1973 CarswellQue 12, 25 C.R.N.S. 217, 17 C.C.C. (2d) 375, 47 D.L.R. (3d) 378

Vallieres v. R.

Vallières v. The Queen

Gagnon v. The Queen

Quebec Court of Appeal

Rinfret, Gagnon and Deschênes JJ.A.

Judgment: 18 mai 1973

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Counsel: *M. Leclaire*, for appellant Vallières.

P. Falardeau, Q.C., for the Crown.

R. Lemieux, for appellant Gagnon.

J.G. Boilard, for the Crown.

Subject: Criminal; Civil Practice and Procedure

Criminal Law --- General principles involving criminal law — Criminal statutes — Interpretation — General.

Judges and Courts --- Contempt of Court — Procedure — Summary process — General.

Contempt of court — Accused moving before Court of Queen's Bench for bail and for dismissal of serious criminal charges — Instructed to submit written argument — Letters sent to Judge refusing to comply — Whether contempt in face of court — Whether Crown justified in resorting to summary process — One of accused repeating contemptuous remarks in court — Whether right of appeal in case of contempt in face of court — The Criminal Code, R.C.S. 1970, c. C-34, s. 9, now amended by 1972, c. 13, s. 4.

The accused were charged with conspiring to overthrow the government, entertaining seditious intentions and declaring membership in the Quebec Liberation Front. The accused moved for a dismissal and applied for bail to a Justice of the Court of Queen's Bench. The Judge instructed that the accused be advised that they might prepare written submissions. Both accused wrote letters to the Judge, prior to his giving judgment, refusing to submit written arguments. The Attorney General laid contempt of court charges based on these letters. At trial the accused, Gagnon, acknowledged sending the letter, refused to make a retraction and added "the ensuing sequence of events will demonstrate that I should add to it, rather than retracting any part of it". The trial Judge held that these remarks constituted a further contempt of court. The following issues required determination upon the appeals by the two accused against their convictions and sentences: (1)

Did the writing of the letters constitute a contempt in the face of the court? (2) If they amounted only to contempt outside the court, was the Crown justified in resorting to summary process? (3) If Gagnon's remarks in court constituted contempt in the face of the court, had he a right of appeal?

Held, the answer to each of the questions was "no".

Per Rinfret J.A.:

The letters constituted a contempt outside the court; Gagnon's repetition of these insults was a contempt in the face of the court. In view of the wording of Code s. 9(1) in force at the time, no appeal lay in the case of a contempt in the face of the court. The amendment of s. 9(1) was not retroactive. Urgency existed and resort to summary process was justified. The appeals against convictions should be dismissed.

Per Gagnon J.A.:

Dealing with the letters, they did not constitute contempt in the face of the court. The Judge was not faced with the immediate need to take steps to maintain order during a hearing. Urgency being absent, there was no justification for resort to the summary process. Accordingly, the convictions with regard to the letters must be quashed. The amendments to s. 9 not being retroactive, the accused had no right of appeal with regard to the contempt in the face of the court. The accused, Gagnon, had served a considerable time in prison and under the very special set of circumstances, neither the necessity for deterrence nor the protection of society required that he be further imprisoned.

Per Deschenes J.A.:

Challies A.C.J. erred in holding that (Translation): "a letter sent to a judge embodying written argument on an application for bail which is under consideration constitutes ... what is termed 'contempt in the face of the court', and in this situation summary proceedings have always been used." Contempt in the face of the court was to be given the narrow interpretation of a contempt committed in the presence of, and within the knowledge of, a judge presiding over court. Reference should be made to *Cooke v. United States* (1925), 267 U.S. 517 at 536, 45 Sup. Ct. Rep. 390, in which the Supreme Court held that an insulting letter delivered to the judge's chambers during an adjournment did not constitute "a contempt in open court".

Appeals against convictions and sentences for contempt of court.

***Rinfret J.A.*:**

1 Malgré que ces appels aient été plaidés séparément et par des procureurs différents, je crois devoir les joindre car ils soulèvent des questions identiques.

2 Lors de l'audition le 19 janvier 1973 le procureur de l'appelant Vallières nous avait demandé la permission de produire une liste d'autorités et des notes supplémentaires. Ces documents n'ont été reçus que le 2 avril 1973.

