Regina v. Fields

56 O.R. (2d) 213
[1986] O.J. No. 794
Also reported at 28 C.C.C. (3d) 353

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ONTARIO
COURT OF APPEAL
DUBIN, THORSON AND GRANGE JJ.A.
25TH AUGUST 1986

Criminal Law -- Contempt of court -- Jurisdiction -- Provincial court -- Provincial court judge presiding at summary conviction trial -- Summary conviction court having power to fine and imprison and thus court of record -- Such court having power to punish where contempt of court committed in face of court -- Cr. Code, ss. 2, 489, Part XXIV.

A provincial court judge presiding at the trial of an accused on a summary conviction offence under Part XXIV of the Criminal Code is a court of record and thus has jurisdiction to punish for contempt of court committed in the face of the court, such as the refusal of a witness to answer relevant questions. Although s. 2 of the Criminal Code, which defines "court of criminal jurisdiction", does not include a provincial court judge presiding at a summary conviction trial and Part XXIV of the Criminal Code contains no equivalent of s. 489 which creates certain courts as courts of record where trying indictable offences, nevertheless there can be no doubt that a provincial court judge, sitting as a summary conviction court under Part XXIV, is exercising a criminal jurisdiction conferred on him by Parliament and that he has power to fine or imprison and is thus a court of record.

R. v. Dunning (1979), 50 C.C.C. (2d) 296, discd

Canadian Broadcasting Corp. et al. v. Cordeau et al. (1979), 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24, [1979] 2 S.C.R. 618, 28 N.R. 541 sub nom. Canadian Broadcasting Corp. et al. v. Quebec Police Com'n, 4 C.P.C. 60, consd

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Criminal Law -- Contempt of court -- Proof of offence -- Refusal of witness to answer -- Witness complainant on trial of police officer for assault -- Offence arising out of disturbance on picket line -- Defence counsel asking witness whether member of Marxist-Leninist party -- Witness refusing to answer although directed to do so by trial judge -- No indication at trial as to relevancy of question -- Appeal by witness from conviction for contempt of court allowed -- Defence to charge of contempt based on refusal to answer question that answer to question irrelevant -- Cr. Code, s. 9.

A police officer was charged with assault as a result of a disturbance on a picket line during a strike. The victim of the assault was not an employee of the company against which the strike was directed. At the trial of the police officer his counsel sought to cross-examine the victim on whether he was a member of the Marxist-Leninist party. The witness refused to answer, saying that he considered the question irrelevant. On two occasions the witness was directed to answer the question and when he refused to do so he was found guilty of contempt of court. Defence counsel did not indicate at trial why the question was relevant, except to state that he undertook that the question was relevant. On appeal by the witness from his conviction for contempt, held, Grange J.A. dissenting, the appeal should be allowed and an acquittal entered.

Per Dubin J.A.: Section 9 of the Criminal Code which gives a witness the right to appeal against a conviction also permits the person convicted of contempt of court for refusing to answer a question ruled relevant by a trial judge to challenge the correctness of the ruling. Where a witness objects to answer a question on the ground of irrelevancy, the witness cannot be the judge of that issue at the trial and the witness is bound by the order of the judge. If he refuses to answer and

the rules of procedural fairness are complied with the witness exposes himself to a conviction and punishment. However, if on appeal from conviction for contempt of court in the face of the court it is not shown that the question was relevant, then such a conviction should not be allowed to stand. Where a witness objects to answering a question on the grounds that the question was irrelevant or embarrassing, the trial judge is under a duty to inquire into and determine the relevancy of such a question before convicting the witness for contempt of court particularly where the question appears to be completely irrelevant. In this case it was not shown that the question which the witness refused to answer and which refusal resulted in his conviction for contempt of court was in any way relevant. In particular there was nothing in the record to indicate how the membership of the witness in the Marxist-Leninist party would affect his credibility as a witness. No inquiry was made by the trial judge as to the relevancy of the question and there was no foundation laid for it. A conviction for contempt of court cannot stand on the basis of speculative relevancy where there is no basis on the record to support it. If there was a foundation for the relevancy of the question in this case it should have been inquired into by the trial judge before compelling the witness to answer on the threat of contempt of court if he refused to do so.

Per Thorson J.A.: Only evidence which is relevant to an issue before the court, including the issue of a witness' credibility, is legally admissible at trial. While in general the widest possible latitude should be allowed to the questioner in the cross-examination of a witness at trial, there are limits to the latitude of questioning which the law will accept as tolerable and questions which are clearly irrelevant should not be allowed to be put. Where a question is objected to by a witness it is incumbent on the trial judge to determine whether the evidence that is sought to be adduced in answer to the question is admissible and if the trial judge has any reservations about its admissibility he should require the questioner to indicate the basis on which it is submitted to be relevant. As between the witness and the judge it is obviously the judge at trial who must determine the relevancy of the questions and a witness who disagrees with the trial judge's

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ruling on relevance must nevertheless abide by it or risk being cited for contempt of court. However, a contempt conviction of a witness should be set aside where upon an appeal against that conviction the appellate court determines that the question which the witness refused to answer was indeed irrelevant to any issue before the court at trial and should not, on that account, have been allowed to be put. At the trial it was not immediately apparent why the question as to the witness' membership in the Marxist-Leninist party was relevant. That party is not an illegal organization in Canada and the witness' membership in it was not evidence of bad character. It was not apparent why or how the witness' membership in the party might have had any bearing on the issue of the assault charge or on the witness' credibility as a witness. While the question might have been relevant to show the witness' motive for joining in the picket line, or even that he might have been motivated to provoke a confrontation with the police, possibly resulting in his removal from the picket line or being charged with creating a disturbance, that line of questioning could not plausibly have elicited that he was motivated for ideological reasons to cause himself to be assaulted by a police officer. Moreover, it ought to have been of some concern that in Canada's free and democratic society the question put to the witness about his membership in the Marxist-Leninist party would be seen, at least by some, as offensive of itself, standing as it did unsupported by any explanation offered for it. Against this background it was clearly incumbent on the trial judge in directing the witness to answer the question as to his party affiliation, failing which he might be found in contempt, to indicate why he considered the question to be relevant and hence one which the witness was obliged to answer. While the trial judge was not required to give extensive or detailed reasons for his ruling, it was obviously important and in this case necessary that he give some explanation of it. Had the judge paused to do so he might well have concluded that the question ought not to be allowed. Alternatively, the witness would have had some guidance as to why he was being directed to answer the question, against which he might have better assessed whether he should answer it or run the risk of refusing to do so. As no case was made out at trial that the question had any relevance to an issue before the court in

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these proceedings the trial judge should have instructed the witness that he need not answer the question since prima facie, any evidence that he might give in answer to it was not relevant to any issue before the court and hence was inadmissible and since no case was made by counsel to the contrary. Accordingly, the appeal should be allowed and an acquittal entered.

