonment for three months was imposed.

[70] The appeal on this ground is dismissed.

Consideration of third ground – that the appellant was denied natural justice by reason of the fact that part of the hearing was conducted in his absence

[71] Following the appellant's arrest and imprisonment for contempt in the face of the court the matter resumed with the appellant appearing by audio-visual link from the Darwin Correctional Centre. The appellant then applied for an adjournment in order to apply for legal aid.[39] That request might be seen as disingenuous given the appellant's failure to avail himself of legal aid when it was offered to him during the course of the proceedings for contempt. The judge presumably considered it to be so given his refusal to accede to the request.

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39 Transcript of Proceedings, 26 April 2017, p 54.

[72] The appellant then threatened to remove his clothing and take no further part in the proceedings.[40] The judge was apparently unmoved by that threat. The appellant then removed his clothing. The judge indicated his intention to proceed.

[73] The appellant then asserted that he was mentally ill and expressed the intention to kill himself.[41] The judge then indicated that he would fill out a standard "at risk" form and forward it through to the prison. The appellant was informed that the matter would proceed whether or not he participated in the hearing, and would proceed *ex parte* in the event that he absented himself. The relevant part of the transcript reads as follows:[42]

> HIS HONOUR: Well, I don't want any of your officers to be placed in a difficult situation. If Mr Jenkins will not listen or will not voluntarily participate in the hearing, then I will ask that you take him away and we will continue without him. But I will tell him first.
>
> A PERSON UNKNOWN: I will do that right now, your Honour. Thank you.
>
> HIS HONOUR: Thank you.
>
> Mr Jenkins, we are going to proceed - - -
>
> MR JENKINS: I'm not having a hearing.
>
> HIS HONOUR: We are going to proceed.
>
> MR JENKINS: I'm not having a hearing. I want to get Legal Aid.

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40 Transcript of Proceedings, 26 April 2017, p 54.

41 Transcript of Proceedings, 26 April 2017, p 55.

42 Transcript of Proceedings, 26 April 2017, p 57-58.

HIS HONOUR: We will hear all the evidence - - -

MR JENKINS: I'm mentally ill. I'm not having a hearing - - -

HIS HONOUR: - - - without you if you don't wish to be part of it.

MR JENKINS: I'm mentally ill. I'm not having a hearing. I want to kill myself. I'm mentally ill. I'm not having a hearing.

HIS HONOUR: Alright. We are going to proceed without you, Mr Jenkins.

MR JENKINS: I'm mentally ill. I'm not having a hearing.

HIS HONOUR: Thank you, officers.

MR JENKINS: I'm not going to go on with this. I'm mentally ill. I'm not having a hearing, okay. You give me appeal papers and get me an appeal.

HIS HONOUR: Thank you, officers. Take Mr Jenkins back to his cell.

MR JENKINS: I'm mentally ill. I'm not going to put up with this. I'm mentally ill. I'm not going to put up with this stuff. I'm mentally ill and I'll kill myself. I'm mentally ill and I'll kill myself. I'm mentally ill, okay. So I'm mentally ill. I'm mentally ill.

HIS HONOUR: Officers, can you hear me?

Take Mr Jenkins away now, thank you.

A PERSON UNKNOWN: Thank you. All done.

HIS HONOUR: Thank you so much.

A PERSON UNKNOWN: Thank you, your Honour.

HIS HONOUR: I will just fill out this form, Mr Rowbottam, and then we will proceed.

MR ROWBOTTAM: Thank you, your Honour.

HIS HONOUR: For the record, Mr Jenkins has declined to participate in the hearing even though he has been offered the opportunity to do so by video link from Holtze Prison and he has divested himself of all clothing and threatened to kill himself. For that reason, I am completing the documentation declaring him to be a prisoner at risk, but my decision, in all

the circumstances of this matter, is that we will proceed to receive evidence and deal with the matter in the absence of Mr Jenkins who has chosen to have the court proceed that way by default.

[74] The matter then proceeded in the appellant's absence as indicated.

[75] On the following morning the appellant was again called up by audio-visual link from the prison. Matters proceeded much as they had done on the previous day:[43]

> MR JENKINS: I'm not here to appeal, I'm at risk. I'm at risk. I'm not going through with this. I'm not going through with this because I've got to be able to cross-examine people and call witnesses. I'm not going through with this. I asked for an adjournment, so I can actually – I want to appeal against my contempt. I want appeal papers sent out here by the Sheriff so as I can sit in the Sheriff's house and I can get appeal papers for my contempt charges. I want that. I want to see Legal Aid. I'm – I'm at risk at the moment. I want to kill myself, so I'm at risk and that's the – that's the end of this story. I'm not going through this anymore. You know, I'm at risk, okay, so - I'm not mentally capable of doing this. I want to see forensic mental health. Ré Acacio . I want to see forensic mental health. He hasn't even visited me here, so I'm – Ré Acacio, I'm not capable of handling this. They won't even give me my papers so I can't do anything. So I can't cross-examine people. They won't do anything here. So I need to see Legal Aid and then I - I want to see Legal Aid. I'm still at risk. I haven't even been assessed with that yet, okay. So I'm still at risk and I – I want to see. I want to kill myself. I'm sick and tired of the bullshit, okay. So then – then I'm not capable of doing that, okay, so then I'm asking for an adjournment then to see Legal Aid and I want papers sent out so that I can – I can appeal against the contempt. You haven't even allowed me to put in an appeal. I'm going to appeal and then I'm going to get bail on that because what you said is wrong. It's not two months. It's like three weeks on a contempt charge. You don't even know. Three weeks is the maximum (inaudible) contempt, Mr Neill, so that's what you need to do, okay. So I'm not – I'm not going to go through with this because I'm asking for an adjournment. It's pretty clear, okay. So, I mean, I haven't seen forensic mental health. I've got a forensic mental health assessment (inaudible) from the Supreme Court. It has to be in (inaudible) March 9 and I'd like an adjournment on that and I'd like to apply for bail, okay. So on bail because I'm appealing my charges, okay. So I'm appealing the

43 Transcript of Proceedings, 27 April 2017, p 63-64.

> contempt. I'm also appealing the case up in the Supreme Court, so that – I'm appealing that. So that's what I want to do, okay. So I – I wasn't in contempt of court and I want to appeal against that and also you – it's manifestly excessive saying two months. I want to appeal against that. Otherwise, that's the end of the story before I kill - so they leave me alone, you know. Leave me alone, that's all I want.
>
> HIS HONOUR: Thank you, Mr Jenkins. Mr Jenkins, I decline your application for an adjournment.
>
> MR JENKINS: (Inaudible). I'm sick of this. I'm not going to put up with it. I'm sick of this. Well, I need to see (inaudible) and see Legal Aid. I'm not going to put up with this
>
> ….
>
> HIS HONOUR: I'm not sure that they - yes, well, it was - my ruling is that Mr Jenkins' application for an adjournment is declined. The matter will proceed in his absence as he has made it plain he does not intend to partake or involve himself further in this hearing.

[76] The appellant's assertions of mental illness and suicidal intent, and his behaviour generally, are apt to raise legitimate concerns about his mental state. That is an issue which falls to be addressed before any determination of whether the appellant was denied natural justice by the conduct of the hearing in his absence.

