IN THE SUPREME COURT OF JUDICATURE.

A COURT OF APPEAL.

Royal Courts of Justice.

Thursday, 4th July, 1974.

Appeal by Stephen Bernard Balogh from judgment of Mr. Justice Melford Stevenson at the Crown Court at St. Albans on 22nd May 1974.

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Before

THE MASTER OF THE ROLLS (Lord Denning),

LORD JUSTICE STEPHENSON and

C LORD JUSTICE LAWTON.

Between

STEPHEN BERNARD BALOGH Appellant

and

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THE CROWN COURT, St. Albans Respondent

(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C. 2.)

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Mr. JOHN VINELOTT, Q.C., and Mr. MICHAEL KENNEDY (instructed by Messrs. A.F. & R.W. Tweedie, agents for The Official Solicitor) appeared on behalf of the appellant.

F Mr GORDON SLYNN (instructed by the Treasury Solicitor) appeared as amicus curiae.

G - J U D G M E N T -

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THE MASTER OF THE ROLLS: There is a new Court House at St. Albans.

A It is air-conditioned. In May of this year the Crown Court was sitting there. A case was being tried about pornographic films and books. Stephen Balogh was there each day. He was a casual hand employed by solicitors for the defence. Just as a clerk at £5 a

B day; knowing no law. The case dragged on and on. He got exceedingly bored. He made a plan to liven it up. He knew something about a gas called nitrous oxide N_2O. It gives an exhilerating effect when inhaled. It is called "laughing gas".

C He had learned all about it at Oxford. During the trial he took a half-cylinder of it from the hospital car park. He carried it about with him in his brief case. His plan was to put the cylinder at the inlet to the ventilating system and to release the gas into

D the Court. It would emerge from the outlets which were just in front of Counsel's row. So the gas, he thought, would enliven their speeches. It would be diverting for the others. A relief from the tedium of pornography. So one night when it was dark he

E got on to the roof of the Court House. He did it by going up from the public gallery. He found the ventilating ducts and decided where to put the cylinder. Next morning, soon after the Court sat, at 11.15 a.m., he took his brief case, with the cylinder in it,

F into Court No. 1. That was not the pornography Court. It was the next-door Court. It was the only Court which had a door leading up to the roof. He put the brief case on a seat at the back of the public gallery. Then he left for a little while. He was waiting

G for a moment when he could slip up to the roof without anyone seeing him. But the moment never came. He had been seen on the night before. The officers of the Court had watched him go up to the

H roof. So in the morning they kept an eye on him. They saw him put down his brief case. When he left for a moment, they took it

up. They were careful. There might be a bomb in it. They opened it. They took out the cylinder. They examined it and found out what it was. They got hold of Balogh. They cautioned him. He told them frankly just what he had done. They charged him with stealing a bottle of nitrous oxide. He admitted it. They kept him in custody and reported the matter to Mr. Justice Melford Stevenson, who was presiding in No. 1 Court (not the pornography Court). At the end of the day's hearing, at 4.15 p.m., the Judge had Balogh brought before him. The police inspector gave evidence. Balogh admitted it was all true. He meant it as a joke. A practical joke. But the Judge thought differently. He was not amused. To him it was no laughing matter. It was a very serious contempt of Court. Balogh said:-

"I am actually in the wrong Court at the moment. The proceedings I intended to subvert are next door. Therefore, it is not contempt against your Court for which I should be tried."

The Judge replied:-

"You were obviously intending at least to disturb the proceedings going on in Courts in this building, of which this is one. You will remain in custody tonight and I will consider the penalty in the morning."

Next morning Balogh was brought again before the Judge. The inspector gave evidence of his background. Balogh was asked if he had anything to say. He said: "I do not feel competent to conduct it myself. I am not represented in Court. I have committed no contempt. I was arrested for theft of the bottle. No further charges have been preferred."

The Judge gave sentence: "It is difficult to imagine a more serious contempt of Court and the consequences might have been very grave if you had carried out your express intention. I am not

going to overlook this and you will go to prison for six months.... I am not dealing with any charge for theft....I am exercising the jurisdiction to deal with contempt of Court which has been vested in this Court for hundreds of years. That is the basis on which you will have to go to prison for six months." Balogh made an uncouth insult: "You are a humourless automaton. Why don't you self-destruct?" He was taken away to serve his sentence.