Per Grange J.A. dissenting: A witness has no privilege to refuse to disclose matters irrelevant to the issues at trial. The witness in this case was not the accused, the defence posed the question and the Crown took no objection to it. There would be great difficulty if the trial judge was bound to account to a witness for the relevance of a question posed without objection from opposing counsel. While out of courtesy the trial judge might have explained to a witness why a certain question is relevant, he was under no obligation to do so. A witness is not legally interested in the outcome of the trial and so long as he cannot be adversely affected by the answer it is difficult to see his concern with relevancy at all. Moreover, the question in this case was relevant or at least potentially relevant. While normally a person's political views are irrelevant, if it could be established on behalf of the police officer that the witness subscribed to a doctrine that foments labour strife that might well reflect on his character or in any event upon his conduct at the scene that might make some reaction by the police officer justifiable which might not otherwise have been so. While there is little question that a witness may refuse to answer a question when he legitimately claims a privilege personal to himself and there may even be occasions in which a question is so irrelevant to any possible issue that a witness may decline to answer with impunity, this was not one of those cases. Accordingly, the appeal should be dismissed.

Cloutier v. The Queen (1979), 48 C.C.C. (2d) 1, 99 D.L.R. (3d) 577, [1979] 2 S.C.R. 709, 12 C.R. (3d) 10, 28 N.R. 1; Brownell v. Brownell (1909), 42 S.C.R. 368; R. v. Ma (1978), 44 C.C.C. (2d) 511, consd

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Other cases referred to

Attorney-General v. Mulholland; Attorney-General v. Foster, [1963] 2 Q.B. 477; Re Ayotte (1905), 9 C.C.C. 133, 15 Man. R. 156; Hickey v. Fitzgerald (1877), 41 U.C.Q.B. 303; R. v. Spence (1979), 47 C.C.C. (2d) 167; Ex parte Fernandez (1861), 10 C.B. (N.S.) 3, 142 E.R. 349; Attorney-General v. Lundin (1982), 75 Cr. App. R. 90; Robertson v. Commonwealth (1943), 25 S.E. 2d 352; R. v. Tass (1946), 86 C.C.C. 97, [1946] 3 D.L.R. 804, 1 C.R. 378, 54 Man. R. 1, [1946] 2 W.W.R. 97; affd 87 C.C.C. 97, [1947] 1 D.L.R. 497, [1947] S.C.R. 103, 2 C.R. 503; Carr v. Department No. 1, Second Judicial Dist. Court (1960), 356 P. 2d 16; Schlossberg v. Jersey City Sewerage Authority (1954), 104 A. 2d 662; Field et al. v. United States (1951), 193 F. 2d 86

Statutes referred to

Criminal Code, ss. 2 definition "provincial court judge" (enacted 1985, c. 19, s. 2(7)), 9 (am. 1972, c. 13, s. 4; 1985, c. 19, s. 2), 489, Parts XVI, XXIV

APPEAL by the accused from his conviction for contempt of court.

P. B. Hambly, for accused, appellant.

L. A. Cecchetto, for the Crown, respondent.

DUBIN J.A.:-- I have had the advantage of reading the reasons for judgment of Mr. Justice Thorson and of Mr. Justice Grange. Like Mr. Justice Thorson, I would allow this appeal, set aside the conviction and direct the entry of an acquittal of the appellant on the charge of contempt of court. Since I rest my judment on somewhat narrower bases than my brother Thorson, I thought it appropriate to give short reasons as to why I have arrived at my conclusion in this appeal.

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My brother Thorson has fully set forth the facts and the issues in this appeal, and they need not be repeated in detail. For my purposes it need only be stated that Fields was the complainant who brought a charge of assault against a police officer. The incident which gave rise to the charge occurred while Fields was taking part in a picket line of employees who were picketing the premises of Canada Trustco located in the City of Cambridge, Ontario. A confrontation ensued with the police officers who were present. It was during this confrontation that Fields alleged that he was assaulted by a police officer, one Kenneth Boult.

The charge of assault against Mr. Boult was tried as a summary conviction offence, and the trial was presided over by a provincial judge under Part XXIV of the Criminal Code. During Fields' cross-examination, and without objection by Crown counsel, he was asked whether he was a member of the Marxist-Leninist party. He refused to answer on the basis that his political beliefs were not in issue in the case and that his political affiliations did not matter. He was advised by the judge that if he refused to answer he could be held in contempt of court. When the question was again put to him, he again refused to answer it and was cited for contempt. Although given an opportunity to present a defence, or to purge his contempt, he did neither and was convicted of contempt of court and sentenced to 30 days' imprisonment. It is from that conviction that this appeal is taken.

Power of a provincial judge presiding over a summary conviction offence under Part XXIV of the Criminal Code to convict for contempt of court

The first issue raised was whether the provincial judge presiding over the trial of Mr. Boult had the jurisdiction to punish for contempt of court committed in the face of the court. It is now established that only a court of record has the power to convict for contempt of court and only a superior court has power to punish for contempt committed ex facie. Although an inferior court of record has power to punish for contempt, it is only for contempt committed in facie. This proposition was stated by Beetz J., concurred in by the

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majority of the Supreme Court of Canada, in the case of Canadian Broadcasting Corp. et al. v. Cordeau et al. (1979) 48 C.C.C. (2d) 289 at p. 303, 101 D.L.R. (3d) 24, [1979] 2 S.C.R. 618, as follows:

> Finally, the author perhaps most often referred to in cases of contempt, James Francis Oswald, Contempt of Court, 3rd ed. (1911), at pp. 1-21, takes it as established that: (1) only the superior Courts have an inherent power to punish for contempt committed ex facie; (2) inferior Courts of record have an inherent power to punish for contempt committed in facie, and (3) inferior Courts which are not Courts of record have no power to punish for contempt unless such a power is given to them by statute: they only have the power to maintain order by expelling disorderly persons.
>
> Canadian Courts have followed the English decisions.

It was submitted that a summary conviction court is not a court of record, and, therefore, the judge presiding over such a court is powerless to convict for contempt of court committed in its face. Part XXIV is silent on this issue and does not declare, in terms, that a summary conviction court is either a court of criminal jurisdiction or a court of record. However, where a court is given power to fine and/or imprison, such a court is thereby constituted as a court of record.

In Words and Phrases Legally Defined, 2nd ed., vol. 1, p. 368, the following definition of court of record is to be found: "Wherever a statute gives a power to fine and imprison, the persons to whom such power is given are judges of record and their court is a court of record."

The same proposition is to be found in the following passage quoted by Martin J.A., speaking for this Court, in R. v. Dunning (1979), 50 C.C.C. (2d) 296 at p. 302:

> Sir William Holdsworth, in A History of English Law, vol. 5, at pp. 157-61, examines the history of the distinction between Courts of record and other Courts which did not

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possess that status, and concludes that, although the technical distinction between Courts of record and other Courts still exists, it is of little practical importance in modern times. It was established, not later than the beginning of the 18th century, that a Court which has power to fine and imprison is a Court of record: see Groenvelt v. Burnell et al. (1686), Carthew 492 at p. 494, 90 E.R. 883 at p. 884. Sir William Blackstone, in Commentaries on the Laws of England (1803), states the following in Book III, c. 3, at p. 24:

"All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record.

(Emphasis added.)

Because a judge presiding over a summary conviction court has, pursuant to the power conferred by Part XXIV, the power to fine and/or imprison, such a court is, in my opinion, a court of criminal jurisdiction and a court of record. Thus, a judge presiding over a summary conviction court, being an inferior court of record, has the jurisdiction to register a conviction for a contempt of court committed in its face and to fine and/ or imprison anyone who is found guilty of such a contempt.