[77] During the course of both proceedings before the Local Court and this appeal the appellant was insistent that consideration be given to a number of mental state assessments. The purpose for which the appellant sought to draw attention to his mental state is apparent from

the submission he made during the course of sentencing proceedings (discussed further below) in the following terms:[44]

> MR JENKINS: Is that report – because I haven't seen it, I haven't looked through it and I wanted to discuss that with Mr Acacio and I've asked him to come out to the prison several times and I haven't been able to do that.
>
> ….
>
> So you'd understand what a psychotic episode is from that experience. So to understand my behaviour. I'm just trying to put it into a context so you understand (inaudible) and I don't think it's a criminal action. This is why I get upset about it. But when I'm perfectly – I'm happy to talk about it in a closed court, as long as there's not like ABC or NT News or someone sitting there, because it gets just blown out of proportion.
>
> ….
>
> If you give me kind of ten minutes, 20 minutes I can calm down, I can access myself, that's fine. But a lot of times, no, when I'm getting pressured and people are saying okay, no, there's a security guard here. When Mr Rowbottam was abusing me, all those things are happening, then I get put into cells. It all goes haywire and then it's like – (inaudible) I can talk about that quite openly. But I don't like – in my life, you get over those things. It's a stigma you don't really want to look at.

[78] It is no doubt the case that an offender's mental illness may have a very significant bearing on any determination whether to proceed to determine criminal charges on an *ex parte* basis, on criminal responsibility generally, and on the question of punishment and sentence. So far as the issue of criminal responsibility is concerned, during the course of these appeal proceedings the appellant expressly disavowed any mental impairment which would prevent him comprehending the nature and quality of his conduct; or prevent him

44 Transcript of Proceedings, 26 May 2017, pp 4-6.

knowing that his conduct as perceived by reasonable people was wrong; or give rise to an inability to control his actions. The appellant also disavows any inability by reason of mental impairment to understand the nature of charges brought against him or to participate in the trial process. As will be seen, the medical assessments also do not suggest any mental impairment with those consequences.

[79] The nub of the appellant's submission in this respect is that although his mental illness does not prevent him from forming the requisite intent or appreciating the consequences of his conduct (either in relation to counts 2 to 6 or the contempt), it does operate such that special accommodation must be made for him in the context of court proceedings.

[80] The two reports produced to the Local Court in aid of that submission during the sentencing proceedings were an advice to the Chief Health Officer pursuant to s 77 of the *Mental Health and Related Services Act* (NT) dated 13 March 2015 and prepared by a Designated Mental Health Practitioner, and a Mental State Assessment and Personality Inventory Assessment of the appellant prepared by a Psychologist and dated 4 May 2017. Those reports were also relied upon by the appellant for the purposes of this appeal, together with discharge summaries from the Tamworth Hospital in relation to the three attendances between 1994 1996.

[81] The advice to the Chief Health Officer had been requested by a magistrate in the context of previous court proceedings involving an alleged trespass at Parliament House and related disorderly conduct charges. It describes the appellant as a 50-year-old, single, unemployed male of no fixed abode who has been living in Darwin since 2005. It describes a childhood characterised by obsessive behaviours and a young adulthood characterised by drug use and intermittent engagement with mental health facilities. During the course of those engagements he was generally assessed to have insight into his behaviours but an unwillingness to conform. There was no evidence of genuine suicidal ideation, homicidal behaviour, perceptual disturbance, delusions or thought disorder.

[82] The advice to the Chief Health Officer goes on to record that since his arrival in Darwin, the appellant has been assessed and found not to be suffering from any mental illness in March 2013, September 2013, January 2014, February 2014, March 2014 and February 2015. It is of some note that the March 2014 assessment was conducted after the appellant simulated a suicide attempt while being held in the cells at court. On assessment, he told the attending mental health professionals that he had done this to voice his frustration at the court process but at no stage carried any suicidal intent. Similarly, in February 2015 the appellant was categorised "at risk" following disorderly conduct in a

courtroom. On assessment he was found not to be mentally unwell with no indication for follow-up.

[83] The advice to the Chief Health Officer concluded that the appellant showed no evidence of psychotic symptoms or delusional ideas. Rather, he had an "entitled manner" and overvalued his own ideas to the point of obsession. There was no evidence he was suffering from mental illness or disturbance.

[84] The psychological report from May 2017 was prepared in the context of the application to restore the sentence held in suspense for contempt in the face of this court. That report drew a number of relevant conclusions. The appellant is excessively sensitive and overly responsive to the opinion of others. He exhibits delusions of both persecution and grandeur. He has an unrealistic and exaggerated appraisal of his own worth, and has difficulty controlling impulsive expression. He is unable to express emotions in an adaptive modulated way, and may alternate between direct expression and under-controlled emotional outburst. He has a narcissistic personality as a pathological defence against depression and rage. He is untrusting of others and believes that he is being plotted against. He believes that he is a gifted person, a lateral thinker, a "legend", and a "great artist". He also believes that he is a "political figure" who has "stood up to authority" which now intends to destroy his political career. He considers himself

to be totally free and independent of the system, and that "[his] reality is just as important, just as powerful as any court reality or Judge's reality".

[85] Most significantly for the purposes of this appeal, the appellant was assessed following his threats to kill himself during the course of the proceedings in the Local Court on 26 and 27 April 2017. In that assessment the appellant admitted that he had only threatened to kill himself in an attempt to stop the proceedings. This was a considered and strategic action on his part. At no stage did he harbour any suicidal intent or ideation. The appellant also told the psychologist that he is entitled to express himself in any way he sees fit because he is a "great artist", and that the courts cannot dictate how he should behave because it would make him less of an artist. The psychologist concluded that the appellant is not mentally ill, but "has a separate reality that is grandiose" and a Narcissistic Personality Disorder.

[86] There is nothing in that material to suggest that the appellant does not properly bear criminal responsibility for his conduct, either at the time he committed the public disorder offences for which he was found guilty or at the time he committed the contempt in the face of the court. While the material might provide something in the way of explanation for the appellant's conduct, it does not provide any excuse or exculpation. The material also suggests positively that the appellant's

assertions of mental illness and suicidal ideation made before the Local Court on 26 and 27 April 2017 were a ruse directed to derailing the conduct of the proceedings. A reading of the relevant part of the transcript and the progression of the appellant's behaviours at the time bears out that suggestion.

[87] During the course of this appeal the appellant suggested that the trial judge should also have disqualified himself on the ground that he harboured some personal animus towards the appellant. This assertion was made on the basis of a comment by the trial judge in a pre-trial hearing conducted on 19 April 2017. During the course of that hearing the following exchange took place: [45]

> MR JENKINS: Well, I'll charge Mr Rowbottam with attempt to pervert the course of justice. I'll go down there today.
>
> HIS HONOUR: Do you what you choose, Mr Jenkins, but today we're here to look at the hearing - - -
> MR JENKINS: I'm not going to be harassed over this.
>
> HIS HONOUR: - - - on 26 and 27 April.
>
> MR JENKINS: I'm being harassed because I'm a self-represented litigant and I stand up for myself.
>
> HIS HONOUR: Mr Jenkins, you're – we're trying to fit in with your peculiarities.
>
> MR JENKINS: No, you're not. I'm not peculiar and I'd like you to be recused for saying that, okay?
>
> HIS HONOUR: No, Mr Jenkins.

45 Transcript of Proceedings, 19 April 2017, pp 10-11.

MR JENKINS: You have a bias me; I'm not peculiar, okay.

HIS HONOUR: No, Mr Jenkins.

MR JENKINS: Write down that – I'll take a reason – I'll get you recused in the Supreme Court for saying that. I'm not a peculiar person.

HIS HONOUR: You can take such action as you see fit in other places.

[88] The reference to the appellant's "peculiarities" did not demonstrate either actual or apprehended bias against him. It was only to acknowledge the fact that the conduct of a trial in which the appellant was to represent himself gave rise to particular challenges, and required particular accommodations, not least because of the matters disclosed in the medical assessments traversed above.

