Indexed as:

R. v. Fizell

Between
Her Majesty the Queen, and
Jason Fizell, accused

[2001] M.J. No. 22

48 W.C.B. (2d) 482

Manitoba Provincial Court
Winnipeg, Manitoba

Kopstein Prov. Ct. J.

January 4, 2001.

(48 paras.)

Contempt -- What constitutes contempt -- Contempt in the face of the court -- Court proceedings -- Punishment -- Imprisonment -- Practice -- Evidence and proof -- Hearing -- Who should act as judge.

Ruling on a citation for contempt of court against the accused Fizell. Fizell was on trial for cruelty to animals as a result of injuries to a police dog involved in his arrest for breaking and entering. During the trial Fizell frequently interrupted and used inappropriate language. The trial judge warned him about his conduct and asked his lawyer to warn him about his conduct and the possibility of a contempt citation. The warnings had no effect. The judge cited Fizell for contempt, but decided to put the contempt proceedings over to the following morning to allow Fizell's counsel to explain the situation to him. When Fizell directed an inappropriate comment to the judge, she ordered Fizell removed from the courtroom. Upon reconvening the following morning, the judge decided to put the contempt issue over for hearing before another judge. Fizell directed another inappropriate comment to the judge and he was removed from the courtroom and cited for contempt. The matter came on for hearing and disposition before another judge. Fizell was given an opportunity to purge his contempt, but his lawyer indicated that he did not wish to do so.

HELD: The accused was found in contempt for his interruptions and offensive language, as well as for an egregious insult directed at the trial judge. The citation itself was proof of the contempt, subject to Fizell calling evidence of a defence to the charge. However, Fizell made no attempt to show cause why he should not be held in contempt, and no cause was shown. The transcript was an adequate substitute for observing the offending conduct directly. For the first contempt Fizell was sentenced to 60 days consecutive to the sentence he was already serving. For the second contempt he was sentenced to a further 60 days consecutive to the first 60 days.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 11(d).

Criminal Code, R.S.C. 1985, c. C-34, ss. 1, 9, 445(a), 475, 484.

Counsel:

Peter Murdock, for the Crown.
Michael Cook, for the accused.

---

1 **KOPSTEIN PROV. CT. J.**:-- The accused was tried before Everett P.J. on a charge of Cruelty to Animals contrary to section 445(a) of the Criminal Code R.S., c. C-34, S.1. The trial proceeded on October 4, 2000. The proceedings before me arise out of the accused's conduct during and following that trial.

2 The facts of the case itself before Everett P.J. related to the injury of a police dog. The dog, under the direction of its handler, had located and held the accused, in its teeth, by his right hamstring, under a staircase where the accused was hiding in a building into which he had broken and entered. The accused suffered superficial wounds from the dog bites, a result, according to police testimony, of the accused's struggle once he was grasped in the dog's jaws, after police had cautioned him not to fight the dog. According to the evidence of Constable Bessasson, the dog is trained merely to hold a suspect: "A simple full bite so there is no ripping or tearing." While the dog held the accused, according to police evidence, the accused's arm was hitting the dog in the head. It was dark, however, and the police did not have a well-lighted view as they only had flashlights.

3 Once the accused was subdued, the dog was examined by its handler and found to have a slight cut to its right eye which was bleeding, and a stab wound to its forehead. Found where the accused had been hiding was a screwdriver that the accused admitted having used to break into the building. He denied, however, having used the screwdriver as a weapon against dog. He opined that the injuries to the dog's head occurred when he, the accused, was pushing the dog away from himself against the underside of the staircase. That staircase, he testified, may have had nails or jagged edges. The Crown's theory was that the accused used the screwdriver to stab and injure the dog. On issues of credibility, the Crown's case was strong. There were internal inconsistencies and memory lapses in the accused's testimony.

4 For his conduct, his interruptions and his mode of expression during the course of the trial, the accused was cautioned frequently and patiently by the presiding judge. I quote from the transcript several passages where the accused's remarks prompted interventions. At page 12, line 12, Constable Bessasson testifies:

> CST. BESSASSON:.....So I had to actually crawl through and --- I could see the accused. He was laying on his side. He was hitting the dog in the head and...
>
> MR MURDOCH: You're making a swinging motion with your right arm?
>
> A: That is correct.
>
> THE ACCUSED: You're out of your fuckin mind. You're out of your fuckin...