The scope of an appeal from a conviction for contempt of court

Prior to 1972, there was no right of appeal from a conviction for a contempt of court committed in the face of the court, and the only right of appeal following such a conviction was the right to appeal from the punishment imposed. Section 9 of the Criminal Code, as enacted in 1972, now provides a right of appeal from conviction as well as from the punishment and reads as follows:

9. Where a court, judge, justice or provincial court judge summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect

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thereof, that person may appeal

(a) from the conviction, or

(b) against the punishment imposed.

It was submitted that notwithstanding the right of appeal from a conviction for contempt of court in the face of the court, the determination by the trial judge as to the relevancy of the question posed cannot be reviewed and the ruling by the trial judge at trial is final. That view appears to find favour with my brother Grange. With respect, I do not agree. In my opinion, the right of appeal provided by the Criminal Code permits a person convicted of contempt of court for a refusal to answer a question ruled relevant by a trial judge to challenge the correctness of the ruling.

A refusal by a witness to answer a question directed to be answered by the presiding judge of a court of record exposes himself to a conviction for contempt of court. Where a witness objects to answer on the ground of relevancy the witness cannot be the judge of that issue. At the trial, during which the witness is testifying, the matter of relevancy is the concern of the parties, and, in that sense, not the concern of the witness. Since a judge has the jurisdiction at the trial to determine the matter of relevancy, the witness at that stage is bound by the order of the judge, and, if he refuses to answer and the rules of procedural fairness are complied with, the witness exposes himself to a conviction and punishment. If the witness is convicted for refusing to answer the question, the witness has a right of appeal.

On an appeal from such a conviction I think that the relevancy of the question does become an issue with respect to the validity of the conviction for contempt.

It is trite law that only evidence which is relevant is admissible at a trial. Evidence which is relevant may be excluded on policy grounds, but evidence which is irrelevant is never admissible. Although a broader scope is given to the cross-examination of a witness than the cross-examination of an

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accused person, there are nevertheless limits. Any question relating to the credibility of a witness may be put to such a witness, and evidence of bad character may be relevant to the issue of the witness' credibility. The policy considerations which sometimes lead to excluding the cross-examination of an accused as to his character do not pertain to the cross-examination of a witness. However, any question to a witness cannot be put merely under the guise that it goes to the witness' credibility. The questions put must be relevant to that issue.

The failure of the parties to object is not decisive in a determination whether a witness has been properly convicted for contempt of court. If on an appeal from a conviction for contempt of court in the face of the court, it is not shown that the question was relevant, then, with respect to the contrary view preferred by my brother Grange, such a conviction should not be allowed to stand. I see no principle of justice which would warrant any person to be convicted for contempt of court and fined or imprisoned for a refusal to answer a question when the question put to him should never have been put and the answer sought is completely irrelevant to the proper determination of the issues at trial.

I see no hardship in imposing a duty upon a trial judge where a witness objects to answer a question on the ground that the question was irrelevant or embarrassing to inquire into and to determine the relevancy of such a question before convicting the witness for contempt of court, particularly so as in this case where the question at first blush appears to be completely irrelevant. Indeed, a trial judge traditionally has had a duty to see that any witness is not being unfairly dealt with.

Conclusion

In my opinion, it has not been shown that the question which the witness refused to answer, and which refusal resulted in his conviction for contempt of court, was in any way relevant. He was the alleged victim of an assault and testified as to what he claims occurred. My brother Thorson has detailed the relevant portions of the transcript which resulted in his

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conviction. I refer only to the following portions of it:

Q. ... you are a member, however, of the Marxist-Leninist Party?

A. Ahhh, I am not going to answer that.

Q. Well I am asking you.

A. My political beliefs is not the issue here.

Q. Your Honour, I ask for an answer to that.

THE COURT: Yes, you have to answer the question.

A. And if I refuse?

THE COURT: And if you refuse you may be held in contempt of Court.

Q. I undertake to you that it is relevant, sir?

THE COURT: Yes.

A. I'm going to refuse to answer the question.

. . . . .

Q. O-kay, all right, now you ... lets get back to the question that I asked you earlier, and I do want an answer because it is important. Are you a member of a group called the Marxist-Leninist Party?

A. I am going to refuse to answer that.

Q. But His Honour has instructed you to answer?

A. Yes, I know that, yes.

Q. Your Honour I want an answer to that question because it is relevant in this sense in terms of what the whole purpose

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is of these proceedings and by that I mean the charges and so on and I want an answer to that question.

THE COURT: You are refusing to answer?

A. Yes, I am

THE COURT: Yes, well I am going to cite you for contempt and I will give you an opportunity to present a defence to that charge, do you understand that?

A. Yes.

(Emphasis added.)

There is nothing in the record to indicate how the membership of the appellant in the Marxist-Leninist party would affect his credibility as a witness. It is to be noted that no inquiry was made by the trial judge as to the relevancy of the question, and there was no foundation laid for it.

With respect to the contrary view of my brother Grange, I do not think that a conviction for a contempt of court can stand on the basis of speculative relevancy where there is no basis in the record to support it. If there was a foundation for the relevancy of the question, it should have been inquired into by the trial judge before compelling the appellant to answer it on the threat of contempt of court if he refused to do so.

Since it has not been shown that the question that the appellant refused to answer was relevant, I would allow the appeal, set aside the conviction and direct a verdict of acquittal.

THORSON J.A.:-- On July 17, 1984, the appellant Wendel Fields was taking part in a picket line of employees who were picketing the premises of a Canada Trustco branch office located in the City of Cambridge, Ontario. The appellant had joined the picket line although he was not a member of the striking union or, for that matter, of any other union. Later that same day, the appellant became involved in a heated

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confrontation with one of the two police officers who were present at the scene and who were assisting in ushering automobiles through the picket line to the parking-lot serving customers of the branch. Apparently as a result of this confrontation, the appellant was pulled out of the picket line and informed that he was under arrest for "impeding". A struggle ensued and the appellant had to be carried to the police cruiser. In the course of being put into the cruiser and while trying to free himself, the appellant sustained some minor injuries which he alleged were inflicted on him by one of the police officers, Sergeant Boult. He subsequently charged Sergeant Boult with assault.

At Boult's trial, Fields gave his evidence-in-chief as the first witness for the Crown. On cross-examination by defence counsel, he was asked the question whether he was a member of the Marxist-Leninist party. He refused to answer that question, and persisted in his refusal after being told by the trial judge that he was obliged to answer. He was then cited for contempt and given an opportunity to present his defence to that charge. Following a brief adjournment to allow counsel for the Crown to speak to him and explain the charge and the consequences of his refusal to answer the question, the appellant waived his right to retain counsel and called no witnesses, saying only that he was relying on his rights under the Charter and that he considered the question irrelevant. He was then convicted of contempt of court and at the conclusion of the day's proceedings was sentenced to 30 days' imprisonment. He now appeals his conviction and sentence on the charge of contempt of court.

The appeal raises two principal issues:

1. Whether in the circumstances of this case the question as to his membership in the Marxist-Leninist party was a question which the appellant was obliged to answer.

2. Whether the trial judge, as a judge of the Provincial Court (Criminal Division), had the power to punish the appellant for a contempt committed in the face of the court in the course of proceedings being conducted under Part XXIV of the Criminal

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Code.