Eleven days later he wrote from prison to the Official Solicitor. In it he acknowledged that his behaviour had been contemptible, and that he was now thoroughly humbled. He asked to be allowed to apologize in the hope that his contempt would be purged.

The Official Solicitor arranged at once for Counsel to be instructed, with the result that the appeal has come to this Court.

The first point is whether the Judge had any jurisdiction to commit Balogh summarily for contempt. The Judge was sitting in the new Crown Court. It was suggested that this Court has not the wide jurisdiction which was previously exercised by the Judges of Assize, but only a narrower jurisdiction controlled by Rules of Court.

THE JURISDICTION OF THE CROWN COURT

The Crown Court is a superior Court of Record (section 4(1) of the Courts Act 1971). In regard to any contempt of Court, it has the like powers and authority as the High Court (section 4(8)). The High Court has the same powers and authority as the Superior Courts used to have, and as the Judges of Assize had, see section 18 of the Judicature Act, 1925. The procedure is, however, governed by Order 52 of the Rules of the Supreme Court. Mr. Vinelott, Q.C., for Mr. Balogh, submitted that, under those Rules, this contempt of Court (if it were one) could only be punished by application to the Divisional Court; and that the Judge here had no

jurisdiction to punish it himself. The Judge, he said, had only power to commit for contempt, "committed in the face of the Court", see Order 52 Rule 1(2)(a)(ii). That expression, he said, was confined to cases where "all the circumstances of the alleged contempt are in the personal knowledge of the Court", see McKeown v. The Queen (1971) 16 D.L.R. (3rd) 390 at page 408 by Mr. Justice Laskin, and Borrie and Lowe, The Law of Contempt, page 7. The Judge in this case had no personal knowledge of the circumstances. He only knew what was reported to him. So Mr. Vinelott said that the contempt was not committed "in the face of the Court".

Mr. Slynn submitted that the answer to this point was to be found in Order 52, Rule 5. It preserves the power of the High Court "to make an order of committal of its own motion against a person guilty of contempt of Court". That is a good answer, so far as it goes; but it leaves open the question: In what circumstances can the High Court make an order "of its own motion"? In the ordinary way the High Court does not act of its own motion. An application to commit for contempt is usually made by motion either by the Attorney-General or by the party aggrieved, see The Queen v. Gray (1900) 2 Q.B. 36; Attorney-General v. Times Newspapers (1973) Q.B. at page 737 in this Court by me as corrected in the House of Lords (1973) 3 W.L.R. at page 303 by Lord Reid, and at page 319 by Lord Diplock; page 333 by Lord Cross of Chelsea: and such a motion can, in an urgent case, be made ex parte, see Warwick Corporation v. Russell (1964) 1 W.L.R. 613. All the cases cited in the notes to Order 52 Rule 5 are of motions by some one ex parte. None of them tells us when the High Court can make an order of its own motion. All I find in the books is that the Court can act upon its own motion when the contempt is committed "in the face of the Court". Chief Justice Wilmot in his celebrated opinion in The King v. Almon (1765) Wilm. at page 254 said:

"It is a necessary incident to every Court of Justice to find and imprison for a contempt tothe Court, acted in the face of it." Blackstone in his Commentaries, Book IV page 288, said: "If the contempt is committed in the face of the Court, the offender may be instantly apprehended and imprisoned, at the discretion of the Judges." Oswald on Contempt 2nd edition page 23, said: "Upon contempt in the face of the Court, an order for committal was made _instanter_" and not on motion. But I find nothing to tell us what is meant by "committed in the face of the Court". It has never been defined. Its meaning is, I think, to be ascertained from the practice of the Judges over the centuries. It was never confined to conduct which a Judge saw with his own eyes. It covered all contempts for which a Judge of his own motion could punish a man on the spot. So "contempt in the face of the Court" is the same thing as "contempt which the Court can punish of its own motion". It really means "contempt in the cognizance of the Court".

Gathering together the experience of the past, then whatever expression is used, a Judge of one of the Superior Courts or a Judge of Assize could always punish summarily of his own motion for contempt of Court whenever there was a gross interference with the course of justice in a case that was being tried, or about to be tried, or just over - no matter whether the Judge saw it with his own eyes or it was reported to him by the officers of the Court, or by others - whenever it was urgent and imperative to act at once. This power has been inherited by the Judges of the High Court and in turn by the Judges of the Crown Court. To show the extent of it, I will give some instances:-

(1) _In the sight of the Court_. There are many cases where a man has been committed to prison at once for throwing a missile at the Judge, be it a brickbat, an egg or a tomato. Recently, too, when a group of students broke up the trial of a libel action, Mr.