MR. COOK: Mr. Fizell

THE COURT: Just one moment please. Mr. Fizell, this is a courtroom. I demand dignity in the courtroom.

THE ACCUSED: I'm sorry -

THE COURT: You'll get your turn -

THE ACCUSED: I just want to -

THE COURT: -- to give --

THE ACCUSED: -- want to -- this guy is supposed to be -

THE COURT: Okay, just let me finish.

THE ACCUSED: -- a police officer-

THE COURT: -- Don't, don't -

THE ACCUSED: -- and he's blatantly fuckin lying. I get choked.

THE COURT: Mr. Fizell, don't interrupt me when I'm speaking please. You will get your turn to testify if you choose.

THE ACCUSED: Yeah, I choose.

THE COURT: Until that time you can consult with your lawyer. I'll give you time to do that, and I've given you a pad and pencil so that you can make notes.

THE ACCUSED: I did that.

THE COURT: Other than that don't speak when other people are speaking. Do you understand me?

THE ACCUSED: Yeah.

THE COURT: Thank you, Mr. Fizell. Sorry officer, go ahead.

5 At page 29, line 20, the transcript records that the accused said something inaudible. Then, at line 32:

THE COURT: Excuse me officer. I'm sorry to interrupt you again. Mr. Cook, would you take a moment to speak with Mr. -

MR. COOK: Fizell.

THE COURT: Fizell and impress upon him the need for proper courtroom behavior.

MR. COOK: Yes, Your Honour, I will. Thank you.

THE COURT: Thank you.

THE ACCUSED: I'm sorry.

6 At page 77, line 9, during the accused's examination in chief:

MR COOK: And did you complain to the police about the dog bite?

THE ACCUSED: Yeah, I, I told him, I says, "Why did you do it, "you know I already gave up at the time when they sent the dog on me. I was telling the officers before they even released the

> dog that I gave up, and you know, I says "Why did you have to do it?" you know, what did I do to deserve that?" They said, "You're nothing but a fuckin' criminal. You deserve whatever you get, "you know
> ....."

7 The cross-examination of Mr. Fizell having revealed some inconsistencies in the accused's version of events, which when put to the accused were sometimes met with responses in language, and tone which I gather, was not appropriate to a courtroom setting. At page 82 of the transcript, the Crown Attorney was questioning the accused about his use of cocaine or crack on the night in question. At line 17:

> MR. MURDOCH: Alright, you say that when you smoke cocaine it does not affect your memory. Now you're telling us you can't remember how much drugs you had that night; is that right? Is that right sir?
>
> THE ACCUSED: I can't remember. It's been seven months. I remember the incident that occurred. I remember the dog biting me. I remember the police yelling at me like I was a fuckin' piece of shit. I remember those things. So are you saying I have a selective memory, sir?

8 At page 84, line 17:

> MR. MURDOCH: One more time. Is it possible you snorted some cocaine that night?
>
> THE ACCUSED: No, sir, it isn't.
>
> MR. MURDOCH: Then I simply ask you again, why did you say that, that you may well have?
>
> THE ACCUSED: Because I was getting sick of you badgering me.
>
> MR. MURDOCH: Ah. I'll -
>
> THE ACCUSED: I just wanted you to get off the line of topic and more (sic) to your next question, sir.
>
> MR. MURDOCH: Are you having difficulty with my questions?
>
> THE ACCUSED: I'm having difficulty with people making me feel like an ass.
>
> MR. MURDOCH: Hum.

THE COURT: Mr. Fizell, no one wants to make you feel like an ass. The Crown attorney is -- they have a right to ask you questions --

THE ACCUSED: Yeah.

THE COURT: -- and in cross examination they have a fairly wide latitude. So -

THE ACCUSED: I have never done this before. This is the first time in this kind of hearing, Your Honour.

THE COURT: I appreciate that and that's why I'm sort of stepping in to, to just explain the process to you. The Crown is going to ask you some questions and, you know, if you just try -

THE ACCUSED: But -

THE COURT: -- to relax and answer them it will probably be easier.

THE WITNESS: I don't see any relevancy.