The second issue, which goes to the jurisdiction of the trial judge in this case to punish a contempt such as this committed while the judge was sitting as a summary conviction court, was raised for the first time in this case in the factum submitted to this Court by the respondent Crown, no doubt in anticipation that it would surface in any event because, as the Crown's factum observes, that issue has not yet been determined by this Court. It was, however, fully argued by both counsel on the hearing of this appeal. Since it is obvious that the conviction of the appellant cannot stand, whatever the merits of the first issue, if the trial judge had no power to punish a contempt of court committed in proceedings such as these, I shall deal with the jurisdictional question first.

I. The power to punish the contempt charged in this case

Considering the very large numbers of criminal cases in Ontario which are regularly dealt with and disposed of by judges of the provincial court sitting as summary conviction courts pursuant to Part XXIV of the Code, it may seem curious that the issue of the power of such a court to punish a contempt committed in the face of the court has not to date been decided by this Court, yet this would appear to be a correct statement of the situation. In 1979, Martin J.A., speaking for this Court in R. v. Dunning (1979), 50 C.C.C. (2d) 296, dealt with the question whether a provincial court judge, exercising the jurisdiction of a magistrate to try indictable offences pursuant to Part XVI of the Code, had an inherent power to punish for contempt of court a witness who wilfully refused to give evidence when lawfully required to do so at a trial before that judge. Following a thorough and detailed review of the case-law and other authorities bearing on the question, Martin J.A. concluded that a magistrate so acting did have such a power, flowing from s. 2 of the Code which expressly constitutes a magistrate acting under Part XVI as a "court of criminal jurisdiction". He was, however, careful to add at p. 306:

> ... I restrict my judgment to the inherent power of a

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Magistrate acting under Part XVI of the Code to convict for contempt of Court when committed in the face of the Court. I do not find it necessary to examine the power of a Justice or Magistrate to punish for contempt in the face of the Court while holding a trial for a summary conviction offence. I leave aside that question until it is necessary to decide it.

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Section 2 of the Criminal Code is silent on whether a judge of a provincial court, sitting as a summary conviction court under Part XXIV, is a "court of criminal jurisdiction", and it is thus open to the inference, as counsel for the appellant argued, that by expressly including in that definition "a magistrate ... acting under Part XVI" Parliament intended to deny that status to a magistrate (here a judge of the provincial court) sitting as a summary conviction court under Part XXIV. Moreover, it is to be noted that there is no provision in Part XXIV corresponding or equivalent to s. 489, which is found in Part XVI and which provides that:

> 489(1) A judge who holds a trial under this Part shall, for all purposes thereof and proceedings connected therewith or relating thereto, be a court of record.

With respect, I am unable to view these two omissions as being dispositive of the issue in this case. In Dunning, supra, it was strongly urged upon the Court that since the word "judge" in s. 489 is defined in Part XVI in such a way as to exclude a provincial court judge, there was a clear intention by Parliament to deny, for the purposes of that part, the status of a court of record to a provincial court judge, on the basis of the expressio unius est exclusio alterius rule of statutory construction. Martin J.A. rejected this submission, noting that while the rule is often a valuable aid to construction, it cannot be controlling where its application would result in an inconsistency or would lead to an illogical result. As he put it, at pp. 303-4:

> ... the jurisdiction of a Magistrate and a "judge" under Part XVI are co-extensive with respect to the class of offences which they may try with the accused's consent. Accordingly, it would be illogical and inconsistent to deny a Magistrate,

in a trial before him, the same power that a "judge" has when trying the same offence with respect to the ability to punish a witness who wilfully refuses to be sworn and testify.

In light of the historical review that is found in the decision in Dunning of cases, spanning a period of over two centuries, which have sought, somewhat inconclusively, to rationalize the powers of the various criminal courts to punish contempts in the face of the court, it is unnecessary in my opinion to repeat at any length here what has been said and written, in this country and elsewhere, on this subject. The uncertainty which has surrounded these powers of criminal courts is well set out by Martin J.A., in the Dunning case, at pp. 300-1:

> The law is clear that only a superior Court has jurisdiction to punish all types of contempt of Court whether committed in the face of the Court or out of Court. On the other hand, the power of an inferior Court to fine and imprison for contempt is confined to contempt of Court when committed in the face of the Court: see R. v. Lefroy (1873), L.R. 8 Q.B. 134, and "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" 30 Can. Bar Rev. 225 at p. 226 (1952), by the Honourable J. C. McRuer. What is, perhaps, not so clear is whether the power of inferior Courts to punish for contempt of Court in the face of the Court is confined to inferior Courts of record, or whether the power is inherent in all inferior Courts. The language used by the Judges in R. v. Lefroy, supra, suggests that only inferior Courts of record have the power to punish for contempt, even when committed in the face of the Court. In Re Rose, [1964] 1 C.C.C. 25, 42 D.L.R. (2d) 45, [1964] 1 O.R. 299, Stewart, J., held that a Magistrate trying a provincial offence under the Summary Convictions Act, R.S.O. 1960, c. 387 (now R.S.O. 1970, c. 450), is not a Court of record, and hence has no inherent power to punish for contempt in the face of the Court. In support of the proposition that Courts which are not Courts of record have no power to commit for any contempt unless such power is expressly conferred by statute, Stewart, J., cited McDermott v. Judges of British Guiana (1868), L.R. 2 P.C. 341. I do not regard that case as

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authority for the proposition that the power to punish for contempt in the face of the Court is confined to Courts of record.

Continuing at pp. 301-2, he added:

There are dicta which appear to indicate that the power to punish for contempt of Court committed in the face of the Court is not confined to Courts of record. In R. v. Almon (1765), Wilm. 244 at p. 254, 97 E.R. 94 at p. 99, Wilmot, J., said:

"The power, which the Courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the Court, acted in the face of it, 1 Vent. 1. ..."

(Emphasis added.) Whatever the true view may be with respect to the power of an inferior Court which is not a Court of record to punish a contempt committed in the face of the Court, I am satisfied that a Magistrate trying an indictable offence under Part XVI of the Criminal Code is a Court of record in the modern meaning of that term.

Returning to the historical distinction between the different kinds of courts, he noted, at p. 302:

Sir William Holdsworth, in A History of English Law, vol. 5, at pp. 157-61, examines the history of the distinction between Courts of record and other Courts which did not possess that status, and concludes that, although the technical distinction between Courts of record and other Courts still exists, it is of little practical importance in modern times. It was established, not later than the beginning of the 18th century, that a Court which has power to fine and imprison is a Court of record: see Groenvelt v. Burnell et al. (1686), Carthew 492 at p. 494, 90 E.R. 883 at p. 884. Sir William Blackstone, in Commentaries on the Laws of England (1803), states the following in Book III, c. 3, at

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p. 24:

"All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison; so that the very erection of a new jurisdiction with power of fine or imprisonment makes it instantly a court of record."

Halsbury's Laws of England, 4th ed., vol. 10, p. 319, para. 709, states:

"Another manner of division is into courts of record and courts not of record. Certain courts are expressly declared by statute to be courts of record. In the case of courts not expressly declared to be courts of record, the answer to the question whether a court is a court of record seems to depend in general upon whether it has power to fine or imprison, by statute or otherwise, for contempt of itself or other substantive offences; if it has such power, it seems that it is a court of record.

"In the case of criminal courts, this seems to be the only test ...".

(My emphasis.)