[89] Against that background, it may be accepted that:

> … it is an essential principle of the criminal law that a trial for an indictable offence is to be conducted in the presence of the accused and trial means the whole of the proceedings including sentence: *Lipohar v The Queen* (1999) 200 CLR 485 per Gaudron, Gummow and Hayne JJ at 514; *Lawrence v The King* [1933] AC 699 at 708; *R v Cornwell* (1972) 2 NSWLR 1 per Jacobs JA at p 3. The reason for this was that at common law there was no trial in absentia."[46]

[90] Three qualifications may be made to that statement of general principle. First, there are certain well-established exceptions to the operation of the principle. Secondly, the principle is limited in its terms to the trial of an indictable offence, and has nothing directly to say about summary proceedings. Thirdly, the requirement for the

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46 *Director of Public Prosecutions v Bakewell* [2007] NTSC 49; 21 NTLR 171 at 180.

presence of the accused is subject to any statutory provision that might be enacted by the legislature.

[91] The established exceptions to the application of the principle include:-

- Where a defendant absconds and fails to appear at trial, there will have clearly been a waiver of the right to be present, and in that circumstance the prosecution may elect to go on with the trial in the absence of the defendant.[47] There is a divergence of judicial opinion as to whether this exception applies where the defendant is voluntarily absent at the beginning of the trial, or whether it is limited to circumstances in which the defendant absconds during the course of the trial.[48]

- Where a defendant misbehaves in such a way as to make his or her removal from court necessary there will have been a waiver of the right to be present.[49]

- Where a defendant is precluded by illness or incapacity from attendance at the trial the court may proceed in his or her absence,

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47 *Ebatarinja v Deland* (1998) 194 CLR 444 at 454; *Jones, Planter and Pengelly* [1991] Crim LR 856; *R v King* (2004) 155 ACTR 55; *R v Collie* (2005) 91 SASR 339 at [33]; *Hellenic Republic v Tzatzimakis* (2003) 127 FCR 130 at [89]; *R v Ferguson* [2015] NTSC 35.

48 *R v Jones (Anthony)* [2003] 1 AC 1 at [10]; *R v Gee* [2012] SASCFC 86; 113 SASR 372.

49 *R v Hayward* [2001] QB 862; *R v Berry* (1897) 104 LT Jo 110; *R v Lee Kun* (1916) 1 KB 337 at 341; *R v Vernell* [1953] VLR 590; *R v Ferguson* [2015] NTSC 35.

although a person in those circumstances will have much stronger grounds for resisting the continuance of the trial.[50]

[92] In each of these cases, the court has a discretion as to whether the trial should proceed or not.[51] Those exceptions are recognized in s 361 of the *Criminal Code*, but it is plain from the context that provision has application to trials on indictment and not otherwise. Whatever the nature and scope of the exceptions may be, the common law principle requiring the presence of the accused also has no application to summary proceedings. It is limited in application to indictable offences.[52] There is no "essential principle" that any part of a summary proceeding must be conducted in the presence of the accused.[53] The governing statutes and the implication of powers regulate the circumstances in which a court exercising summary jurisdiction may conduct proceedings in the absence of the accused.

[93] The *Local Court Act* provides for the exercise of summary criminal jurisdiction in the Northern Territory, subject to the operation of any statute dealing with specific subject matter. Section 38 of the *Local*

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50 *R v Abrahams* (1895) 21 VLR 343; *R v Sykes and Campi (No 2)* [1969] VR 639.

51 *R v Hayward* [2001] QB 862 at [22]; *R v Jones (Anthony)* [2003] 1 AC 1 at [6].

52 *Lawrence v The King* [1933] AC 699 at 708; *Kenny: Outlines of Criminal Law* (Cambridge University Press, 15th ed, 1945). See also Archbold, *Criminal Pleading, Evidence and Practice* (36th ed), par 546 and cases there cited.

53 The abolition of the distinction between felonies and misdemeanours does not bear upon that conclusion. At the time when the distinction between felonies and misdemeanours was maintained, the defendant had to be present at trial of a felony and when judgment was given. In the case of a misdemeanour, this was not necessary but the presence of the defendant was usually required as a matter of practice (*R v Harwood* (1738) 2 Str 1088), unless the judgment was to be only for payment of a fine (*R v Williams* (1870) 18 WR 806). The distinction had application only to trials by jury under the process of indictment. It had no application, operation or place in the context of summary jurisdiction under statute.

Court Act provides expressly that the court may order a party be excluded from the courtroom during the whole or any part of the proceedings if it appears that the person's conduct makes it impracticable to continue the proceedings in the person's presence.[54] Similarly, ss 62, 62A and 62AB of the *Local Court (Criminal Procedure) Act* provide for the court to proceed *ex parte* in circumstances where a defendant fails to appear in obedience to a summons or in accordance with a bail undertaking.

[94] Although there is no provision dealing expressly with the conduct of proceedings in a defendant's absence in other circumstances, the Local Court has an implied power to regulate its own proceedings and to take such steps as are necessary for the exercise of its jurisdiction. Those implied powers must permit it also to proceed where a defendant in custody absents himself during the course of trial, or where a defendant in custody appearing by way of audio-visual link misbehaves in such a way as to make his or her removal necessary, or where a defendant in custody declines to participate in proceedings. The implied powers probably also extend to circumstances where a defendant is precluded by illness or incapacity from attendance at the trial and, in appropriate circumstances, where a defendant seeks to be excused from attendance.

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54 That is subject to the requirements in ss 78 and 117 of the *Sentencing Act* (NT) requiring the presence of the offender in any application for an indefinite sentence or at the time of sentence. It may be noted that the first provision is subject to an express exception where "the offender acts in a way that makes the hearing of the evidence or application in the offender's presence impracticable", or where an offender is unable to be present due to illness or "another reason".

[95] Those statutory and implied powers operate as exceptions to the ordinary rule that natural justice permits and requires the presence of the accused during the conduct of criminal proceedings. That exception is subject to the application of various criteria which govern the proper exercise of the discretion, and which are discussed further below.

[96] The trial judge did not make any formal order on either 26 or 27 April 2017 in terms that the appellant be excluded from the courtroom. It was put on the basis that the appellant had declined to participate in the hearing despite being offered the opportunity to do so by audio-visual link; and that the court's "decision" was to "proceed to receive evidence and deal with the matter in the absence of [the appellant] who has chosen to have the court proceed that way by default". That is properly characterised as an order pursuant to s 38 of the *Local Court Act* or, in the alternative, an order and procedure falling within the implied powers of the court.

[97] Accepting there was power to make the order in those terms, the question then becomes whether that power was exercised in error. It is plain from a consideration of the transcript of proceedings that the appellant's conduct – both while he was present in the courtroom prior to the finding of contempt and subsequently by audio-visual link from the prison – had made it impracticable to continue the proceedings in

his presence. That on its face warranted the exercise of the power under s 38 of the *Local Court Act*.

[98] In *R v Ferguson*,[55] Mildren J considered the criteria identified in *R v Hayward*[56] for the guidance of courts in the exercise of powers and discretions directed to this purpose. The following observations may be made in the application of those criteria.

[99] The appellant's behaviour was deliberate, voluntary and such as to plainly waive his right to appear at the trial of the charges. Given the persistence of his behaviour and his antecedents, the court was correct to consider that an adjournment would not have cured the defendant's disruptive behaviours.