THE COURT: Okay. If there -- you have a very competent lawyer and if-

THE ACCUSED: Um hum.

THE COURT: And he's very well trained in the law. If the Crown attorney asks a question on cross examination that he should not ask, you can be assured that your lawyer will object -

THE ACCUSED: Um hum.

THE COURT: -- and then I'll rule on whether or not -

THE ACCUSED: Okay.

THE COURT: -- he's allowed to ask it. And your lawyer is listening very carefully to the questions and I know he's very alive to whether or not the questions are appropriate and he will -

THE ACCUSED: Okay.

THE COURT: Okay. Thank you.

9 At page 86, line 18:

THE ACCUSED: They were about an inch to two inches long. It might have been just scratch marks, but that's where he came. He came at my throat and face. I pushed him away and he scratched me here and latched onto my ass.

10 At page 94, line 3:

MR. MURDOCH: Only one of us can talk at a time. Do you have difficulty understanding that? Only one of us can talk at a time. Let's try it again.

THE COURT: Part, part of the reason why you have to be really careful about only one person talking at a time is because of the tape recorder and if there needs to be a transcript, it's very difficult for them to type up the transcript if there's two voices at one time. So that's part of the reason why you have to kind of always be careful of that. And I know it's not always the way the normal flow of conversation usually goes but that's the way we have to do it in the courtroom.

THE ACCUSED: Okay. I'll try not to do it.

THE COURT: Thank you.

11 At page 95, line 31:

THE ACCUSED: Like I was trying to explain, there is two by fours, sir. Well....

MR. MURDOCH: Go ahead and explain.

THE ACCUSED: Forget it.

MR. MURDOCH: I'm not sure I know what you're talking about.

THE ACCUSED: Forget it. It's okay. I've explained it to you three times and you still haven't grasped it so I don't know how much more it have to.

MR. MURDOCH: Well, I'm not the brightest lad in the world.

THE ACCUSED: Neither am I, sir, so we have something in common.

12 At a point where the Crown attorney confronted the accused with an internal inconsistency in his testimony relating to his recollection of what the police officers had said about the presence the dog, the transcript reads at page 103, line 1:

THE ACCUSED: Forget it man. I'll just go -- fuckin' charge me, put me in a fuckin' jail. I quit. I'm not doing any more of this fuckin' testifying. Fuck-

13 At line 11:

THE COURT: Mr. Fizell, we're going to take a short recess just so you can collect yourself. Mr. Cook is going to come and speak with you and I -- I'll speak with you after Mr. Cook speaks with you.

14 At line 22, following the recess:

THE COURT: Mr. Fizell, just before we resume, I just want to remind you that this is a courtroom. You have chosen to subject yourself to cross-examination and I want you to behave in a respectful manner.

15 At page 105, line 26:

THE ACCUSED: So maybe I said the wrong thing the first time or I said the wrong thing the second time you asked me, but you've asked me that question five or six fuckin' times, pardon my language, but I'm getting sick of it.

THE COURT: Okay. Mr. Fizell, I'm trying to be very patient with you.

THE ACCUSED: So am I, Miss.

THE COURT: You're (sic) swearing this morning in the courtroom -

THE ACCUSED: um-hum

THE COURT: -- and your swearing again.

THE ACCUSED: Um hum.

THE COURT: I will not tolerate that kind of talk in the courtroom.

THE ACCUSED: Well .....

THE COURT: Don't do it again.

THE ACCUSED: All right.

THE COURT: Do you understand me?

THE ACCUSED: Sure.

THE COURT: Thank you.

16 At page 109, line 2:

MR MURDOCH: You didn't want to injure this animal?

THE ACCUSED: No.

MR MURDOCH: This one that was, as you say, first of all going at your throat?

THE ACCUSED: Yeah.

MR MURDOCH: Poor puppy, I don't want to hurt you; is that what you were thinking?

THE ACCUSED: It's not like that.

MR MURDOCH: No, not like that. So -

THE ACCUSED: I have a certain amount of respect for a dog though, more than I do for you.

THE COURT: Mr. Fizell --

THE ACCUSED: Yeah.

THE COURT: -- that comment was completely uncalled for.

THE ACCUSED: Uncalled for, yeah, I know, but I'm just getting mad, Miss, and I don't know, you know.