Whatever significance ought or ought not to be attached to Parliament's omission to include, in the definition "court of criminal jurisdiction" in s. 2 of the Code, a reference to a provincial judge sitting as a summary conviction court under Part XXIV, or its omission to include any counterpart to s. 489 in Part XXIV, I am of the opinion that these omissions cannot be taken to be determinative of the jurisdictional issue raised in this case.

There can be no doubt that a provincial judge, sitting as a summary conviction court under Part XXIV, is exercising a criminal jurisdiction conferred on him by Parliament. Equally, there can be no doubt that the summary conviction court over which the judge presides has the power to fine or imprison a person who is convicted by the court following that person's

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trial on a charge that is properly before it.

The same reasoning that led to the rejection, in the Dunning case, of the application of the exclusio unius rule to the construction of s. 489 ought, in my opinion, to prevail here. Were it not to do so, the law governing the power of our courts in criminal proceedings to punish contempts committed in the face of the court would, in my opinion, be flawed by inconsistency and want of logic, not unlike the kind that concerned this Court in Dunning.

Consider, on the supposition that the exclusio unius rule were to be determinative of the matter, the situation which would confront a judge of a provincial court before whom an accused appears standing charged with an offence of the kind that may be proceeded with either by indictment or by summary conviction, accordingly, as the Crown elects. If counsel for the Crown elected to proceed by indictment, the judge's authority at the trial to deal with and punish a contempt committed in the face of the court would be undoubted: R. v. Dunning, supra. If, on the other hand, counsel for the Crown elected to proceed by summary conviction and during the course of the trial the very same contempt occurred, the same judge would be powerless to deal with it. In the latter case, presumably, the only way the contempt could be dealt with would be by the issuing of a summons or like process charging the person in question with a contempt of the court, and thereafter having the charge dealt with by a superior court. Quite apart from the consequences for the administration of justice of the trial delays this could lead to, I find troubling the inconsistency of treatment that could flow from, and the want of logic that seems apparent in, any interpretation of the law which would accept, in such a situation, the inability of the trial judge to deal with the contempt by reason only of the manner in which the Crown in the case chose to have the charge proceeded with.

In my opinion, this Court should strive to avoid such an anomalous result in the absence of compelling reasons which would preclude it from doing so. I do not accept that there are any such compelling reasons present in this case. While a court

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constituted as a summary conviction court under Part XXIV of the Code is clearly a creature of statute, the proposition enunciated as long ago as 1803 by Sir William Blackstone, that a court which has the power to fine or imprison is on that account alone a court of record, impresses me as a functionally sound and sensible vantage point from which to approach the scope of the court's power to punish for contempt in a case such as this.

Accordingly, I would accept that a provincial court judge, sitting as a summary conviction court under Part XXIV of the Code, is a court of record having the power, as such, to deal with and punish contempts committed in the face of the court.

This conclusion acknowledges that the distinction between courts of record and other courts still exists in our law. Since the decision of the Supreme Court of Canada in Canadian Broadcasting Corp. et al. v. Cordeau et al. (1979), 48 C.C.C. (2d) 289, 101 D.L.R. (3d) 24, [1979] 2 S.C.R. 618, it now appears to be settled, in Canada at least, that "inferior Courts which are not Courts of record have no power to punish for contempt unless such a power is given to them by statute: they only have the power to maintain order by expelling disorderly persons". This statement, said to describe what the author of Oswald, Contempt of Court, 3rd ed. (1911), "takes ... as established", appears at p. 303 of the reasons for judgment in that case delivered by Beetz J., preceding the latter's observation that "Canadian Courts have followed the English decisions" in this regard.

For the foregoing reasons, I would decide what I have described as the jurisdictional issue in the affirmative. Accordingly, I now turn to the second principal issue raised by this appeal.

II. The obligation of the appellant to answer the question put to him concerning his party affiliation

There can be little doubt that, prima facie, the refusal of a witness at trial to answer a question put to him which the trial judge has directed him to answer, constitutes a contempt

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of court. In order for his contempt conviction to stand, however, it must be established that the witness, without justification or excuse, refused to answer a question that he was legally obliged to answer. The question then is whether the appellant in this case was obliged to answer the question put to him by defence counsel concerning his membership in the Marxist-Leninist party. This in turn raises the further question: whether the question put to him was or might have been relevant to any issue before the court on the trial of Sergeant Boult for assault.

It is trite law that any evidence to be adduced at trial must meet the legal criteria for its admissibility, of which the sine qua non is its relevance. As stated by the Supreme Court of Canada in Cloutier v. The Queen (1979), 48 C.C.C. (2d) 1 at p. 28, 99 D.L.R. (3d) 577, [1979] 2 S.C.R. 709, "[t]he general rule as to the admissibility of evidence is that it must be relevant". Thus before a trial judge may compel a reluctant witness to testify, he must be satisfied that the evidence or testimony sought to be adduced is relevant to some issue before the court at trial. In some cases, the relevance of a question put to the witness will be obvious. Where, however, an objection is taken by the witness or by counsel, or the ultimate purpose of the line of questioning is unclear and potentially irrelevant, it is incumbent on the trial judge, in the exercise of his duty and authority to maintain control over the proceedings, to require that the questioner indicate the basis on which the question is submitted to be relevant. This appears to be the recognized rule in most if not all common law jurisdictions, although the expression of the rule may be seen to vary somewhat. Thus, in Attorney-General v. Mulholland; Attorney-General v. Foster, [1963] 2 Q.B. 477 (C.A.), Donovan L.J. stated, at p. 492:

> In the first place the question has to be relevant to be admissible at all: in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand ...

In Re Ayotte (1905), 9 C.C.C. 133, 15 Man. R. 156, the Manitoba Court of King's Bench held, at p. 135, that:

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> To justify a magistrate in committing a witness ... it must appear not only that the witness refused without just excuse to answer, but that the question asked was in some way relevant to the issue.

Finally, Borrie and Lowe's Law of Contempt, 2nd ed. (1983), states at p. 42: "An unjustifiable refusal to answer a question properly put by the court and relevant to the case is punishable as contempt."

There is, however, no doubt that a wider scope of questions is permitted in cross-examination than in direct examination, particularly in a criminal case where defence counsel is cross-examining. Clearly, every opportunity should be afforded an accused person to weaken if he can the prosecution's case or to establish a defence. However, the courts have held that this broader right is not unrestricted.

In Brownell v. Brownell (1909), 42 S.C.R. 368, Anglin J., speaking for the majority of the Supreme Court of Canada, stated the ambit of the right in this way at p. 374:

> No doubt the limits of relevancy must be less tightly drawn upon cross-examination than upon direct examination. The introduction upon cross-examination of the issue of the witness's credibility necessarily enlarges the field. But it does not follow that all barriers are therefore thrown down. That which is clearly irrelevant to this issue or to the issues raised in the pleadings is no more admissible in cross-examination than in examination in chief.

Counsel often will try to use cross-examination to attack a witness' credibility by revealing some reason or motive the witness may have for not telling the truth. To do this, counsel may refer to incidents not related to the issues of the case, including incidents tending to portray the witness as a person of bad character. Again, however, there are limits: see Phipson on Evidence, 13th ed. (1982), pp. 812-3.