Justice Lawton, as he then was, very properly sent them at once to prison, see Morris v. Crown Office (1970) 2 Q.B. 114. There is an older case, too, of great authority, where a witness refused to answer a proper question. The Judge of Assize at York Castle at once sentenced him to prison for six months and a fine of £500, see Ex parte Fernandez (1861) 10 C.B., N.S. 3).

(ii) Within the Court Room but not seen by the Judge. At the Old Bailey a man distributed leaflets in the public gallery inciting people to picket the place. A member of the public reported it to a police officer, who reported it to the Judge. The offender denied it. Mr. Justice Melford Stevenson immediately heard the evidence on both sides. He convicted the offender and sentenced him to seven days imprisonment. The man appealed to this Court. His appeal was dismissed (Lecointe v. Courts' Administrator of the Central Criminal Court, 8th February, 1973).

(iii) At some distance from the Court. At Bristol 22 men were being tried for an affray. The first witness for the prosecution was a school girl. After she had given her evidence, she went to a cafe' for a meal. A man clenched his fist at her and threatened her. She told the police, who told the Judge. Mr. Justice Park had the man arrested. He asked Counsel to represent him. He broke off the trial. He heard evidence of the threat. He committed the man. He sentenced him to three months' imprisonment. The man appealed to this Court. His appeal was dismissed (Moore v. Clerk of Assize, Bristol 1971 1 W.L.R. 1669). Another case was where a man was summoned to serve on a jury. His employer threatened to dismiss him if he obeyed the summons. Mr. Justice Melford Stevenson said it was a contempt of Court which made him liable to immediate imprisonment, see 1966 130 J.P. 622.

Those are modern instances. I have no doubt there were many like instances in the past which were never reported, because there

was until recently no right of appeal. They bear out the power which I have already stated - a power which has been inherited by the Judges of the Crown Court.

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

Over 100 years ago, Chief Justice Erle said that: ".... these powers, so far as my experience goes, have always been exercised for the advancement of justice and the good of the public", see <u>Ex parte Fernandez</u> (1861) 10 C.B., N.S. at page 38. I would say the same today. From time to time anxieties have been expressed lest these powers might be abused. But these have been set at rest by section 13 of the Administration of Justice Act, 1960, which gives a right to appeal to a higher Court.

As I have said, a Judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney-General or to the party aggrieved to make a motion in accordance with the rules in Order 52. The reason is so that he should not appear to be both prosecutor and judge: for that is a role which does not become him well.

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Returning to the present case, it seems to me that up to a point the Judge was absolutely right to act of his own motion. The intention of Mr. Balogh was to disrupt the proceedings in a trial then taking place. His conduct was reported to the senior Judge then in the Court building. It was very proper for him to take immediate action, and to have Mr. Balogh brought before him. But, once he was there, it was not a case for summary punishment. There was not sufficient urgency to sarrant it. Nor was it imperative. He was already in custody on a charge of stealing. The Judge would have done well to have remanded him in custody and invited Counsel to represent him. If he had done so, Counsel would, I expect, have taken the point to which I now turn.

THE CONDUCT OF Mr. BALOGH

Contempt of Court is a criminal offence which is governed by the principles applicable to criminal offences generally. In particular, by the difference between an attempt to commit an offence and an act preparatory to it. "It has often been said that to constitute an attempt the act must be proximate to and not remote from the crime itself.....It must be left to common sense to determine in each case whether the accused has gone beyond mere preparation", see Haughton v. Smith (1974) 2 W.L.R. at page 13-G by Lord Reid.

When this case was opened, it occurred to each one of us: Was Mr. Balogh guilty of the offence of contempt of Court? He was undoubtedly guilty of stealing the cylinder of gas, but was he guilty of contempt of Court? No proceedings were disturbed. No trial was upset. Nothing untoward took place. No gas was released. A lot more had to be done by Mr. Balogh. He had to get his brief case. He had to go up to the roof. He had to place the cylinder in position. He had to open the valve. Even if he had

done all this, it is very doubtful whether it would have had any effect at all. The gas would have been so diluted by air that it would not have been noticeable. In these circumstances the question at once springs to mind: Had he gone so far as to be guilty of an attempt? Were not his acts merely preparatory acts falling short of an attempt? Suppose a man steals a car and drives up to a house intending to break into it. But the police arrive before he gets anywhere near the door - even before he gets out of the car - clearly he is guilty of stealing the car. But he is not guilty of attempting to break into the house. He had the criminal intent to break in, but that is not enough. So here Mr. Balogh had the criminal intent to disrupt the Court, but that is not enough. He was guilty of stealing the cylinder, but no more.