MR. MURDOCH: I don't want to make you mad, sir.

THE ACCUSED: Oh, yes, you do.

17 Commencing at page 124, after a recess, the Court reviewed the evidence, and considered the law and its application to the evidence. Concluding at page 132 of the transcript, the Court entered a conviction.

18 At page 127, line 10, in the course of the Court's Reasons for Decision:

THE COURT: The dog was supposed to grip Mr. Fizell and his trainer was seconds behind him, less than a minute behind him.

THE ACCUSED: (inaudible) fuckin' (inaudible).

THE COURT: Mr. Cook, I'm going to give you a minute to talk to Mr. Fizell about -

THE ACCUSED: I don't need him to talk to me.

THE COURT: -- contempt of court and the consequences of being found in contempt of court.

MR. COOK: That's a good idea, Your Honour. If I could -

THE COURT: Thank you.

MR. COOK: -- ask for a short recess. Do you want to recess or do you want me just to talk to him now?

THE COURT: I'd like you to do it now -

MR. COOK: Okay.

THE COURT: -- because I don't want Mr. Fizell to wind up in more trouble than necessary.

MR. COOK: Thank you. Thank you, Your Honour.

THE COURT: Thank you. Can you - I think that my last sentence was that the dog was responding in a trained and
controlled way .....

19 At page 130, line 19:

THE COURT: ....and even though I can accept that there -

THE ACCUSED: Just get on with it.

THE COURT: -- could have been injuries that night - or that wouldn't show today .....

20 At page 134, Line 28:

THE ACCUSED: And he told me not to plead guilty and now I'm fuckin' gettin' another 6 months.

THE COURT: Mr. Fizell -

THE ACCUSED: I don't care, contempt me, whatever, man.

THE COURT: Mr. Fizell, you are this close to being found in contempt of court. Mr. Cook, I'm sure, explained to you that -

THE ACCUSED: You told me not to plead guilty because of the evidence I brought forth to you. You said that yourself. (As revealed a little later in the transcript, the accused appears to think that judge Everett is the same judge who refused to accept his guilty plea, to this charge on an earlier appearance, when he said he had not touched the dog. The earlier appearance was before a different judge.)

MR. COOK: Perhaps I'll have another go at it -

THE ACCUSED: So now I got to look at -

THE COURT: You better talk to Mr. Cook because -

THE ACCUSED: I don't give a fuck,

THE COURT: I'm trying to be very patient with him because I don't think he understands the significance of his behavior.

THE ACCUSED: Yeeah, but fuck, if I'm getting it dealt for nothin', now I'm getting' six more months after this fuckin' goof lies.

MR. COOK: Shhh, shhh, shhh, shhh, just be quiet. Just don't say anything.

THE ACCUSED: You wait 'til I get out buddy, I'll see ya. (It is not evident from the transcript as to whom these words were directed.)

MR. COOK: Shhh, shhh ...

THE ACCUSED: You think it's funny college boy.

21 At page 141, line 28:

THE COURT: Thank you for the recess, and I apologize for keeping everyone so late.

I took the recess because I wanted some time to consider the proceedings that have taken place throughout the day in court and, Mr. Fizell, I am citing you for contempt. The behavior of Mr. Fizell throughout the day has been extremely contemptuous towards counsel, towards witnesses and towards the Court. I have attempted to warn Mr. Fizell about his conduct, I have warned him about his language, to no avail. I have asked his lawyer to have conversations with him to warn him about his conduct, also to no avail. Ultimately, I asked his lawyer to warn him and inform him about contempt of court. His lawyer complied with my instructions and, I assume, warned him about contempt of court proceedings. None of this has had any impact on Mr. Fizell.

Now, I can appreciate that for an accused person courtroom proceedings are of very stressful, they are tense, they may be frustrating, but there is a certain decorum that is expected in a courtroom, there is a certain amount of dignity and respect for the Court and the court process that is expected. There is a leeway granted to all accused, given what I understand to be the very high pressure, intense nature of a court proceeding, but Mr. Fizell, in my view, has fallen far, far below the acceptable standard of Courtroom behavior. Mr. Cook, I am citing Mr. Fizell for contempt. What I intend to do, because I want to give you time to formulate a response on his behalf, I intend to put the contempt proceedings over to tomorrow morning. That will give you time to meet with Mr. Fizell, to explain the penalties and maximum period of imprisonment on contempt that he is facing. It will also give Mr. Fizell time to consider his own behavior and take whatever action he chooses---

THE ACCUSED: And lady, you wouldn't know the fuckin' truth if it fuckin' -- hit you in the face.