3 Après lecture des dossiers et considération des notes de délibéré de mes deux collègues, Deschénes et Gagnon JJ.A., je suis d'accord avec eux à l'effet que l'envoi de lettres constituait un outrage commis hors la présence du tribunal et que la répétition de la même attaque verbalement par l'appelant Gagnon constituait un outrage commis à la face du tribunal.

4 Pour les motifs exprimés par mes collègues dans la présente instance, par Brossard J.A. dans ses notes sur l'appel

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Vallières v. La Reine (non publié), dans lesquelles ses collegues du banc ont concouru, par la décision unanime de notre Cour dans *Boisjoli v. La Reine*, [1970] C.A. 763, 11 C.R.N.S. 265, et les remarques que j'ai moi-même faites dans la cause de *Regina v. Côté*, [1972] C.A. 64, 11 C.C.C. (2d) 551, je suis d'opinion que n'est pas appelable, en vertu des dispositions de l'art. 9(1) [du Code criminel, S.R.C. 1970, c. C-34] en vigueur lors de sa commission, l'outrage à la face du tribunal de la part de M. Gagnon. Par ailleurs, l'amendement apporté à l'art. 9(1) [1972, c. 13, art. 4] n'a pas d'effet rétroactif. Son appel de la conviction sous cet aspect doit donc être rejeté.

5 L'outrage commis hors la présence du tribunal est cependant susceptible d'appel.

6 L'on objecte que la procédure adoptée par la Couronne était entachée d'un vice radical en ce qu'elle a procédé par voie de requête sommaire au lieu de par voie d'acte d'accusation.

7 Il est, en fait, deux genres de procédures sommaires: celle qui permet au juge de sévir immédiatement en matière d'outrage commis devant lui, à la face du tribunal; le second genre est celui que l'on a adopté en la présente instance et qui consiste en une requête présentable devant un juge devant qui l'intimé doit comparaître et démontrer les raisons pour lesquelles il ne serait pas trouvé coupable d'outrage au tribunal.

8 Cette seconde méthode s'applique aux outrages commis hors la présence du tribunal, lorsqu'il y a urgence de disposer de cette question au cours d'un procès déjà engagé, pour ne pas le retarder indûment.

9 Il est à noter que les présents outrages ont été commis à l'occasion de l'audition d'une requête en cautionnement au cours d'un procès mû devant la Cour du Banc de la Reine, juridiction criminelle, où les deux appelants étaient accusés conjointement avec trois autres de divers crimes sous les art. 60, 62 *a*) et *c*), 230 et 231 (1) du Code criminel et sous l'art. 4 *a*) du règlement de 1970 concernant l'ordre public.

10 Le fait que le Juge en chef suppléant ait remis sa sentence à 4 $^{1}/_{2}$ mois, ne démontre pas, à mon avis et en toute déférence pour l'opinion contraire, qu'il n'y avait pas urgence en la matière.

11 La culpabilité prononcée sur l'outrage au tribunal permettait à la Cour du Banc de la Reine, juridiction criminelle, de pro céder avec le procès indépendamment du prononcé de la sentence.

12 J'estime qu'il existe une distinction fondamentale entre la présente instance et celle de *Hébert v. Procureur général de Québec*, [1966] B.R. 197, 50 C.R. 88, [1967] 2 C.C.C. 111.

13 Dans ce dernier cas, l'outrage au tribunal avait été commis plusieurs années après que le procès discuté par M. Hébert était terminé.

14 En pareilles circonstances, je n'aurais aucune hésitation à admettre que l'on doive procéder par voie d'acte d'accusation comme la Cour l'a décidé.

15 Mais ici la situation est tout à fait différente.

16 Dans l'affaire *Re Miller* (1921), 54 N.S.R. 529, l'outrage au tribunal, qui consistait également en une lettre adressée à l'un des Juges par le procurer d'une des parties, deux jours seulement après la date d'une décision, la Cour d'appel de la Nouvelle Ecosse a procédé par voie de requête sommaire et tenu (p. 531):

> Such action on the part of a suitor has always been regarded as a grievous contempt; but coming from a member of

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> the bar it is doubly offensive, and such conduct must and ought to receive the condemnation of the Court and of every member of the bar.

17 Le 11 février 1970 la Cour d'appel d'Angleterre rendait une décision dans *Morris v. Crown Office*, [1970] 2 Q.B. 114, [1970] 2 W.L.R. 792, [1970] 1 All E.R. 1079. d'où j'extrais les remarques suivantes de Lord Denning (p. 794):

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without trial — but it is a necessary power.