[100] The appellant expressed no genuine wish to be legally represented at the trial. To the extent he sought an adjournment to make application for legal aid, that application was properly considered as another ruse designed to delay the conduct of the proceedings. It must be noted in this respect that the appellant had not taken up the opportunity for legal representation during the conduct of the contempt proceedings beyond providing instructions for an apology to be conveyed to the court. The appellant's serial appearances as a self-represented litigant before the

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55 [2015] NTSC 35.

56 [2001] QB 862.

various courts in this jurisdiction also suggests a disinclination on his part to avail himself of qualified legal advice and representation.

[101] In any event, it might be considered unlikely that the appellant would have provided instructions to solicitors in a manner which would have enabled them to present a defence. That conclusion may be drawn from the various matters in his defence to which the appellant made advertence prior to the finding of contempt and during the sentencing proceedings (discussed further below). Those matters were founded on a series of untruths, misrepresentations and misapprehensions, and provided nothing by way of defence known to the law. It is also apparent from the evidence given by the witnesses called during the trial that the factual basis for many of the assertions made by the appellant were simply not correct (also discussed further below).

[102] As the matter was conducted summarily before a judge, there was no risk of a jury reaching an improper conclusion concerning the absence of the appellant. Finally, given the nature of the charges and their relationship to the administration of justice it was in the public interest that they be determined within a reasonable time.

[103] The appeal on this ground is dismissed.

Consideration of fourth ground – that the sentence imposed by the trial judge on the convictions for counts 2, 3, 4, 5 and 6 was manifestly excessive

[104] The sentencing proceedings were blighted by the same difficulties which presented during the hearing of the substantive charges. Those difficulties are apparent in the following extract from the transcript of the sentencing proceedings:[57]

> MR JENKINS: And I'll end up – I have a mental illness. I have a mental illness and I want to be able to be heard because I'm a genius. I'm a genius. I'm an artistic genius. I want to be able to be heard because I'm an artistic genius.
>
> A PERSON UNKNOWN: Trevor - - -
>
> MR JENKINS: I'm an artistic genius (inaudible) - - -
>
> HIS HONOUR: Officer, if we're going to continue - - -
>
> MR JENKINS: (inaudible).
>
> HIS HONOUR: - - - Mr Jenkins is to stay where he is.
>
> MR JENKINS: You're not listening to me.
>
> HIS HONOUR: Thank you.
>
> MR JENKINS: I want to be able to have an appeal. I want to be able to have an appeal.
>
> A PERSON UNKNOWN: (inaudible).
>
> MR JENKINS: I want to be able to have an appeal.
>
> A PERSON UNKNOWN: Do you want to (inaudible).
>
> MR JENKINS: I want to talk to you and to be able to have an appeal. That's all I want (inaudible) - - -

57 Transcript of Proceedings, 12 May 2017, p 28-31.

HIS HONOUR: The officer is telling the court that he cannot hear us over Mr Jenkins.

MR JENKINS: I've got a mental illness. I've got a mental illness and I want to be left alone. I want to be left alone because I have a mental illness. All you're trying to do is harass me. You're trying to harass me because I've got a mental illness - - -

A PERSON UNKNOWN: (inaudible).

MR JENKINS: I've got a mental illness and I want to be left alone. I've got a mental illness and I want to be left alone. I want to be left alone because I have a mental illness. I have a mental illness. I have a mental illness and I want to be left alone. I want you to leave me alone. I am not guilty; I've done nothing wrong. I've got a mental illness and I want to be left alone.

You don't understand me. I want to be left alone. You people have got to understand me. (inaudible) and I'm not guilty. I'm not guilty about what I do. I'm not guilty about what I do. All I want to be able to do is file an appeal. I want to be able to file an appeal and talk to my witnesses. That's what I want to be able to do. I want to file an appeal and (inaudible).

….

MR JENKINS: I don't understand you. I want to be (inaudible). I want to speak to a psychiatrist. I want to speak to a psychiatrist.

A PERSON UNKNOWN: Mr Jenkins - - -

MR JENKINS: I want to speak to a psychiatrist.

HIS HONOUR: Leave Mr Jenkins there until we ask him to go.

MR JENKINS: I want to speak to a psychiatrist.

A PERSON UNKNOWN: (inaudible), your Honour.

HIS HONOUR: Thank you.

Turn down the sound.

What has just happened is that a guard at the prison has entered the room to find out what is happening because Mr Jenkins was apparently becoming agitated. Mr Jenkins then spoke over the guard and over the court, such that the guard was unable to hear what the court had to say. I

wrote on a piece of paper, requesting the guard to leave Mr Jenkins where he is in the room until we ask for him to be taken back to his cell.

We will now proceed. We will continue to give Mr Jenkins an opportunity to make submissions on his own behalf and partake in the sentencing process. But, as long as Mr Jenkins continues to interrupt the court and interrupt Mr Rowbottam, we will continue to exercise the control we have of turning down his sound; so that the court's procedures cannot be brought to an end by this behaviour on the part of Mr Jenkins.

Mr Rowbottam, you were talking to me about the report of Mr Ray Acacia – Acacia, is it, or Acacio?

….

HIS HONOUR: Put the sound back on, please.

MR ROWBOTTAM: - - - he was just removed.

HIS HONOUR: Yes.

MR ROWBOTTAM: Having taken his clothes off.

HIS HONOUR: For the record, Mr Jenkins has just been removed from the AVL room at Holtze Prison by a prison guard, Mr Jenkins having just removed his clothes; a practice he has engaged in previously before me and, I understand, before other courts and other judges. The matter will have to proceed in his absence. Mr Jenkins – can I hear the guard? Turn the sound up, please.

Good morning, Officer, Mr Jenkins has been removed, I see.

Sorry, turn the sound up. Turn it on.

Can you hear me, Officer? But I can't hear you. Yes, I can hear you now, Officer.

A PERSON UNKNOWN: Thank you.

HIS HONOUR: Thank you for that. Now, Mr Jenkins has been taken away, in the execution of your obligation to him. I understand that circumstance. The court will proceed in his absence, having made every effort to engage him in this process. But thank you for your help.

[105] The matter was subsequently adjourned to 26 May 2017, in part to comply with the requirement in s 117 of the *Sentencing Act* (NT) that the offender be present when the sentence is imposed.

[106] On the resumption of the sentencing proceedings the Local Court received character evidence from two witnesses called by the appellant for that purpose. One witness was an officer of the Salvation Army and the other witness was the General Secretary of the St Vincent de Paul Society. Their evidence was essentially to the effect that the appellant participated in community work and that if a sentence was imposed involving some element of community service those organisations would be willing to host the appellant for the performance of that service.

[107] The appellant also expressed his intention to call a further five witnesses who could give evidence in relation to his artistic accomplishments. Those witnesses had not presented to court on that day for the purposes of the sentencing proceedings and no evidence was taken from them. The sentencing proceedings were adjourned to 16 June 2017 to allow the appellant to make arrangements in that respect.

[108] On the resumption of the sentencing proceedings the appellant called a "digital arts educator" who described herself as a person with "a dynamic understanding of diverse communities and how people like

[the appellant] engage with life and learning through art". The essence of the witness's evidence was that the accused had contributed to the Darwin community through his art, and that the appellant could stay with her in the event he was sentenced to a community service order.

[109] That witness was followed by the Deacon from the Christ Church Cathedral. The witness's evidence was, in essence, that the appellant had contributed to a number of workshops run by the Cathedral; that although the appellant sometimes became agitated and heated in discussion, the witness never felt threatened; that the appellant had frustrated or exasperated a number of people associated with the Cathedral; and that the church always welcomed volunteers provided their contribution was workable.