THE COURT: Please remove Mr. Fizell from the courtroom.

22 When Court reconvened the following morning, October 5, 2000, Judge Everett advised counsel and the accused that having considered the matter overnight, she had decided to put the contempt issue over for hearing before another judge. She requested counsel to arrange for hearing on that issue before another judge. At that time, the accused compounded the jeopardy in which he had placed himself. In the course of advising counsel that she had ordered a transcript so as to expedite the hearing before another judge, followed by discussion between herself and counsel as to a convenient remand date, the transcript of that day's proceedings, at page 2, line 30 reads:

> THE ACCUSED: Your Honour, I'm only sorry I didn't call you a stupid fuckin' cunt though earlier.
>
> THE COURT: Would you please remove Mr. Fizell from the courtroom.

23 At page 3, line 19:

> THE COURT: Okay. --- I am citing Mr. Fizell for contempt today by the way also, and, and, and remanding him is
> custody on this matter .....

24 The contempt of court charge came on before me for hearing and disposition on October 25, 2000. The accused was in custody as a sentenced prisoner on other matters. When his matter was called, I was informed that the accused would not come willingly into court. According to information provided by the Crown Attorney, the Sheriff advised that he would have to be brought in by force. Counsel agreed that his matter should proceed in his absence pursuant to section 475 of the Criminal Code. Having read the transcript, I had concerns about the accused's state of mind. His conduct, it seemed to me, was so outrageous that I thought it wise to order a psychiatric assessment before proceeding further with the matter. An assessment was, therefore ordered, contrary to the submissions, I might say, of both counsel.

25 By letter dated November 2nd, which will be filed as an exhibit to these proceedings, the doctor reports, inter alia:

> "There is no evidence of a formal thought disorder." Under the heading Diagnosis, he says: "The defendant has a lengthy past history of social chaos, polysubstance abuse and antisocial behavior. I find no evidence of any other psychiatric disorder. Thus, my DSM-IV diagnostic formulation was:
>
> Axis I Polysubstance abuse.
> Axis II Antisocial Personality Disorder"

26 Under the heading Fitness to Stand Trial, he wrote:

> "The defendant demonstrated a good understanding of the roles of the various officers of the court. He knew what pleas were available to them (sic) and the consequences of the possible verdicts. The defendant was able to communicate effectively with me and, at this time, there was no reason why he should not be able to similarly communicate with the various officers of the court."

27 On November 22, 2000, the matter came on before me for submissions and sentence. In the course of the Crown Attorney's address, the accused was given an opportunity to purge his contempt, and, through counsel, expressly declined to do so.

> (Transcript of November 22, 2000, page 4, line 11):

MR. MURDOCH: ....The proper procedure, I would think, is to allow him the opportunity today, to perhaps purge that contempt before we take the next step, perhaps I'd suggest that.

THE COURT: Yes, Mr. Cook, do you want to address that?

MR. COOK: Your Honour, if I might just have a moment again with Mr. Fizell, please? Your Honour, thank you. I spoke to Mr. Fizell to see if there's anything he wanted to say to Your Honour. He indicated that he prefer all comments come through me. He doesn't want to make a formal address himself, so, I can't say that Mr. Fizell will personally attempt to purge his contempt. So, I think what I'm proposing -- what I'm saying, I suppose, is that we'll proceed to look at the appropriate quantum of sentence and you'll hear hopefully from my friend and I on the background of the individual, the circumstances of his case, and of course, we'll review the report from the Health Sciences Centre.

THE COURT: Yes, do I understand from your comments that neither through yourself, nor himself personally does he wish to attempt to purge his contempt?

MR. COOK: Yes. I specifically asked him that, if he wanted to and he shook his head in the negative.

THE COURT: And he understands what that means? Are you satisfied that he understands what that means?

MR. COOK: Yes, I'm satisfied that Mr. Fizell understands what purge means.

THE COURT: All right. Thank you.