18 Comme le Juge en chef adjoint, j'estime que:

> C'est un outrage au tribunal caractérisé d'accuser le juge indirectement d'être fasciste. De plus, il est clairement sousentendu que le juge est sous la férule du Ministre de la Justice qui l'a nommé. L'intimé n'a donné aucune explication ou justification à ses paroles outrageantes.

19 Le procès-verbal dans l'affaire de l'appelant Vallières note que "l'intimé témoigne dans sa propre défense bien que le tribunal l'avait avisé qu'il n'était pas obligé". "L'intimé présente un long réquisitoire ..."

20 Celui dans l'affaire de l'appelant Gagnon, fait voir que "l'intimé sur l'invitation du tribunal, ne veut pas témoigner mais seulement plaider. La Cour lui accorde ce droit et l'intimé présente un long réquisitoire".

21 Ni l'un ni l'autre ne peuvent donc se plaindre d'avoir été empêchés de témoigner et de n'avoir pas pu présenter de plaidoirie.

22 Je rejetterais donc les deux appels sur la conviction.

23 Sur les appels de sentences, je reconnais que les sentences imposées étaient adéquates mais je m'en rapporte aux remarques de mon collègue Gagnon J.A. et je les attribue également à l'appelant Vallières.

24 Avec lui, je répète, vu les considérations antérieures [post p. 226]:

> En toute équité, je crois que l'on peut considérer que Gagnon (et Vallières ont) reçu indirectement la punition de (leurs actes) et je ne puis me convaincre que les fins de la justice seraient mieux servies en y ajoutant. C'est devant cette situation bien particulière que je serais disposé à libérer l'appelant Gagnon (et l'appelant Vallières).

[Translation]::

25 Although both of these appeals were argued separately by different counsel, I feel that they ought to be joined, since they involve identical issues.

26 During the course of argument on 19th January 1973 counsel for the appellant Vallières asked for leave to produce a list of authorities, together with supplementary notes, although this material was not received until 2nd April 1973.

27 After examining the record and considering the opinions written by my colleagues, Deschênes and Gagnon JJ.A.,

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I agree with them that the letters constituted a contempt committed outside the court, but that appellant Gagnon's verbal repetition of the same insults amounted to a contempt committed in the face of the court.

28 For the reasons given by my colleagues in the instant case, by Brossard J.A. in *Vallières v. The Queen* (not yet reported), in which his colleagues concurred, as well as for the reasons set out in the unanimous decision of our Court in *Boisjoli v. The Queen*, [1970] Que. C.A. 763, 11 C.R.N.S. 265, and in the remarks which I made in *Regina v. Côté*, [1972] Que. C.A. 64, 11 C.C.C. (2d) 551, I am of the view that, by virtue of the provisions of s. 9(1) of the Criminal Code, R.S.C. 1970, c. C-34, in force at the time, the contempt committed in the face of the court by Gagnon is not subject to appeal. Furthermore, the amendment to s. 9(1) [1972, c. 13, s. 4] is not retroactive, so that his appeal from conviction for contempt committed in the face of the court must therefore be dismissed.

29 The conviction for contempt committed outside the court, however, is subject to a right of appeal.

30 It was alleged that the procedure adopted by the Crown was a nullity, involving as it did a fatal defect, i.e., the decision to proceed by way of summary process rather than by way of indictment.

31 There are, in fact, two kinds of summary process, one which permits the judge to proceed immediately in respect of a contempt committed in the face of the court; and the other, which was adopted in the instant case, and which consists of a citation returnable before a judge, before whom the respondent must appear to show cause why he should not be found guilty of contempt.

32 The second method applies to contempts committed outside the court, where it has become urgent to dispose of the question during the course of a trial already under way, in order to ensure that it will not be unduly impeded.

33 It should be noted that the contempts in the instant case were committed while an application for bail was being heard during the course of a trial before the Court of Queen's Bench, Crown Side, involving both appellants who had been jointly charged with three other offences under ss. 60, 62(*a*) and (*c*), 230 and 231(1) of the Code, as well as under s. 4(*a*) of the Public Order Regulations, 1970.

34 With respect for those who hold to the contrary, in my view the fact that the Chief Justice delayed imposing sentence for 4 $^{1}/_{2}$ months does not indicate that the matter was free of urgency.