In Hickey v. Fitzgerald (1877), 41 U.C.Q.B. 303, the

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plaintiff in a civil assault case was cross-examined as to the number of previous fights in which he had been involved. The trial judge would not allow the question unless it was to test the witness' credibility; defence counsel claimed he did not have to state the purpose of his question, but could not say its purpose was the one suggested by the judge. The judge did not allow the question. On appeal, the judge's exercise of his discretion was upheld (at p. 307):

> The learned Judge was willing to allow the questions to be put if put for the purpose of testing the character or credit of the witness, but was not willing to allow them to be put for an improper purpose. If put for the purpose of giving the plaintiff a bad name--of shewing that on other occasions he was of a quarrelsome disposition, and so of leading the jury to infer that because he had been engaged in several previous fights he on this occasion commenced the fight, the purpose was an improper one ...
>
> No other purpose than the foregoing was suggested, either at the trial or the argument, for the putting of the question, and none other occurs to us. (Emphasis in the original.)

In R. v. Ma (1978), 44 C.C.C. (2d) 511, this Court ruled that where the appellant was accused of attempting to obstruct the course of justice, evidence of his association with a criminal organization whose members were bound to assist each other even by violence was indeed relevant. The evidence was introduced through the testimony of police officers; the appellant denied membership in the organization. Lacourciere J.A. stated at p. 517:

> The evidence objected to would be clearly inadmissible if it proved nothing more than the bad character of the appellant, and thus that he was more likely to commit the offence. But when it was tendered for the purpose of allowing the jury to draw an inference of motive, a material issue in this case, it became admissible.

The Ma case was distinguished on its facts by this Court in

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R. v. Spence (1979), 47 C.C.C. (2d) 167. In Spence, the appellant was also accused of having attempted to intimidate a Crown witness. Much evidence was introduced at trial about the Rastafarians, a group to which the appellant belonged. The trial judge held it was relevant to the accused's motive. On appeal, Brooke J.A. stated at p. 169: "The case here is quite different from the case of R. v. Ma ... There was no evidence here that one man was duty bound to his fellow Rastafarian to resort to violence to aid him."

Finally in this regard, the Supreme Court of Canada, ruling in Cloutier v. The Queen, supra, that evidence that the accused used marijuana was not admissible because it did not establish a motive on a charge of importing, put the matter in this way at pp. 28-9:

> ... evidence is not admissible if its only purpose is to prove that the accused is the type of man who is more likely to commit a crime of the kind with which he is charged; such evidence is viewed as having no real probative value with regard to the specific crime attributed to the accused: there is no sufficient logical connection between the one and the other.

Accepting that questions which will elicit irrelevant answers are inadmissible, there is a further question which arises and which must be addressed in this case. That question is: who determines the issue of their relevance?

In the context of witness versus trial judge, the answer seems obvious: it would, as the English Court of Common Pleas remarked in Ex parte Fernandez (1861), 10 C.B. (N.S.) 3 at p. 40, 142 E.R. 349, be a "startling proposition" that the witness should be the judge of the relevance of questions put to him or her. The court added: "... there has never been any doubt that it is for the Court to decide whether the circumstances judicially before it are such as to excuse the witness from answering."

The apparent unanimity of the decided cases on the court's power to determine which questions must be answered by the

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witness may, however, be seen to mask another issue the resolution of which presents a greater difficulty: does the determination made by the trial judge stand, so that even if the questioning appears to be irrelevant to any issue before the court at trial, the witness, if ordered to answer, must do so or risk conviction for contempt, or is the determination reviewable objectively as to its correctness? On this issue there is markedly less unanimity of opinion.

Arlidge and Eady, The Law of Contempt (1982), states: "A witness who is ordered to answer a question by the judge is not in contempt at common law when he refuses to answer it if the answer is in fact not admissible and necessary."

Borrie and Lowe's Law of Contempt, 2nd ed. (1983), at p. 42, expresses it thus: "An unjustifiable refusal to answer a question properly put by the court and relevant to the case is punishable as contempt." (My emphasis.)

In support of this proposition, Arlidge and Eady cite Attorney-General v. Lundin (1982), 75 Cr. App. R. 90, in which the English Divisional Court observed, at p. 95: "... refusal by a witness to answer a question in a criminal trial even when ordered by a judge to do so does not inevitably put that person in contempt of court."

Against this view there are equally strong expressions of judicial opinion that the witness must answer. See, for example, Robertson v. Commonwealth (1943), 25 S.E. 2d 352 at p. 359:

> The fact that a witness may disagree with the court on the propriety of its ruling is, of course, no excuse for his not complying with it. The proper method of challenging the correctness of an adverse ruling is by an appeal and not by disobedience.

I would add that although the possibility of appealing a conviction for disobeying an order to answer a question may offer only limited comfort to a witness whose fear of the consequences of his obeying such an order has led him to refuse

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to answer, there is no doubt that there is strong judicial support for this last-mentioned view of a witness' obligation. There is some judicial support, further, for the view that the irrelevance or impropriety of a question put to a witness furnishes no reason for impeaching his conviction for a refusal to answer: see the discussion of this subject in 17 Am. Jur. 2d para. 29.

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It is apparent, therefore, that an objecting witness may find himself in a precarious position: if the trial judge rules that a question is relevant and must be answered, the witness will clearly be risking a contempt conviction if he then refuses to answer, even if he believes that the question is not relevant and even if, according to the view of some, a reviewing court confirms that it was indeed not relevant.

In my opinion, the view which holds that the irrelevance or impropriety of a question affords no basis for impeaching a contempt conviction for a refusal to answer it goes too far. Were it to find acceptance, the trial judge's ruling on whether a witness must answer would be absolute and binding, right or wrong, in relation to any conviction of the witness for contempt by reason of his failure to abide by the ruling. The witness would have no protection afforded to him by the law from being obliged to answer any question put to him which he was directed by the trial judge to answer, no matter how irrelevant, improper or damaging the question put to him by his questioner and no matter how wrong or even capricious or perverse the judge's ruling on the matter. I cannot accept that such an extreme view of the law is compatible with the fairness of our criminal justice system, or with the principles of fundamental justice which are now embodied in our constitution. There must, in my opinion, be room in the system for an objective assessment of the correctness of such a ruling.

From the foregoing brief review, it seems to me that the following general principles can be distilled:

1. Only evidence which is relevant to an issue before the court, including the issue of a witness' credibility, is legally admissible at trial.

2. While, in general, the widest possible latitude should be allowed to the questioner in the cross-examination of a witness at trial, there are limits to the latitude of questioning which the law will accept as tolerable. Questions which are clearly irrelevant should not be allowed to be put.

3. Where a question is objected to by a witness, it is incumbent on the trial judge to determine whether the evidence that is sought to be adduced in answer to the question is admissible. If the trial judge has any reservations about its admissibility, he should require the questioner to indicate the basis on which it is submitted to be relevant.

4. A witness who disagrees with the trial judge's ruling on relevance must nevertheless abide by it or risk being cited for contempt of court.

5. A contempt conviction of a witness should be set aside where, upon an appeal against that conviction, the appellate court determines that the question which the witness refused to answer was indeed irrelevant to any issue before the court at trial and should not, on that account, have been allowed to be put.

With these principles in view I now turn to what occurred during that part of the proceedings at the trial of Sergeant Boult with which this appeal is concerned.