On this short ground we think the Judge was in error. We have already allowed the appeal on this ground. But, even if there had not been this ground, I should have thought that the sentence of six months was excessive. Balogh spent fourteen days in prison: and he has now apologized. That is enough to purge his contempt, if contempt it was.

CONCLUSION

There is a lesson to be learned from the recent cases on this subject. It is particularly appropriate at the present time. The new Crown Courts are in being. The Judges of them have not yet acquired the prestige of the Red Judge when he went on Assize. His robes and bearing made everyone alike stand in awe of him. Rarely did he need to exercise his great power of summary punishment. Yet there is just as much need for the Crown Court to maintain its dignity and authority. The Judges of it should not hesitate to exercise the authority they inherit from the past. Insults are best treated with disdain - save when they are gross and scandalous. Refusal to answer with admonishment - save where it is vital to know

the answer. But disruption of the Court or threats to witnesses or to jurors should be visited with immediate arrest. Then a remand in custody and, if it can be arranged, representation by Counsel. If it comes to a sentence, let it be such as the offence deserves - with the comforting reflection that, if it is in error, there is an appeal to this Court. We always hear these appeals within a day or two. The present case is a good instance. The Judge acted with a firmness which became him. As it happened, he went too far. That is no reproach to him. It only shows the wisdom of having an appeal.

As I have previously announced, the appeal is allowed and the sentence set aside.

LORD JUSTICE STEPHENSON: I would decide the last question first: was there a contempt of Court by the appellant? In my judgment, there was not. I agree that the admitted acts of the appellant were preparatory to what might have been a serious contempt of Court but that he had not got as far as contempt or indeed as an attempt to commit a contempt, except possibly on an understanding of what constitutes an attempt which is not generally accepted and may be too unfavourable to a person charged with an attempt.

Contempt of Court is a misdemeanour at common law, but I doubt if an attempt to commit contempt is punishable as such. Whether it is or not, I have no doubt that acts which would not amount to an attempt cannot amount to a contempt, of whatever type or category. It is not a contempt to plan or intend a contempt or to take such preliminary steps towards carrying out the plan or intention as the appellant took.

This would-be contemnor had not insulted the Court or obstructed its proceedings or done anything to bring the authority of the Court into disrepect or to interfere with the administration

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of justice or to prejudice the prosecution or defence in any trial in the St, Albans Crown Court. Any danger of his doing so was averted by the action of the police. That is enough to determine this appeal in his favour, and for this reason I agreed that the appeal should be allowed.

But if the appellant had carried out his intention, even if to no purpose or without effect upon Counsel or the proceedings in the Crown Court, he would have been guilty of contempt, and contempt in the face of the Court however narrowly that expression is interpreted. Indeed I did not understand Mr. Vinelott to maintain any argument that the appellant would not then have been in contempt.

On that answer to the first question there is no need to answer any part of the next question: if the appellant was in contempt, could or should his contempt have been immediately punished by Mr. Justice Melford Stevenson, as a Judge of the Crown Court in the way in which it was punished, namely by committal to prison for six months? Again my answer is "No", and my reasons can be even more shortly stated - in two sentences. This procedure is one to which Judges should resort in exceptional cases where a contempt is clearly proved and cannot wait to be punished. Here the facts alleged to constitute the contempt were admitted, but there was no need for immediate punishment. We have, however, heard full and interesting submissions by Mr. Vinelott on behalf of the Official Solicitor for the appellant and by Mr. Slynn as amicus curiae on the matters comprehended in this question, and we may be able to give guidance to Judges, in particular the many Judges of the Crown Court who now have this arbitrary power to make of their own motion immediate orders of committal for con tempt of Court, on the limits of the power and

the conditions required for its exercise. I therefore offer a few observations on those submissions in elaboration of the reason I have given for answering this hypothetical question in the negative.