35 The conviction for contempt permitted the Court of Queen's Bench, Crown Side, to proceed with the trial, independently of the sentence.

36 I would therefore say that there is a fundamental distinction to be drawn between the instant case, and the decision in *Hébert v. Attorney General of Quebec*, [1966] Que. Q.B. 197, 50 C.R. 88, [1967] 2 C.C.C. 111.

37 In the *Hébert* case, the contempt was committed several years after the trial forming the subject matter of Hébert's discussions had terminated.

38 Under such circumstances, I would have no hesitation in admitting that the Crown was obliged to proceed in that case by way of indictment, and the Court so held.

39 But in the instant case, the situation is quite different.

40 In *Re Miller* (1921), 54 N.S.R. 529, the contempt also consisted of a letter addressed to one of the Judges by counsel for one of the parties only two days after judgment had been rendered, and in that case the Nova Scotia Court of

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Appeal proceeded by way of summary process, making the following findings at p. 531:

> Such action on the part of a suitor has always been regarded as a grievous contempt; but coming from a member of the bar it is doubly offensive, and such conduct must and ought to receive the condemnation of the Court and of every member of the bar.

41 On 11th February 1970 judgment was rendered by the English Court of Appeal in *Morris v. Crown Office*, [1970] 2 Q.B. 114, [1970] 2 W.L.R. 792, [1970] 1 All E.R. 1079, a case in which Lord Denning made the following remarks at p. 794:

> The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without trial — but it is a necessary power.

42 Like the Chief Justice in the instant case, I am of the view that:

> Indirectly accusing a judge of being a fascist is certainly a contempt. Furthermore, it is well known that the judge is under the aegis of the Minister of Justice who has appointed him. Respondent gave no explanation and offered no justification for his outrageous comments.

43 The transcript in the *Vallières* case notes that "respondent testified on his own behalf, although advised by the court that he was not obliged to do so". "Respondent presented a lengthy plea ..."

44 The transcript in the *Gagnon* case notes that "respondent, upon being invited to do so by the Court did not wish to testify, but only to plead. He was granted this right by the Court, whereupon he presented a long plea".

45 Neither Vallières nor Gagnon, therefore, could be heard to complain that they were precluded from testifying, or that they were unable to present argument.

46 I would therefore dismiss both appeals from convictions.

47 As for the appeals from sentences, I feel that the sentences imposed were adequate, that I would make reference to the remarks of my colleague Gagnon J.A. and I would apply these to Vallières as well.

48 In view of what I have said, therefore, I would repeat the following comments made by Gagnon J.A. [post p. 228]:

> In all fairness, I feel that it may be said that Gagnon (and Vallières have) been indirectly punished for (their) actions, and I am not convinced that justice would be best served by adding to such punishment. In view of this very special situation I would release the appellant Gagnon (and Vallières).

***Gagnon J.A.*:**

49 Il est trop facile d'oublier, lorsqu'il est question d'outrage au tribunal, que ce n'est pas la personne du juge qu'il s'agit de protéger, mais bien la fonction souvent délicate qu'il a le devoir de remplir.

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50 Il ressort clairement du contexte des deux lettres adressées par les appelants au Juge saisi de leur requête pour cautionnement que non seulement elles visaient la personnalité du magistrat, mais qu'elles s'attaquaient en même temps à l'intégrité et à l'indépendance du corps judiciaire.

51 Je crois que tout le monde admettra que les tribunaux doivent être les premiers à protéger le droit de commentaire et de critique, même lorsqu'il est exercé à l'égard de leurs décisions et de leur façon de procéder, mais ils ont en même temps, non pas le loisir, mais le devoir de sévir contre les agissements qui ne cherchent qu'à perturber l'administration libre et sereine de la justice.

52 Sur cette épineuse question la majorité de la Cour a exposé mieux que je saurais le faire dans *Hébert v. Procureur général de Québec*, [1966] B.R. 197, 50 C.R. 88, [1967] 2 C.C.C. 111, des vues auxquelles je souscris entièrement. Il s'agissait, bien sûr, dans l'affaire Hébert, d'un livre publié trois ans après le procès et, à ce point de vue, la différence entre cette publication et des lettres adressées au Juge en cours d'instance saute aux yeux. Mais il n'en reste pas moins, à mon avis, qu'il n'y avait urgence de procéder ni dans un cas, ni dans l'autre. Le Juge a disposé de la rêquete qu'il avait devant lui, avant qu'il ne soit jugé nécessaire de prendre action contre les appelants, et sans qu'une action immédiate ne s'impose pour maintenir l'ordre d'une audience.