[110] That evidence was followed by submissions. The appellant's submissions on sentence were discursive. They run for approximately 13 pages of the transcript.[58] They are directed in large part to the findings of guilt rather than to the question of sentence. They are not recognisably directed to orthodox sentencing considerations at all. Before turning to consider the sentence that was imposed it is necessary to give some attention to the evidence received by the Local Court during the course of the trial.

58 Transcript of Proceedings, 16 June 2017, pp 37-50.

[111] The court heard evidence from the Sheriff of the Supreme Court. That evidence was to the effect that on the morning of 8 April 2016 he was advised that the appellant was appearing in proceedings before the court. (Those proceedings were, somewhat ironically, the application by the Registrar in the matter of *Jenkins v Todd* seeking to have the appellant dealt with for contempt in the face of the court.) As a result of the appellant's behaviours in court on that morning, the presiding judge had directed that the appellant was to leave the courtroom and would only be permitted to participate in the proceedings by audio-visual link from the vulnerable witness room if he chose to do so. Alternatively, the matter would proceed in his absence. That advice was provided to the Sheriff by the Deputy Sheriff, and had in turn been provided by the presiding judge's Associate.

[112] After receiving that advice the Sheriff proceeded to the courtroom. He had a conversation with the presiding judge's Associate in which she confirmed the orders that had been made. The legal practitioner representing the other party in the proceedings was attempting to persuade the appellant to leave the courtroom. The appellant refused to leave. The Sheriff directed the appellant to leave the courtroom. The appellant refused to leave and remained seated at the bar table. The Sheriff then said, "This is your last opportunity to stand on your own and remove yourself". The appellant refused to leave.

[113] The Sheriff then directed three court security guards who were in attendance to remove the appellant from the courtroom. Each of the security contractors employed as a security guard at the Supreme Court was also appointed as a Deputy Sheriff. As the court security guards were removing the appellant from the courtroom he wrapped his legs around a chair in order to impede their progress. He also went limp to constitute himself as a "dead weight" in order to impede their progress. Despite that passive resistance, the appellant was taken out of the courtroom into the foyer of the court building. The appellant was yelling and screaming as this took place.

[114] The appellant continued yelling and screaming in the foyer. The Sheriff directed him to desist or he would be removed from the court building. The appellant refused to comply with that direction. The Sheriff then directed the security guards to remove the appellant from the court building. The appellant again constituted himself as a dead weight but pressed his heels against the floor in an attempt to stop his progress towards the exit. The Sheriff then took the appellant by the legs and he was carried bodily outside. He was placed on the ground outside the court building. The appellant continued yelling during this process.

[115] The appellant was told that he would not be permitted to return to the court building until he calmed down and was prepared to behave

himself. He would then appear to have calmed himself to a degree and convinced the security supervisor to readmit him to the court. The Sheriff approached the appellant and advised him that the proceedings in which he was involved had concluded. The appellant became aggressive. Police then attended.

[116] The Sheriff subsequently took a copy of the audio recording of proceedings before Kelly J on the morning of 8 April 2016, and what transpired after the judge had left the bench. That audio recording was received into evidence in the conduct of this prosecution. It records the presiding judge directing the appellant to leave the courtroom, and the direction subsequently given by the Sheriff to that same effect.

[117] The Sheriff also subsequently took a copy of CCTV footage from the court foyer on the morning of April 2016. That CCTV footage was also received into evidence in the conduct of this prosecution. It records the appellant being carried out of the court building in the manner described by the Sheriff, and the appellant variously screaming, praying and running in circles near the entrance to the court building following his ejection.

[118] The Local Court then heard evidence from the Sheriff's Officer who was on duty in the proceedings on the morning of 8 April 2016. Her evidence was as follows. The appellant was appearing in that matter. His behaviour deteriorated rapidly. He became very aggressive and

began screaming “the same sentence” very loudly and repetitively. As a consequence, nobody else in the courtroom could speak. In response, the presiding judge adjourned proceedings. The Sheriff’s Officer then reported the matter to the Sheriff.

[119] The Sheriff attended, directed the appellant to leave the courtroom in a clear manner, and gave the appellant “multiple opportunities” to do so. The appellant refused and was subsequently removed by security guards. The witness also gave evidence of the appellant wrapping his legs around a chair in order to impede that removal. She remained in the courtroom, but heard the appellant yelling from the foyer of the court building.

[120] The Local Court then heard evidence from one of the court security guards who on the morning of 8 April 2016 was involved in the removal of the appellant from the court room, and ultimately from the court building. His evidence was as follows. On that morning he received a call from the supervisor to provide assistance in the courtroom in which the appellant was appearing. When he arrived in that courtroom both the judge and the appellant were present. He observed that the appellant kept interrupting the presiding judge as she was attempting to speak despite the judge’s directions that he not do so. The judge then adjourned proceedings.

[121] The Sheriff arrived and asked the appellant to leave the courtroom. The appellant refused and the security guards then "escorted" the appellant out of the courtroom. During the course of that process the appellant "was resisting and he just was leaving his body and was lying on the ground beside the Bar table".

[122] The Local Court then heard evidence from the legal practitioner representing the other party to the proceedings on the morning of 8 April 2016. His evidence was as follows. After the presiding judge adjourned proceedings the Sheriff directed the appellant to leave the courtroom. The appellant refused to do so and threatened to have the Sheriff charged with some unspecified criminal offences. The appellant's protests in that respect were loud and repetitive. The appellant was then forcibly removed from the courtroom by court security guards.

[123] The Local Court then heard evidence from the presiding judge's Associate. Her evidence was as follows. As a result of the appellant's conduct the presiding judge directed that if he wished to continue appearing in the matter he was to do so by audio-visual link from the vulnerable witness room. The appellant was subsequently removed from the courtroom by security guards.

[124] It was the conduct described in that evidence which founded the findings of guilt in respect of count 5 (failing to comply with a

requirement of a security officer); and in respect of count 6 (resisting a court security officer in the execution of his duty).

[125] The Local Court then heard evidence from a police officer who was tasked to attend the Supreme Court on the morning of 8 April 2016. His evidence was as follows. On arrival at the Supreme Court he saw the appellant standing outside. The appellant was yelling at a person wearing robes who the witness assumed was a legal practitioner. The police officer watched this for a period of approximately five minutes before intervening. The appellant said: "Fuck off. It's none of your business."

[126] The witness was then joined by another two police officers. The appellant then went into the Supreme Court building to the registry and started aggressively demanding documents. In doing so he was swearing at the court staff behind the counter. The court security then requested police to escort the appellant from the court building. The appellant then walked without assistance to the front steps of the court building and sat on the ground.

[127] One of the other police officers in attendance then notified the appellant to cease to loiter and that he had 30 minutes to leave the area. The witness then went inside to speak to court security staff. While inside he heard the appellant shouting and saw him being arrested by the other two police officers in attendance.

[128] The Local Court then heard evidence from the police officer who had directed the appellant to cease loitering. His evidence was as follows. He was called to attend at the Supreme Court building on the morning of 8 April 2016. On arrival he observed that another police officer was already in attendance and speaking to the appellant. The appellant was highly agitated, aggressive, and engaged in argument with a legal practitioner.

[129] The appellant then said he needed paperwork from the court registry and went inside the court building. He approached the counter in the civil registry of the court and demanded paperwork. Registry staff advised that there would be a lot of photocopying involved and it might take in the order of an hour. The appellant's behaviour then deteriorated and he began swearing. He then left the court building voluntarily having been directed by the Sheriff to do so.