The power of a superior Court to commit (or attach) a contemnor to prison without charge or trial is very ancient, very necessary but very unusual, if not indeed unique. It is as old as the Courts themselves and it is necessary for the performance of their functions of administering justice, whether they exercise criminal or civil jurisdiction.

If they are to do justice they need power to administer it without interference or affront, as well as to enforce their own orders and to punish those who insult or obstruct them directly or indirectly in the performance of their duty or misbehave in such a manner as to weaken or lower the dignity and authority of a Court of Law. Indirect interference with judicial proceedings may now be the more serious and the more frequent kind of contempt, though it was insulting behaviour in Court which once called for punishment of even more horrifying severity. According to Blackstone, "Contempts against the King's Palaces or Court of Justice have been always looked upon as a high misprision: and by the antient law, before the Conquest, fighting in the King's Palace or before the King's Judges, was punished with death"; but "Striking in the King's Superior Courts of Justice, in Westminster Hall, or at the Assizes, is made still more penal than even in the King's Palace. The reason seems to be that those Courts being antiently held in the King's Palace, and before the King himself, striking there included the former contempt against the King's Palace, and something more; viz. the disturbance of public justice". So it was a capital felony "by the antient common law before the Conquest": Commentaries 4th edition (1809) Book IV,

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Ch. 9, pages 123-4. It is clear from the 20th chapter of the same book that Blackstone regarded "the method, immemorially used by the Superior Courts of Justice, of punishing contempt by attachment" as a summary proceeding and any summary proceeding as irregular and authorised only by statute with this one exception: "for the common law is a stranger to it, unless in the case of contempts"; but for contempts the power of immediate attachment must be "an inseparable attendant upon every superior tribunal" if it is to secure the administration of laws from disobedience and contempt: ibid. pages 280, 283, 286.

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It is not disputed that though the power of a Superior Court to attach may remain, the High Court now makes immediate orders of committal. Again there is undoubted power to indict for contempt, though it does not seem to have been used since 1902. Further, any party can move the Court to commit for contempt, but it is the Attorney-General who now usually moves the Court to commit for criminal contempt. And the Rules of the Supreme Court purport by Order 52 rule 1(2)(a) to give sole jurisdiction to make such orders to the Divisional Court of the Queen's Bench Division with leave when contempt of Court is committed in connection with "(ii) criminal proceedings, except where the contempt is committed in the face of the Court, or consists of disobedience to an order of the Court or a breach of an undertaking to the Court". But by Order 52 rule 5 "Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the High Court or Court of Appeal to make an order of committal of its own motion against a person guilty of con tempt of court". Finally, section 4(8) of the Courts Act 1971 provides that "the Crown Court shall, in relation to the attendance and examination of witnesses, any contempt of court, the enforcement of its orders and all other matters incidental to its jurisdiction have the like powers, rights

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privileges and authority as the High Court", and the Crown Court now has the power to punish summarily any person who disobeys a witness summons to attend before it "as if his contempt had been committed in the face of the Court": Criminal Procedure (Attendances of Witnesses) Act 1965, sections 2 and 3, Courts Act 1971, section 56 and Schedule 8 paragraph 45.

The present Rules, like section 3(1) of the 1965 Act, reflect in Order 52, almost as clearly as the old rules in Order 44 rule 2 and Order 59 rule 26 which Order 52 replaced, the notion that the summary power of the High Court to imprison of its own motion, or by an immediate order, is limited to contempts in facie curiae, or in the face of the Court, whatever those words mean in Latin or in English. (I say "almost as clearly" because their omission from Order 52 rule 5 may be intentional.) I would understand the words to have meant originally "in the sight of the Court", which may still be ambiguous. They have received a statutory interpretation in section 157 (1) of the County Courts Act 1959, which, based on the judgment of Lord Justice Bowen in Re Johnson (1887) 20 Q.B.D. at page 74, extends the range of a Court's vision beyond the Court's walls but confines contempts to insults.