At the critical point in the proceedings the appellant had completed the giving of his evidence-in-chief as the first witness on behalf of the Crown. The cross-examination of the appellant by defence counsel then began as follows:

Q. Mr. Fields, on the date in question you were not a member of this particular Union that was striking, were you?

A. No, I am a Union sympathiser.

Q. No, just answer my question, I said you were not a member of that Union?

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A. No.

Q. All right, and as a matter of fact you are not a member of any Union?

A. No, that is correct.

Q. Right, you are a member, however, of the Marxist-Leninist Party?

A. Ahhh, I am not going to answer that.

Q. Well I am asking you.

A. My political beliefs is not the issue here.

Q. Your Honour, I ask for an answer to that.

THE COURT: Yes, you have to answer the question.

A. And if I refuse?

THE COURT: And if you refuse you may be held in contempt of Court.

Q. I undertake to you that it is relevant, sir?

THE COURT: Yes.

A. I'm going to refuse to answer the question.

Immediately following this initial exchange defence counsel pursued the matter as follows:

Q. All right, I will finish with my other questions and then perhaps you can get some legal advice and answer that question in due course.

A. If I was an NDP member would you ask what my political affiliation was?

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Q. I don't care about your political affiliation, I asked you if you were a member of the Marxist-Leninist Party?

A. Well the question was geared to it.

Q. I asked you specifically if you are a member of an outfit called the Marxist-Leninist Party?

A. Well what my political affiliation is doesn't matter.

Q. I don't care about politics.

A. Well obviously the question shows that you do.

Q. I am asking you if you are a member of that group? I am suggesting that it is the same if I ask you if you are a member of a motorcycle gang?

A. I can't answer the question.

Q. You won't answer?

A. NO.

The questioning of the appellant then turned to other matters. To this point, therefore, we can only speculate as to what submissions defence counsel might, if he had been asked about the matter by the trial judge, have put forward to the court as to the relevance of the question, following the appellant's initial indication that he was not going to answer it. Correspondingly the transcript to this point sheds no light on why the trial judge instructed the appellant that he had to answer the question.

Unlike the organization which was the subject of the evidence given by the police officers in R. v. Ma, supra, the Marxist-Leninist party is not an illegal organization in Canada. The appellant had every right to be a member of that party if indeed he was such a member. Thus, apart from counsel's "undertaking" to the court that the question was relevant,

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it would not have been immediately apparent why or how the appellant's membership in that party might have any bearing on the issue of the assault charge against Sergeant Boult, or on the appellant's credibility as a witness on behalf of the Crown. Certainly statements under oath at trial when made by a member of that party are not on that account alone less entitled to be believed than those of other persons.

The only clue appearing from the transcript of the proceedings to this point as to what was in the mind of counsel in asking the question is his comment in which he appears to equate the question of the witness' party membership with asking the witness if he was a member of a motorcycle gang. The drawing of this equation would seem to suggest that counsel was seeking to use the appellant's answer as evidence not of his motive in joining the picket line or thereafter conducting himself as he did, but of the appellant's bad character. If that was counsel's purpose, of course, the question was improper since the answer, whatever it might have been, could not reasonably have constituted evidence of the appellant's bad character.

Later on during his cross-examination, defence counsel returned to the question of the appellant's party membership in the following further exchange:

Q. O-kay, all right, now you ... lets get back to the question that I asked you earlier, and I do want an answer because it is important. Are you a member of a group called the Marxist-Leninist Party?

A. I am going to refuse to answer that.

Q. But His Honour has instructed you to answer?

A. Yes, I know that, yes.

Q. Your Honour I want an answer to that question because it is relevant in this sense in terms of what the whole purpose is of these proceedings and by that I mean the charges and so on and I want an answer to that question.

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THE COURT: You are refusing to answer?

A. Yes, I am.

THE COURT: Yes, well I am going to cite you for contempt and I will give you an opportunity to present a defence to that charge, do you understand that?

A. Yes.

THE COURT: So I suppose, do you want this settled before you proceed any further?

Mr. Hafeman: Yes, I do.

THE COURT: Yes.

Mr. Hawe: I wonder if it would be wise to just allow a five or ten minute recess and I will speak to Mr. Fields and explain.

THE COURT: Yes, all right, Court is adjourned. You will have an opportunity to purge your contempt but if you persist in taking ... in saying what you do say that you refuse to answer a question which I consider relevant and the circumstances of this strike then, you of course, citing for contempt will stand and you will have an opportunity to enter a defence ... yes, Court is adjourned for five minutes.

With respect, counsel's explanation to the court of why he wanted an answer to "that question" is not a model of lucidity. Indeed it is all but incomprehensible and the context of the questions and answers leading up to it does not assist in making it less so. In the circumstances, the basis on which it was submitted to be relevant must be considered to be wholly unexplained. That being so, the trial judge's statement that he considered the question to be relevant stands unsupported by any explanation accepted or given by him, other than his one reference to "the circumstances of this strike".

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With respect "the circumstances of this strike" casts the net of conceivable relevancy far too widely. The charge brought by the appellant in this case is that he was assaulted by Boult in the struggle that ensued following the appellant's arrest. Prima facie, the appellant's membership in the Marxist-Leninist party was not relevant to whether or not he was so assaulted, whatever the circumstances of the strike might have been.

Before this Court, counsel for the Crown submitted that the question could have been relevant to the appellant's credibility, in that it might have established a motive or bias on his part. Accepting that the question might have been relevant to show the appellant's motive for joining in the picket line, or perhaps even that he might have been motivated, for ideological reasons, to provoke a confrontation with the police, possibly resulting in his removal from the picket line or being charged with creating a disturbance, the same line of questioning could not plausibly have elicited that he was motivated, for ideological reasons, to cause himself to be assaulted by Sergeant Boult in the course of being put into the police cruiser.

Even if, and this is of course wholly speculative, defense counsel might have been seeking to make the point that the appellant courted the assault on himself in order that he might be seen to be a victim of "brutality" on the part of the police in their handling of this labour dispute, there ought to have been at least some reality to the prospect of such a point being made. In my opinion it is almost impossible to think that counsel could have contended, with any expectation of success, that because the appellant was a member of the Marxist-Leninist party and because, as such, he presumably shared its aims (of which aims the court below could scarcely have been asked to take judicial notice), it would have been the appellant's aim in this instance to portray himself as a victim of brutal police conduct. On any view of the record before us, the necessary connecting links in the evidence for such a contention are nowhere to be found, and the likelihood that by this line of questioning they could have been found is so remote, in my opinion, as to be no more than fanciful.

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Moreover, it ought to have been of some concern in this case that in our free and democratic society, the question put to the appellant about his membership in the Marxist-Leninist party would be seen, at least by some, as offensive on its face, standing as it did unsupported by any explanation offered for it. In this regard it perhaps bears repeating that it is not against the law in this country to be a member of that party, nor, alone and without more, could a person's membership in that party constitute evidence of that person's bad character or want of credibility. Certainly there could be no "open season" for assaults on members of that party as distinct from other persons. Nor is it relevant to the issue of this contempt conviction that Sergeant Boult was subsequently acquitted on the charge of assault brought against him by the appellant.