[130] The appellant remained on the veranda area of the Supreme Court building and continued to act in a highly agitated and aggressive manner. The witness directed him to move to the Civic Park area and wait for the paperwork to be completed by the Registry. The appellant continued to yell aggressively and assert that he had a legal right to remain where he was. The appellant refused to comply with the instructions by police to cease loitering and leave the area. The witness advised the appellant that he had until such time as the police

vehicle arrived to remove himself, failing which he would be arrested for loitering in a public place. The appellant refused to leave the area despite repeated requests by police over an extended period.

[131] A police wagon arrived approximately 25 to 30 minutes later. At that time the witness gave the appellant one final warning and direction to cease to loiter. The appellant again failed to comply and was arrested. The appellant then began screaming: "I've done fuck all wrong. I've done fuck all wrong." The appellant was then walked down the stairs and placed in the back of the police vehicle. The appellant provided a degree of passive resistance during that process which the witness said made it hard to escort him to the rear of the vehicle.

[132] The appellant was then taken to the Darwin watch house. He continued to yell aggressively during the course of his admission. The court received into evidence a DVD recording of that process. As addressed further below, the appellant's behaviour during this process was subject to specific attention by the judge in his sentencing remarks.

[133] The Local Court then heard evidence from the other police officer involved in the appellant's arrest. His evidence was as follows. He had attended at the Supreme Court building on the morning of 8 April 2016 in company with the other officer. He saw the appellant speaking loudly and aggressively to another person who appeared to be a barrister. He followed the appellant into the Supreme Court building.

While inside the appellant spoke aggressively to court staff and demanded paperwork. He was asked to leave and moved out to the front of the court building.

[134] The other officer then gave the appellant a direction to cease loitering. That direction was repeated on a number of occasions. The appellant failed to comply with that direction. The other officer then called for a police van to enable the appellant to be arrested. The police van arrived and the appellant was placed under arrest. The appellant resisted the application of handcuffs. The appellant refused to get into the back of the van and had to be lifted in. During the course of the process the appellant continued to shout words to the effect: "I've done fuck all wrong. I've done fuck all wrong." On arrival at the watch house the appellant repeatedly threatened to kill himself and demanded access to the "mental health team".

[135] The Local Court also heard evidence from an Aboriginal Community Police Officer stationed in the Darwin watch house who was tasked to convey the appellant to the watch house following his arrest at the Supreme Court. Her evidence was as follows. Upon her arrival at the Supreme Court she saw the appellant standing between the two police officers. When the appellant saw the police van he started waving his hands around and yelling. His behaviour was such that the police officers restrained him with handcuffs in order to place him into the

police vehicle and take him to the watch house. As he was being moved towards the police van the appellant continued yelling and refused to enter. The attending police officers took his feet and placed them inside the secure cage in the back of the vehicle. As the Aboriginal Community Police Officer went to close the door to the secure cage the appellant started kicking the cage door. It required two police officers applying force to close the door.

[136] When the vehicle arrived at the Darwin watch house the appellant was placed in the holding cell. A health assessment was conducted, during which the appellant continued yelling and refused to answer any of the assessment questions. He was then placed in the observation cell where he started doing push-ups and continued yelling. At various times thereafter the appellant was observed to be praying. He asked for several cups of tea which were provided to him.

[137] It was the conduct described in that evidence from police, as supplemented by the audio-visual evidence, which founded the findings of guilt in respect of count 2 (failing to cease to loiter when required by member of the police force); in respect of count 3 (resisting a member of the police force in the execution of his duty); and in respect of count 4 (behaving in a disorderly manner in a police station). The judge was not satisfied beyond reasonable doubt that the appellant had

conducted himself in a disorderly manner in a public place, and acquitted the appellant on count 1.

[138] The evidence given during the course of the proceedings came from witnesses who were discharging their professional duties at the material times. There were no material inconsistencies between the accounts given by each witness. Those accounts were given dispassionately and did not appear to be informed by any personal animus towards the appellant. Those accounts were corroborated by objective and contemporaneous evidence in the form of audio, visual and audio-visual recordings of various episodes. It would seem highly unlikely that those accounts would have been undermined in any material way by cross-examination, even in the hands of an expert counsel.

[139] It is then instructive to consider the grounds on which the appellant asserted that the convictions were recorded in error.

[140] First, the appellant asserted that at no stage had the Supreme Court directed that he was to leave the courtroom on the morning of 8 April 2016. That assertion was patently untrue.

[141] Secondly, the appellant asserted that the prosecution had failed to call relevant witnesses in the conduct of the prosecution. In particular, the appellant suggested that material evidence could have been called from the security guard who had permitted him to re-enter the Supreme

Court building after he was initially injected, and from two journalists who were present in the court precincts at the time. The appellant was unable to identify the basis on which he asserted those witnesses may have had some different account to give, or the manner in which that evidence may have led to a different result. As the High Court observed in *Richardson v The Queen*:[59]

> What is important is that it is for the prosecutor to decide in the particular case what are the relevant factors and, in light of those factors, to determine the course which will ensure a proper presentation of the Crown case conformably with the dictates of fairness to the accused.

[142] There is otherwise nothing to suggest any dereliction of duty on the part of the prosecution in that respect.

[143] Thirdly, the appellant asserted that the charges were unsustainable because it is illegal to have private security guards in a public courthouse. That assertion is without legal foundation.

[144] Fourthly, the appellant asserted that the charges were not properly made out because police and security guards attending on the incident were deliberately threatening to the appellant and escalated the incident in breach of their obligations under legislation. That assertion is entirely inconsistent with all the evidence in the matter and is patently untrue.

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59 (1974) 131 CLR 116 at 119.

[145] As already described, on 16 June 2017 the Local Court sentenced the appellant to a total effective period of imprisonment for five months for the offences brought on complaint. On first impression that seems to be a relatively heavy sentence for what might broadly be described as offending in the nature of disorderly conduct; however, that is an assessment which can only be made after a closer consideration of the objective circumstances of the offending, the purpose of the statutory proscriptions, and the appellant's relevant criminal history. The sentencing judge gave careful attention to each of those matters.

[146] First, the sentencing judge noted that the appellant had not demonstrated any willingness to facilitate the course of justice. Although that matter did not operate in aggravation of either the offending or the penalty, it was observed that the proceedings directed to the prosecution of these offences had come before the court on 18 separate occasions before the commencement of the final hearing on 26 April 2017, and that the appellant adopted various strategies to derail the proceedings at that time. The appellant continued to interrupt proceedings during the course of the sentencing remarks. The following passage is illustrative:

> HIS HONOUR: The hearing was not able to proceed at that moment however, because Mr Rowbottam, the prosecutor, then attempted to read onto the record the particulars of various of those charges which the prosecution was going to rely on, as a matter of procedural practicality.

> That step limits the range of the charges. But Mr Jenkins was not prepared to allow Mr Rowbottam to read those particulars onto the record.
>
> MR JENKINS: He was changing the particulars.
>
> HIS HONOUR: Mr Jenkins spoke loudly and aggressively over Mr Rowbottam and over me.
>
> MR JENKINS: He was changing the particulars (inaudible) - - -
>
> HIS HONOUR: Mr Jenkins, please, you've had your turn.
>
> MR JENKINS: He was changing the particulars. Daniel McGregor isn't a security officer.

[147] That passage is also illustrative of the level of the appellant's conceit and misapprehension. Section 5 of the *Court Security Act* deems the Sheriff to be a "security officer" for the relevant purposes. The appellant continued with his ill-advised interruptions during the course of the sentencing proceedings until the sentencing judge was forced to place the audio-visual link setting on "mute" from the appellant's station.