Contempts, however, are not confined to contemptuous or offensive words or conduct or to the disturbance of Court hearings, nor are those the only contempts which attract the summary remedy. I do not accept the argument that the limits of the power of a Superior Court to imprison a contemnor are defined or restricted by the Rules of the Supreme Court. They should disclose but may disguise its true nature and extent, and if they misunderstand it they may need to be revised. The question is not what the rules of procedure which regulate it say or imply that it is but what it really is. I am satisfied that it is not limited to contempt in the face of the Court, on any permissible understanding of those

words, but has long extended not only to disobedience to orders of the Court and breaches of undertakings to the Court, but also to interference with the administration of justice which satisfy two conditions: (1) that the contempt is clearly proved beyond a reasonable doubt, and (2) that it affects or is calculated to affect the course or outcome of judicial proceedings in being - that is, in the words of Lord Diplock in Attorney-General v. Times Newspapers Ltd. 1973 3 W.L.R. at page 31 "actually proceeding or known to be imminent" - unless immediately stopped by the apprehension and, if necessary, the detention of the offender. These are necessary conditions for the exercise of this arbitrary power, whatever the type of contempt against which it is exercised and whether in exercising it the Court is described as acting brevi manu, or immediately, or instanter, or of its own motion, or summarily. Procedure for contempt by motion under Order 52 rules 1 and 2 might be described as summary, but when a Judge of the High Court or Crown Court proceeds of his own motion, the procedure is more summary still. It must never be invoked unless the ends of justice really require such drastic means; it appears to be rough justice, it is contrary to natural justice, and it can only be justified if nothing else will do: see, for instance, the judgments of Sir George Jessel, Master of the Rolls, in Re Clements (1877) 46 L.J. Ch. at page 383, and of Lord Russell of Killowen, Chief Justice, in R. v. Gray (1900) 2 Q.B. at page 41 and the dissenting judgment of Mr. Justice Laskin in the Canadian case of McKeown v. R. (1971) 16 D.L.R. (3d) at page 413. But if a witness or juror is bribed or threatened in the course of a case, whether in the Court or its precincts or at any distance from it, the Judge must act at once against the offender and if satisfied of his offence, punish him, if necessary by committing him to prison.

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I conclude with six comments:-

(1) The first condition is, of course, most easily satisfied where the contempt is something said or done in the sight of the Judge or jury, but it may be satisfied by an admission (as in this case) or by acceptable (and not necessarily uncontradicted) evidence (as in Lecointe v. Courts' Administrator of the Central Criminal Court, before this Court on February 8th, 1973).

(2) I see no reason why one Judge of the Crown Court or the High Court should not commit for contempt of another. It is done in the Family Division when one Judge commits a husband for breach of another's order. It depends on all the circumstances whether more than one Judge should come into these summary proceedings. It may be better for a presiding Judge available in the same building to commit for a contempt of a Circuit Judge's Court. I do not accept the appellant's uninstructed opinion, which I understand Mr. Vinelott to have abandoned, that Mr. Justice Melford Stevenson could not commit him for a contempt of Court next door where he "intended to subvert the proceedings" (his own words) by discharging nitrous oxide.

(3) There may be contempts which require immediate action but not immediate imprisonment. There may be cases punishable summarily where it would be appropriate to fine, or discharge, the contemnor or to take sureties for his good behaviour.

(4) There may be cases where it is proper because necessary to commit a contemnor without giving him legal representation. I know that legal aid is not available for contempt, but a Judge can always ask Counsel to represent a contemnor, as Mr. Justice Park did in Moore v. Clerk of Assize, Bristol 1971 1 W.L.R. 1669; and for my part I would hope that there would be few cases - Morris v. Crown Office 1970 2 Q.B. 114 was one, but this case, in

my judgment, was not - where this course should not be taken if Counsel is available. There is every reason not to cut means of justice, which are of necessity curt if not rough, even shorter than they need be. This appellant asked for legal representation and I am of opinion that the Judge should have tried to find him Counsel, although he was, as the Judge said, "an articulate and highly intelligent person", who knew that he was being charged with a serious contempt, was given an opportunity to defend himself on that charge, and seems to have shown himself in no mood to listen to warnings or to offer apologies.

(5) The power which the Judge exercised is both salutary and dangerous: salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered generally necessary to secure justice for him. This appeal gives an opportunity to make clear that it is a power to be used reluctantly but fearlessly when, and only when, it is necessary to prevent justice being obstructed or undermined - even by a practical joker. That is not because Judges, jurors, witnesses and officers of the Court take themselves seriously: it is because justice, whose servants they are, must be taken seriously in a civilised socity if the rule of law is to be maintained. It must be left to the common sense of Judges of the High Court and the Crown Court to decide when they must resort to this power to deal with such contempts as are listed in the judgment which Mr. Justice Lawton is about to deliver; but now that convictions and sentences for contempt are appealable to this Court, it is for this Court to interfere when this power is misused. I sympathise with the way in which the Judge used it to deal with the folly of an irresponsible young man, who as a solicitor's clerk was under a duty to help and not to hinder the due administration of justice

A in a serious criminal case; but nevertheless I am of opinion that the Judge was wrong to deal with the appellant as he did and not to leave him to be prosecuted for a contemptible theft.