28 Counsel then proceeded to make their submissions on sentence.

The Hearing arising out of a Citation for Contempt of Court

29 By virtue of sections 9 and 484 of The Criminal Code, conviction and punishment for contempt in the face of the Court is a common law jurisdiction available to a Provincial Court Judge.

> 9. Notwithstanding anything in this Act or any other Act no person shall be convicted or discharged under section 730(a) of an offence at common law, ...
>
> but nothing in this section affects the power, jurisdiction and authority that a court, judge, justice or magistrate had, immediately before the 1st day of April 1955, to impose punishment for contempt of court.

> 484. Every judge or provincial court judge has the same power and authority to preserve order in a court over which he presides as may be exercised by the superior court of criminal jurisdiction of the province during the sittings thereof.

30 While as late as 1987, the Supreme Court of Canada had ruled that a Provincial Court Judge had no jurisdiction to entertain a proceeding for an act of contempt committed before another judge: See: R. v. Doz, [1987] 2 S.C.R. 463, other recent cases disapprove of judges hearing and disposing of contempt charges which they themselves have initiated in certain cases, particularly when initiated by a citation for contempt which arises out of insolence: see R. v. Cohn, 15 C.C.C. (3d) 150 (Leave to appeal refused [1985] 1 S.C.R. vii]: R. v. Martin, 19 C.C.C. (3d) 248. In Cohn, Goodman J. speaking of the right under s. 11(d) of the Canadian Charter of Rights and Freedoms to be tried by an independent and impartial tribunal said, at page 176:

> In that regard, where the contempt alleged consists of insolent or contemptuous behavior or other disorderly conduct or behavior which reflects adversely upon the character, integrity or reputation of the initiating judge, the charge should be tried by another judge.

31 In Martin, Lacourcière J.A. said:

> We are all of the view that the contempt proceedings ought not to have been conducted by the same judge who had convicted the appellant on a charge of fraud and who had just made adverse findings of credibility against her. In these circumstances, on common law principles, there arose a reasonable apprehension of bias: see R. v. Nolin (1982) 1 C.C.C. (3d) 36; 29 C.R. (3d) 373; 17 Man. R. 379 (Man. C.A.); and R. ex rel. Germaine v. Wassilyn (1968), 4 C.R.N.S. 157, 10 Crim. L.Q. 461 sub nom R. v. Dnieper, Ex p. Wassilyn.

32 This matter, having come before me for hearing on the basis of a citation for contempt by another Judge of this Court, it is necessary to determine the nature of my function.

33 Is it my function to consider the merits of the citation itself, and to impose sentence if the contempt is, on my review of the record, established (though not in this case, a potentially awkward position to be in when dealing with a citation for contempt pronounced by a sister or brother judge)? Or, is my function merely to sentence the accused, assuming the contempt to be established, upon the basis of the citation for contempt made against him by the citing judge?

34 The answers are partially contained in the B.K.(B) v. The Queen 102 C.C.C. (3rd) 18. A citation for contempt is not a conviction. It is rather a notice to show cause why a person should not be found in contempt. At pp. 24-5 Sopinka J. says:

> [11] In order to simplify matters, it is my opinion that we should use the notion of citing in contempt, not as an expression of a finding of contempt, but instead, as a method of providing the accused with notice that he or she has been contemptuous and will be required to show cause why they should not be held in contempt. This is what I meant in Dagenais when I used the words "citation" and 'cite'. I did not intend them to be equated with conviction. Indeed, in the French version these words are as "assignation" and "assigner ...a comparaitre". These terms which call to mind the notion of a subpoena, indicate that the effect of a citation or 'assignation' is to require a person to appear in court .....
>
> [12] Support for this view to equate a citation with notification comes from Blacks Law Dictionary, (6th ed. St. Paul Minn.: West Publishing Co., 1990) at pp. 223-4. "Citation" is defined as:

> A writ issued out of a court of competent jurisdiction commanding a person therein named to appear on a day mentioned and do something therein mentioned, or show cause why he should not.

While "cite" is defined as:

> To summon; to command the presence of a person: to notify a person of legal proceedings against him and to require his appearance thereto.