[148] Later in the sentencing remarks the judge concluded:

> For this reason when I come to sentence Mr Jenkins in a moment I shall make it clear that I will allow no discount to the sentence for any guilty plea, there was none. Mr Jenkins has by his behaviour shown no remorse whatsoever for his behaviours for which I have found him guilty today – rather on 25 April – sorry, 27 April.

[149] That conclusion was both inescapable and correct.

[150] The sentencing judge then gave some attention to the individual offences. The judge had commenced the sentencing remarks by

observing that the maximum penalty for each of the offences involving members of the police force and conduct within a police station was imprisonment for six months, while the counterpart offences for failing to comply with a direction by a court security officer and resisting a court security officer carried maximum penalties of imprisonment for 12 months and two years respectively. The sentencing judge then went on to note that in his assessment count 4, which was behaving in a disorderly manner in a police station, was the most serious of those offences. Later in the sentencing remarks the judge made the following comments in that respect:

> Count 4. I said earlier this is the offence I regarded as the most serious of the lot. This is the offence which was before the court on CCTV. I can see Mr Jenkins' behaviour at the police station clearly. I could hear everything Mr Jenkins said to the police officers. Mr Jenkins deliberately and vilely goaded the police officers. He bent over pointing to his anus and accused the police officers of desiring to sodomise him. He invited them to proceed in that fashion.
>
> He accused them of this type of behaviour or desire repeatedly. He did everything he possibly could to goad these police officers who were simply trying to do their duty in the circumstances.
>
> I am entirely satisfied, having observed Mr Jenkins' behaviour, his body language, heard his words, the tone of speech, observed the expression on his face in relation to this charge, that Mr Jenkins was doing everything within his power, not only to disrupt the orderly process of having him booked, but also to goad the police officers into attacking him or retaliating in some fashion. He could not have been more inflammatory in any circumstances.
>
> The police officers, to their eternal credit, did not react to this very, very, very bad behaviour on the part of this defendant.

[151] The sentencing judge then gave some attention to the appellant's criminal history in the following terms:

> Mr Jenkins' history involves a lot of similar offending. I am required specifically by the *Sentencing Act* to take the prior history into account, although Mr Jenkins begged to differ. I note that Mr Jenkins over the period 3 April 2012 to May 2014 has the following criminal history.
>
> On three occasions he has been convicted of trespass after directions to leave. On two occasions he has been convicted of assault, once of a worker, once not. On eight occasions he has been convicted of disorderly behaviour in a public place. On six occasions he has been convicted of resisting police. On one occasion he was convicted of obscene indecent language.
>
> On one occasion he was convicted of damaging property. On one occasion he was convicted for objectionable words. On one occasion he was convicted of making threats of reprisals in the course of court proceedings. On four occasions he has been convicted of disturbing religious worship. On two occasions he has been convicted of contempt of court. I do not include in that my conviction of Mr Jenkins on 26 April, as that came after the offences I am dealing with today.
>
> On two occasions he has been convicted of offensive behaviour in a public place. On one prior occasion he has been convicted of resisting and obstructing a court security officer.

[152] The sentencing judge drew the following conclusion on the basis of that criminal history:

> However, I am in no way convinced or satisfied that [the appellant's involvement in the arts] is inconsistent with Mr Jenkins' deliberate, manipulative behaviour in relation to these matters. The history of previous convictions, which I have read out, over the past four years is of like behaviour over a short compass of time.
>
> ….
>
> Mr Jenkins is not a man of good character when it comes to this type of behaviour. Mr Jenkins indeed I am satisfied has shown himself to have deliberately and wantonly engaged in this sort of behaviour.

[153] That conclusion was clearly open to the sentencing judge. It was also a matter which properly attracted a heavier sentence than would have been the case in the absence of such a record. The appellant's prior and recent history of relevant offending elevated the weight to be attached to considerations of deterrence and protection of the community; told against his prospects of rehabilitation; and bore upon the assessment of his moral culpability given that history could be said to demonstrate an attitude of continuing and flagrant disobedience to the law.

[154] The sentencing judge gave due attention to the question of the appellant's mental state in the following terms:

> The matters that I come to consider in setting the penalties include whether Mr Jenkins – clearly raised on all the evidence before me – whether Mr Jenkins suffered a mental illness which would be highly relevant to questions of setting the sentence.
>
> I am satisfied that all the evidence before me starting with Mr Jenkins' own submissions that he does not suffer any mental illness and on that basis of the conclusions set out in each of the reports of Ré Acacio and Susanne Read, that Mr Jenkins indeed at no relevant time that I am dealing with has suffered a diagnosable mental illness.
>
> There is no doubt that Mr Jenkins is an unusual man but that is certainly not an offence nor is it a matter that the court has to weigh particularly in terms of its sentencing exercise.
>
> Indeed at one stage there was plenty of material before me to cause me to be concerned whether Mr Jenkins properly understood his behaviours and the effect of his behaviours, the negative impact they might have upon him. But I am satisfied that is not the case. Indeed I conclude formally and for the record that Mr Jenkins' behaviours are to a significant degree deliberate, pre-planned and part of a highly manipulative behaviour on his part.

> I note that in the report of Susanne Read she stated this on page 12. That, 'Mr Jenkins showed no evidence of psychotic symptoms. He had an entitled manner and his ideas could be called over valued to the point of obsession'. She said that, 'Mr Jenkins was not prepared to make his life any less combative with authority, believing it was his job to expose and change wrongdoings in the community'.
>
> Mr Ré Acacio when he saw Mr Jenkins on 28 April 2017, two days after I sentenced Mr Jenkins to 2 months imprisonment for contempt of court, reports this on page 4 of his report, 'Mr Jenkins tells me that he stated he wanted to kill himself in order to stop the case'.
>
> He agreed when asked that this was a considered and strategic action, that he did not want to die and he did not think he had any mental health problem. Mr Ré Acacio then sets out, in quotes 'I'm not going to kill myself. I said that to stop the case. I'm telling you all this so I get the respect I deserve'.

[155] That assessment and conclusion should be accepted for the reasons already described.

[156] Finally, the sentencing judge gave some consideration in the following terms to the question whether any portion of the sentence imposed should be suspended:

> I come now to consider whether any part of this sentence should be suspended and if so upon what terms. I note that Mr Jenkins, in the past, has been allowed a suspended sentence which he breached. I note that he has, on four separate occasions, breached bail. I note that he has, on separate occasions, committed fresh offending whilst on bail. I note that Mr Jenkins has previously been allowed a community work order which he did not complete.
>
> I have noted Mr Jenkins today has, in no way, expressed the slightest remorse for his behaviours, rather presenting himself as the misunderstood genius and that really it is for the system to get out of his way rather than the other way around.
>
> On the basis of these matters and the nature of Mr Jenkins' offending and very real prospect that he will simply go on offending in this fashion once

> he is out of prison, I am satisfied that there is no proper basis for suspending any part of this sentence.
>
> Mr Jenkins has, once again, chosen to disrobe. However, I have concluded my remarks.

[157] Neither the determination not to suspend the sentence imposed on the appellant, nor the reasons given, demonstrate any error on the part of the sentencing judge. Perhaps the primary consideration in determining whether a sentence of imprisonment should be suspended is the effect that order would have on the rehabilitation of the offender, with the view ultimately to providing a measure of community protection. For the reasons given by the sentencing judge, the appellant's prospects of rehabilitation are extremely poor. The medical reports suggest a history of some 30 years during which the appellant has exhibited behaviours of this type. The prevalence and seriousness of those behaviours appears to have escalated significantly since in or about 2012.