B (6) I find it unnecessary to say anything about the length of the sentence except that everything which Mr. Vinelott wished to say about it in apology and mitigation could have been said on an application to the Judge himself to discharge the appellant.

LORD JUSTICE LAWTON: For nearly the whole of this century those accused of contempt of Court, which is a common law misdemeanour, have been tried and sentenced in a way which is far removed from the ordinary processes of the law. The last reported case of a trial on indictment was in 1902: See R. v. Tibbits (1902) 1 K.B. 77. No precise charges are put; sometimes when the Judge has himself seen what happened, the accused is asked to explain his conduct, if he can, without any witnesses being called to prove what he has done; often the accused is given no opportunity of consulting lawyers or of an adjournment to prepare a defence; and there is no jury. The Judge, who may himself have been insulted or even assaulted, passes sentence. Some aspects of proceedings for contempt of Court, in Blackstone's phrase, are "not agreeable to the genius of the common law" (see Commentaries 16th edition, volume 4 at page 287). Yet Judges have this unusual jurisdiction. In this appeal the Court has been asked to mark some of its boundaries.

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G Three questions require an answer: first, had Mr. Justice Melford Stevenson any jurisdiction at all to deal with this appellant; secondly, if he had, should he have exercised his jurisdiction in the circumstances of this case; and thirdly, did

H the appellant's admitted conduct amount to contempt of Court?

Mr. Vinelott, the appellant's Counsel, did not submit that Judges can never commit summarily for contempt of Court, but that their jurisdiction to do so is circumscribed by being limited to contempts "in the face of the Court", whatever that phrase may mean. He found support for his submission in the Rules of the Supreme Court in which a distinction seems to be drawn between contempts "in the face of the Court" and other contempts. He accepted that in Blackstone's time, that is the mid-eighteenth century, Judges considered that they had jurisdiction to commit summarily for contempts which could not be said to have been committed within the sight or hearing of the Judge, as for example by sheriffs, bailiffs, gaolers and other officers of the Court "for abusing the process of the law, or deceiving the parties, by any acts of oppression, extortion, collusive behaviour or culpable neglect of duty." See Commentaries, ibid, page 283.

He submitted that this extensive jurisdiction had been cut down by the Rules. In my judgment it has not, because rule 5 of Order 52 preserves the common law right of a Judge to make an order for committal of his own motion against a person guilty of contempt.

What then is the jurisdiction at common law to commit for contempt? In the eighteenth century it was a jurisdiction in which the Judges of "all Courts of record generally, but more specifically those of Westminster Hall, and above all the Court of King's Bench, may proceed in a summary manner, according to their discretion" (see Hawkins' Pleas of the Crown, 8th edition, Book 2, chapter 22, page 206). By summary manner, Hawkins meant "without any Appeal, Indictment or Information" (see ibid, page 206). It is clear both from Hawkins and Blackstone that this summary jurisdiction was not confined to cases where the contempt occurred in the Court itself (see Hawkins, ibid, pages 206 to 223, and Commentaries, ibid., pages 283-288). From the way these authors

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expounded the law (and they did so in similar terms) the inference is that at the time they wrote there was no doubt whatsoever about the existence and extent of the jurisdiction and that it was no innovation; and there can have been no doubt amongst lawyers during the first quarter of the 19th century, as the editions from which I have quoted were published in 1824 (the 8th edition of Hawkins) and 1825 (the 16th edition of Blackstone). As far as I am aware, no statute has ever limited this jurisdiction. Section 4(8) of the Courts Act 1971 does not limit jurisdiction; it confers it on the Crown Court. It follows that it was no defence for the appellant to submit, as he did, that he had neither intended to interfere with proceedings in Mr. Justice Melford Stevenson's Court, nor had done anything in this Court which could have interfered with the proceedings there. Once there were reasonable grounds for thinking that a contempt of Court had been committed, no matter where, Mr. Justice Melford Stevenson had jurisdiction to deal with it summarily.