35 A citation for contempt is, therefore, a notice to the party cited to the effect that he or she is charged with contempt of court and that he may show cause why he should not be found in contempt. Being charged with an offence, he or she becomes entitled both to common law protections afforded to accused persons, as well as to the protections afforded by the Canadian Charter of Rights and Freedoms. In R. v Cohn, Goodman J.A. says at p. 168:

> .....the substantive and procedural law relating to the offence have evolved as a matter of common law in the courts of England and Canada during the course of several centuries. It is axiomatic that the common law, if not supplanted by statute law is an evolving body of law ..... It cannot be said that the common law with respect to the offence of contempt of court would be on its face unreasonable when measured against the rights and guarantees in the Charter.... On the contrary, ...the common law principles enunciated in the more recent cases in this jurisdiction are consistent with and do not conflict with or infringe upon the rights guaranteed by the Charter. It is accordingly, the responsibility of the court of first instance to ensure that the procedure adopted in the prosecution of a contempt of court charge complies with such principles and that it does not have the effect of violating the right of an accused under the Charter.

36 At page 176, he concludes:

> ....In conducting these proceedings it is incumbent upon the court to ensure that the offender has a fair trial in accordance with the principles of fundamental justice. Those principles include the right to be presumed innocent until proven guilty beyond a reasonable doubt, to be informed without unreasonable delay of the specific offence with which he is charged, to have counsels, to have a reasonable time to prepare a defence, to call witnesses and not to be compelled to give evidence. He has the right to be tried by an independent and impartial tribunal.

37 The ordinary procedure, however, of requiring a case to be made out against the alleged offender through evidence called by a prosecutor before the offender is called upon to raise a reasonable doubt does not apply to contempt proceedings. While proof beyond a reasonable doubt is essential to conviction, the conduct upon which a citation is founded occurs before the judge who issues the citation. The details of that conduct cannot be doubted. The citation itself, subject only to the offender calling evidence that constitutes a defence to the charge, is proof of the contempt. R. v. Cohn dealt with contempt arising out of a witness' refusal to testify, not, as in the present case, where the contempt arises out of unruly conduct and insolence. The distinction, in that regard, however does not, for the purposes of the

present case, distinguish the rational of Goodman J.A., where at pp. 151 and 152 he says:

> .....Despite the forum in which the citation takes place, it is clear that the contempt of court must be proved beyond a reasonable doubt. While it is true that the contemnor is immediately put on his defence, this is only because in a case of contempt of court arising out of the refusal of a witness to testify there can be no doubt with respect to the facts which form the basis of the charge and that they would in every case be sufficient to prove the offence beyond a reasonable doubt. It is therefore incumbent upon the alleged offender to adduce some evidence in order to avoid conviction. This is not a matter, however, of the presumption of innocence being made inapplicable in contempt proceedings, but simply a matter that the facts known to the presiding judge which took place in his court and with respect to which there can be no doubt and no better proof adduced are such to amount to prima facie proof unless the alleged contemnor calls evidence or gives evidence which affords to him a proper defence.

38 There may be cases of contempt arising out of gestures or other conduct which are not be obvious on the face of the court record. In those cases viva voce evidence might have to be adduced to lay the facts before a judge to whom contempt proceedings are to be heard following a citation by another judge. In this case, however, the conduct giving rise to the citation, appears to be primarily verbal, and to be clear on the record of the proceedings before Judge Everett. In light of the cases that clearly direct that where the alleged contempt is insolent conduct the trial for contempt should be before a judge other than the citing judge, I am of the view that, in this case, the transcript upon which I have relied is an adequate substitute for observing the offending conduct directly.

39 In summary, the citing judge should refer a contempt citation arising out of insolent conduct to another judge for hearing and disposition. A citation for contempt of court is not a finding or conviction for the offence of contempt of court, but is rather the initiating process that charges the offence of contempt of court. The citation provides the accused with notice that he or she is in jeopardy of being found in contempt of court, and may be found in contempt, unless he or she shows cause why he or she should not be found in contempt. The citation itself is prima facie proof of the contempt alleged. The alleged offender must be accorded the rights to which an ordinary alleged offender would be entitled under the common law and Canadian Charter of Rights and Freedoms. Specifically, should he or she wish to do so, an opportunity must be afforded to permit him or her to call evidence or otherwise to make full answer and defence for the purpose of showing cause why he or she should not be convicted of (or found in) contempt.