Against this background it was clearly incumbent on the trial judge, in directing the appellant to answer the question as to his party affiliation failing which he might be found in contempt, to indicate why he considered the question to be relevant and hence one which the appellant was obliged to answer. While he need not have given extensive or detailed reasons for his ruling -- in many trial situations it is simply not practical to expect that to be done -- it was obviously important, and in this case necessary, that he give some explanation of it. Had he paused to do so in this case, following the appellant's initial indication to counsel that he was not going to answer the question, he might well have concluded that the question ought not to be allowed. Alternatively, the appellant would have had some guidance as to why he was being directed to answer the question, against which he might better have assessed whether he should answer it or run the risk of refusing to do so.

As it was, no case was made out at trial that the question had any relevance to an issue before the court in these proceedings; in the words of Cloutier v. The Queen (1979), 48 C.C.C. (2d) 1, 99 D.L.R. (3d) 577, [1979] 2 S.C.R. 709, there was "no sufficient logical connection between the one and the other". I am of the opinion, therefore, that the trial judge should have instructed the appellant that he need not answer

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the question, since prima facie any evidence he might give in answer to it was not relevant to any issue before the court and hence was inadmissible, and since no case was made by counsel to the contrary.

For the reasons given, I would allow the appeal, quash the conviction, and direct the entry of an acquittal of the appellant on the charge of contempt of court.

GRANGE J.A. (dissenting):-- I have had the advantage of reading the reasons of my brother Thorson prepared for delivery herein. I entirely agree with his conclusion that a judge of the provincial court has the power to punish for contempt in the face of the court in the course of proceedings being conducted under the summary convictions sections of the Criminal Code.

As Thorson J.A. points out judicial opinion on the reviewability of the trial judge's determination of the relevance of a particular question in a proceeding for contempt is far from unanimous. I can find no case binding on the court determining that problem. In addition to the authorities Thorson J.A. quoted there are others of great repute going either way. A leading example of those rejecting reviewability is found in 8 Wigmore on Evidence Section 2210, at pp. 149-50, where he states the following:

> 2210. (1) Irrelevant matters. The witness has no privilege to refuse to disclose matters irrelevant to the issue in hand. This is, first, because irrelevancy relates to the scope of the investigation and therefore is a concern of the parties alone and may be obviated, as a ground for exclusion, by their consent or failure to object. Secondly, it is because there is in the mere circumstance of irrelevancy nothing which creates for the witness a detriment or inconvenience such as should suffice to override his general duty to disclose what the court requires. Moreover, the recognition of a privilege of this sort would add innumerable opportunities to make a claim of privilege and would thus tend to complicate a trial and add to the uncertainty of the event. Accordingly it has always been accepted, at common

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law, that no privilege of this sort existed.

Wigmore cites as one of his authorities R. v. Tass (1946), 86 C.C.C. 97 at p. 113, [1946] 3 D.L.R. 804 at p. 818, 1 C.R. 378, where Bergman J.A. of the Manitoba Court of Appeal in dealing with the refusal of a witness to answer a question allegedly because of a risk of incrimination said:

> The only ground on which a witness may object to answer a question, is that it violates some privilege which is personal to himself. In the case at bar the objection could not possibly be based on the fact that the questions asked violated the privilege against self-crimination. That objection would be fully met by s. 5 of the Canada Evidence Act, which abolished that privilege. As I understand it, the objection is based solely on the alleged impropriety of examining Dr. Tass "upon a matter irrelevant to the Ford charge". I, of course, do not agree that the questions complained of were irrelevant to the Ford charge. Assuming, however, that they were irrelevant, they were answered without objection, and, moreover, it was not open to Dr. Tass to object to them on the ground of irrelevancy.

It is perhaps interesting that Bergman J.A. cited Wigmore in an earlier edition as one of his authorities.

The United States authorities are also not unanimous but they seem to lean towards Wigmore's position. The law is summarized thus in 17 Am. Jur. 2d, "Contempt", para. 29:

> Some decisions indicate that refusal to answer questions not pertinent to the issue does not constitute contempt. However, it has also been said that if the court has jurisdiction of the subject matter, a witness should not be permitted to refuse to answer a question on the ground that it is irrelevant. And under this view it is said that the fact that the question is irrelevant or improper furnishes no reason for impeaching a commitment for refusal to answer. Similarly, it has been stated that the immateriality of the evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the court, requiring them to answer the

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questions put to them and to produce written evidence in their possession, on their examination before a special examiner.

In Carr v. Department No. 1, Second Judicial Dist. Court (1960), 356 P. 2d 16, the Supreme Court of Nevada held that a witness' refusal to answer questions put to him by the grand jury was not justified. Pike J. stated at p. 19 that: "As a witness, and not as a party, he was not in a position to contend that the question which was asked him was not relevant to the inquiry."

Schlossberg v. Jersey City Sewerage Authority (1954), 104 A. 2d 662, dealt with an order for the production of documentary evidence. The Supreme Court of New Jersey held (at pp. 668-9):

> Except as he may be relieved from compliance with the subpoena duces tecum ... because the subpoena is "unreasonable and oppressive", or is excused from compliance because he would be incriminated thereby ... the duty owed by every witness to the State to and in the quest for truth in the administration of justice makes it compulsory that he appear and produce documentary evidence ... and, if required, to testify concerning it. The witness is not the judge of the relevancy of the matter.

In Field et al. v. United States (1951), 193 F. 2d 86, the United States Court of Appeals, Second Circuit, said the following at p. 91:

> The District Court's power to protect the execution of its business from obstruction by a witness' refusal to answer inquiries is established ... The witness may not take exception to the materiality of the questions ... Objections to the proceedings are for the parties thereto. It is enough if the court has de facto existence and organization. The interference with carrying on the court's business in the presence of the court furnishes the reason for the use of the contempt power.

I think there is great merit in the position stated by

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Wigmore above. At the trial of Sergeant Boult the appellant was not the accused; he was only a witness. The defence posed the question and the Crown took no objection to it; the appellant's sole objection both at trial and on this appeal was based on relevancy. I can see great difficulty if the trial judge is bound to account to a witness for the relevance of a question posed without objection from opposing counsel. Out of courtesy I think a trial judge will often explain to a witness why a certain question is relevant but I would be very loathe to convert that courtesy into an obligation. A witness is not legally interested in the outcome of the trial and so long as he cannot be adversely affected by the answer it is difficult to see his concern with relevancy at all. If he is embarrassed by the question, it is of course proper for him to ask if he must answer it but once the judge has ruled that should be the end of the matter. If witnesses are to be permitted to continue to refuse to answer because of their own views as to relevancy, justice in my view can only suffer.

Moreover, in my opinion the question is relevant or at least is potentially relevant. Normally of course a person's political views are irrelevant to most issues but here the appellant had no personal business at the scene. If it could be established on behalf of the accused that he (the appellant) subscribed to a doctrine that foments labour strife it might well reflect on his character or in any event upon his conduct at the scene that might make some reaction by the accused justifiable which might not otherwise have been so. The point as I see it is we do not know. Counsel for the accused was prevented from probing the issue by the appellant's obdurate refusal to answer a necessary preliminary question.

Wigmore acknowledges and I think there is little question that a witness may refuse to answer a question when he legitimately claims a privilege personal to himself. There may even be occasions in which a question is so irrelevant to any possible issue that a witness may decline to answer with impunity. But in my opinion this is not one of them. The burden upon a witness to justify his refusal to answer a question particularly when that question is asked in cross-examination on behalf of the accused in a criminal prosecution must be a

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heavy one.

For these reasons I would dismiss the appeal.

Appeal allowed; acquittal entered.

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