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The fact that Judges, whether of the High Court or the Crown Court, have this summary jurisdiction does not mean they should use it whenever opportunity offers. It is an unusual jurisdiction which has come into being to protect the due administration of justice. In Blackstone's words, it applies to any conduct which "demonstrates a gross want of that regard and respect, which when once courts of Justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people." See Commentaries, ibid, page 285. In my judgment this summary and draconian jurisdiction should only be used for the purpose of ensuring that a trial in progress or about to start can be brought to a proper and dignified end without disturbance and with a fair chance of a just verdict or

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judgment. Contempts which are not likely to disturb the trial or affect the verdict or judgment can be dealt with by a motion to commit under Order 52, or even by indictment.

The exercise of judicial discretion in this way can be illustrated by reference to the kinds of contempt which are most frequently witnessed by or reported to Judges: witnesses and jurors duly summoned who refuse to attend Court; witnesses duly sworn who refuse to answer proper questions; persons in Court who interrupt the proceedings by insulting the Judge, shouting or otherwise making a disturbance; persons in Court who assault or attempt to assault or threaten the Judge or any officers of the Court whose presence is necessary; persons in or out of Court who threaten those about to give evidence or who have given evidence; persons in or out of Court who threaten or bribe or attempt to bribe jurors or interfere with their coming to Court; persons out of Court who publish comments about a trial going on by revealing a defendant's criminal record when the rules of evidence exclude it. Contempt of these kinds may well justify the use of the summary jurisdiction; but everything will depend upon the circumstances. For example, Judges from time to time have to decide what to do about a witness who refuses to answer a question, often because he cannot bring himself to state that which is obvious to both Judge and jury or because the answer would cause acute personal emabrrassment, as sometimes happens with doctors and ministers of religion. In many such cases a judicial admonition may be adequate if judicial comment is required at all: but when the witness refuses to answer questions because he wants to deny the Court evidence which is important, the position is very different. Contempts committed or becoming known some time after verdict or judgment, as for example when a newspaper comments in insulting terms about the Judge's

decision or conduct of the trial, or it becomes known that someone on behalf of a convicted defendant attempted to bribe a juror are best dealt with otherwise than in a summary manner by the trial Judge.

In this case the vigilance and intervention of the police stopped the appellant from doing what he had been minded to do, which was to disturb the proceedings in what the Master of the Rolls has described as the pornography Court. Once he had been arrested for stealing the cylinder of gas there was no chance of this coming about; and before his arrest nothing had happened in that Court. If the appellant had done what he was minded to do he would have deserved a sharp sentence given summarily. On the proven facts in this case, even if they had amounted to a contempt of Court, I am doubtful whether the exercise of summary jurisdiction was necessary. I do not feel able to give my opinion in more definite terms because I was not there. I know from my own experience as a trial Judge that conduct amounting to contempt of Court can happen, indeed usually does happen, unexpectedly. If the Judge is to protect effectively the proper administration of justice, he has to act at once. He may have no time for reflection and he seldom has time to consult colleagues. He has to act on his own assessment of the situation. In my judgment, if he does decide to act summarily, this Court should be slow to say that he should not have done so. But in this case such an exercise may not have been necessary to safeguard either the orderly continuance of the trial in the neighbouring Court or the integrity of the jury there.

The appellant has apologised, somewhat belatedly, for what he did. It was conduct which was puerile and stupid. The Courts, however, have no jurisdiction to punish anyone for mere folly:

they can only be punished for proven crime. Did the appellant's conduct amount to the common law misdemeanour of contempt of Court? He intended to disturb the proceedings in a Court; but he could not be punished for what was in his head. He had made preparations to put his plan into operation: he had stolen the cylinder of gas and left it in Mr. Justice Melford Stevenson's Court in a place where it would be handy for him to pick up when he went on to the roof to release the gas into the ventilation system. Making preparations to commit a crime is not the same as committing it or attempting to commit it: such conduct does not become criminal until it is so near to the crime that an intelligent onlooker watching what was going on would say that the person under observation was about to commit it. In my judgment, this could not have been said of the appellant in this case. Providence intervened to save him from turning his preparations into criminal action. It follows that what he was proved to have done was just, but only just, short of contempt of Court.

It was for these reasons that I agreed to the appeal being allowed.

THE MASTER OF THE ROLLS: Mr. Vinelott, there is no order to be made?

Mr VINELOTT: No order, my Lord.

Appeal allowed: sentence set aside.