40 Referred to by Goodman J. at page 164 in the Reasons for Judgment in R. v. Cohn. the classic definition of the offence of contempt may be found in R. v. Gray, [1900] 2 Q.B. at page 40, where Lord Russel of Killowen C.J. said:

> Any act or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority, is a contempt of court. This is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of court. The former class belongs to the category which Lord Harwicke L.C. characterized as "scandalizing a court or a judge.

41 In the present case, the initial citation for contempt of court arose out of the accused's unruly and disruptive conduct, including his continued use of language he was ordered not to repeat. Concerning the citation for that behavior he has not attempted to show cause why he should not be held in contempt, and no cause was shown. I find him guilty, therefore, in respect of that citation.

42 Following Judge Everett's Reasons for Judgement and her decision on the day of the trial, the accused uttered the words:

> And lady, you wouldn't know the fuckin' truth if it fuckin' - hit you in the face.

At that point, she had him removed from the courtroom, but she did not, according to the transcript, cite him for

contempt, specifically for that remark. In the absence of a citation, there is no process upon which I can base a finding that the accused was charged with an offence in respect of that remark or that he was informed that he was being charged. I make no finding, therefore, regarding that remark.

43 On October 5th, the following morning, having had a night to consider his position, presumably with the advice of counsel, he did not attempt to show cause, or to apologize. Instead, he said:

> Your Honour, I'm only sorry I didn't call you a stupid fucken' cunt though earlier.

After having him removed from the courtroom following that remark Judge Everett did cite him for contempt for that remark.

44 As noted earlier, on November 22nd he declined any attempt to show cause why he should not be found in contempt or to purge his contempt through an apology. No cause having been shown, I find him guilty of contempt in respect of his final insult.

SENTENCE

45 The Crown submitted that a global sentence of six months was appropriate to address the principles of general and specific deterrence. Defence counsel urged two to three months would be appropriate, referring to the principle of totality, noting that the accused had been sentenced a few months before to a total of thirty-three months for offences including the offence of break and enter into the building where the dog incident occurred. He argued that although the accused had a considerable record, he had never before entered a plea of not guilty and experienced the trial process. Being a man with a low frustration level, he found the rigours of the trial and the cross-examination to be beyond his ability to contain himself. He is a 28-year-old man. He knew that his offending behavior was wrong. He has some experience as a plumber and aspires to take a course to upgrade his skills in the plumbing trade.

46 The cases have held that the maximum sentence for contempt of court, though technically there is no limit, is five years. In practice the maximum actually imposed in Canada during the 20th century has been two years: See discussion respecting sentence for contempt of court in R. v. Cohn, pp. 168 - 173. In considering the imposition of sentence, I note that the accused appeared to be greatly agitated. His agitation, it appears, was based upon his contention that the police were lying or (as Mr. Cook puts it) embellishing the facts of the case during their testimony, that his conviction was founded in their lies, and that the trial judge believed them and not him.

47 Obviously, his remedy if he believed his conviction to be wrongful was to appeal it. Having said that, however, it is well known, particularly in the light of the recent examples of David Milgaard and Thomas Sophonow, that regardless of the protections built into the law to avoid the conviction of innocent persons and the good consciences of judges and juries who attempt to apply that law, the innocent are sometimes convicted. I make that observation, by no means as a suggestion that my conclusion would have differed from that of Judge Everett in the cruelty to animals charge. In considering the sentences, however, for these contempt convictions, I would have considered the possibility, however remote, that the accused was innocent and that his conduct reflected a feeling of righteous indignation. I would have done so on November 22nd, had there been an acknowledgment by him that his conduct was very wrong and had he offered a sincere apology. Had he offered a sincere apology even on that date, I would have been obliged to consider that apology, if not to clear him of the contempt, to mitigate the sentence: See: R. v. Martin, at p. 253.

48 Respecting the first citation of contempt for constant interruptions of the proceedings and the use of offensive language despite the order prohibiting the use of such language, I sentence the accused to 60 days consecutive to the term he is presently serving. For the second citation relating to his egregious insult directed at the trial judge, I sentence him to a further 60 days, consecutive to the first 60 days and consecutive to the balance of the term he is presently serving.

KOPSTEIN PROV. CT. J.

cp/s/qljpn