[158] As already addressed, there was nothing before the Local Court to suggest remorse for or acknowledgement by the appellant of his wrongdoings. That attitude persisted during the course of this appeal. The appellant represented himself at all times as a person entirely without blame who had been purposefully and unjustly aggrieved, harassed, persecuted and traduced by corrupt or incompetent authorities. It might be considered highly unlikely that an order

suspending sentence in whole or in part would have encouraged any form of rehabilitation or change in attitude. It may even have operated to entrench the appellant's belief that he has at all times been in the right.

[159] Leaving aside the question of rehabilitation, the appellant's recent criminal history, his previous breaches of bail and orders suspending sentence, his otherwise poor character, his age, his long-term disengagement from employment activity, and his disordered personality all militated against an order suspending sentence.

[160] The appellant's assertion that the sentence imposed was manifestly excessive falls to be assessed having regard to those subjective circumstances and the objective circumstances of the offending as described in the evidence and the sentencing remarks. In *Truong v The Queen*,[60] the Court of Criminal Appeal referred with approval to the following statement in relation to manifest excess made by Bongiorno JA in *Hanks v The Queen*:[61]

> The term 'manifest excess' is usually used when a ground of appeal alleges that a sentence is so egregiously erroneous that the sentencing judge must have made a sentencing error although that error cannot be identified. To succeed on this ground the excess must be obvious, plain, apparent, easily perceived or understood and unmistakable. It must be so far outside the range of a reasonable discretionary judgment as to itself bespeak error.

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60 [2015] NTCCA 5; 35 NTLR 186 at [37].

61 [2011] VSCA 7 per Bongiorno JA at [22], Redlich JA agreeing. Also cited in *Namala v Whittington* [2016] NTSC 71 at [25].

[161] That is the relevant test.

[162] The sentence imposed in respect of count 5, which was failing to comply with a requirement of a security officer, was imprisonment for one month. The sentence imposed in respect of count 6, which was resisting a court security officer in the execution of his duty, was imprisonment for two months to be served concurrently with the sentence imposed for count 5. Neither of those sentences could be said to be manifestly excessive, particularly having regard to the order for concurrent service.

[163] Those provisions requiring members of the public to comply with the requirements of court security officers and not to resist such officers in the execution of their duty are clearly directed to the orderly administration of justice. A breach of those provisions strikes at the effective conduct of the judicial process. So much is apparent from the circumstances under consideration in this case. The presiding judge in proceedings before the Supreme Court had ordered their conduct in a particular manner in order both to accommodate the appellant's misbehaviour and to facilitate his continuing appearance. The appellant refused to comply with directions provided by court security officers to give effect to the judge's orders. That conduct required a condign response to achieve the important purposes of deterrence and punishment.

[164] The sentence imposed in respect of count 2, which was failing to cease to loiter when required by member of the police force, was imprisonment for one month. That term was also ordered to be served concurrently with the sentence imposed for count 6. The sentence imposed in respect of count 3, which was resisting a member of the police force in the execution of his duty, was imprisonment for two months with one month of that period to be served cumulatively upon the sentence imposed for count 6. Although those sentences might be characterised as heavy if considered in isolation, they could not be considered manifestly excessive in the relevant sense having regard to the appellant's recidivist behaviour in this respect.

[165] The sentence imposed in respect of count 4, which was behaving in a disorderly manner in a police station, was imprisonment for two months to be served cumulatively upon the sentence imposed for the other counts. That sentence could not be characterised as manifestly excessive having regard to the offending behaviours described by the sentencing judge. Nor was the order for cumulation made in error having regard to the fact that the sentences imposed for the earlier offending in no way reflected the criminality of the appellant's behaviour in the police station in any temporal or circumstantial sense.

[166] That total effective period of imprisonment for five months was ordered to commence from 9 August 2017, after completion of the

sentence of imprisonment for contempt previously restored by the Supreme Court. In making that order for what was effectively cumulation upon the sentences already being served, the sentencing judge gave no apparent consideration to the principle of totality. By that cumulation the appellant was subjected to a total period of imprisonment for eight-and-a-half months. Imprisonment for that length of time and in these circumstances required some consideration of totality.

[167] Totality is concerned with the overall appropriateness of the penalty to be served for a number of different criminal events which may or may not be unconnected. It must be considered where the sentence to be imposed by a court will overlap or operate cumulatively upon an existing custodial sentence, including an existing sentence being served in relation to offences of a different character which have been committed at different times and for which penalty has been imposed by a different court (including a superior court). The overriding consideration is that the total sentence must not exceed the total criminality.[62]

[168] For the reasons already given, it cannot be said that the individual sentences imposed for the "disorderly conduct" offences, or the manner of their cumulation *inter se*, was unreasonable or plainly unjust. In

62 *Mill v The Queen* (1988) 166 CLR 59 at 63.

addition to those considerations, however, the principle of totality required the sentencing judge to give attention to the effect of the proposed sentence in all its aspects. The further question was whether making the five months wholly cumulative on the three-and-a-half months already being served for the contempts produced a sentence which exceeded the appellant's total criminality. Although that may well have been the appropriate conclusion in different circumstances, the order for cumulation could not be said to have excessive effect in the present case.

[169] First, the sentences for the two episodes of contempt of court were imposed to serve the interests of the public in maintaining the due administration of justice, the authority of the courts, and the interests of litigants. These are specific and crucial purposes. Any casual description of the appellant's conduct as that of a harmless eccentric flouting convention would belie its serious criminality. By his conduct in that respect the appellant imposes a very substantial drain on the resources of the courts with a deleterious impact on the claims of deserving litigants to the application of the courts' time. That effect is in diametric opposition to the result which the appellant is claiming to pursue – which is to further the interests of litigants, and particularly self-represented litigants. By his mindless, tedious and anarchic conduct he achieves nothing but to distract attention from those interests.

[170] Secondly, the "disorderly conduct" offences must be seen in context. The appellant's recent criminal history is redolent of the serial pest. There is an obvious and important civic purpose underlying requirements to comply with directions by police and specific categories of security officer, and to refrain from conduct in a police station which would interfere with the maintenance of law and order and the processing of offenders. By his conduct in that respect the appellant puts a significant and continuing strain on the already stretched resources of police and security services. This particular incident required the involvement of no fewer than eight personnel even before the accused was admitted to the Darwin watch house. His conduct generally was flagrant, in the public gaze, and designed to undermine the conduct of the judicial process, the administration of justice, and the enforcement of law and order. His behaviour in the watch house specifically was offensive, revolting and inflammatory in the extreme.

[171] Although those offences were no doubt motivated by the same misguided activism which drove the appellant's contemptuous behaviour in the courts, there was no temporal or circumstantial interdependence between them. The sentences imposed for contempt could not be said to reflect in any way the criminality of the appellant's behaviour towards court security officers and police. For the purpose of the sentencing exercise it is necessary to identify and

evaluate the nature and seriousness of each different type of conduct, to ensure that an appropriate penalty is imposed for each, and to ensure that the harm done by each is recognised by appropriate cumulation.

[172] Finally, it was both permissible and necessary for the total sentencing disposition in this case to incorporate substantial components directed to deterrence and punishment designed to protect society from what might be considered to be a very significant risk of recidivism. The total sentence reflects those purposes without producing a figure that is "crushing" in the sense of removing any reasonable expectation of a life after release.

[173] The appellant's assertion of manifest excess, in either the individual sentences imposed or in their totality, must be dismissed.

Disposition

[174] The appeal is dismissed.