53 Dans *McKeown v. La Reine*, [1971] R.C.S. 446, 2 C.C.C. (2d) 1, 16 D.L.R. (3d) 390, Spence et Laskin JJ., bien que dissidents sur le caractère de l'outrage commis dans l'espèce qui était soumise à la Cour suprême, ont à leur tour insisté sur la prudence et le soin tout particuliers avec lesquels les accusations d'outrage au tribunal, qui n'ont pas été commis à la face de la cour, doivent être traitées.

54 A mon avis, les insultes lancées au Juge par ces lettres, au moment même où il devait délibérer et rendre jugement sur l'affaire que les appelants avaient portée devant lui, constituaient des tentatives de pression inexcusables et des attaques qui ne visaient qu'à attirer sur les tribunaux le mépris de la population. On aura beau dire pour se disculper que c'est le Juge qui s'est chargé d'en faire la publicité, il reste qu'on peut se demander comment le Juge aurait pu se permettre de classer cette pièce du dossier dans ses tiroirs.

55 D'autre part, d'accord avec Deschênes J.A. et pour les motifs qu'il exprime, je suis d'opinion que les lettres ne constituaient pas des outrages commis à la face du tribunal et qu'en outre, les circonstances n'exigeaient pas, et par conséquent ne justifiaient pas, le recours à la procédure sommaire qui a été adoptée. J'exprime cet avis avec la plus grande déférence pour le Juge en Chef adjoint, dont les services à la cause de la justice sont connus.

56 Je concluerais donc que les jugements de culpabilité à l'égard des lettres devraient être cassés. Pour ce qui est des propos que l'appelant Gagnon a jugé bon de tenir devant la Cour, je partage l'opinion de Brossard J.A. exprimée dans *Vallières v. La Reine* (non publié), que les amendements apportés en 1972 [1972, c. 13, art. 4] à l'art. 9 du Code criminel, S.R.C. 1970, c. C-34, n'ont pas d'effet rétroactif et n'ont pas conféré à Gagnon un droit d'appel.

57 Objectivement sa conduite appelle une punition et je ferais offense à son intelligence, comme à celle de son procureur, qui, pour peu, aurait voulu nous convaincre que son client avait raison d'agir ainsi, en ne faisant pas la distinction élémentaire entre le droit de s'exprimer et les attaques les plus viles à l'égard de ceux qui sont chargés de rendre justice.

58 Au niveau de la sentence, il faut pourtant tenir compte des circonstances dans lesquelles s'est trouvé et se trouve aujourd' hui Gagnon et rechercher où se trouve le meilleur intérêt de la société.

59 Ainsi, je crois qu'il faut tenir compte que la lettre qui est à l'origine de l'affaire a été adressée au cabinet du Juge et qu'elle n'avait pas ainsi le caractère plus grave d'une déclaration publique, même si elle n'excuse pas la déclaration de

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Gag non en cour, et qu'une seule sentence a été imposée pour les deux outrages.

60 Il faut aussi tenir compte des antécédents judiciaires de Gagnon. Le jour où la sentence a été imposée, la Couronne a déclaré qu'elle n'avait relevé contre lui qu'une condamnation à deux années d'emprisonnement pour conspiration afin de commettre un vol qualifié, condamnation qui a été confirmée par notre Cour. Gagnon était alors sous le coup d'accusations pour conspiration séditieuse et pour appartenance à une association illégale, dont il a été libéré. Il reste qu'il a passé 47 mois en prison. Il a donc purgé bien plus que sa peine de deux années et c'est là, à mon avis, une raison et une circonstance bien particulière, qui fait que ni la protection de la société ni le besoin de dissuasion n'exige une nouvelle période d'emprisonnement.

61 En toute équité, je crois que l'on peut considérer que Gagnon a reçu indirectement la punition de son acte et je ne puis me convaincre que les fins de la justice seraient mieux servies en y ajoutant. C'est devant cette situation bien particulière que je serais disposé à libérer l'appelant Gagnon.

[Translation]:

62 It is all too easy to forget, when dealing with contempt matters, that it is not the judge's person which must be protected, but the office which he must fill, and such office frequently involves very delicate tasks.

63 The context of the two letters addressed by the appellants to the Judge who was dealing with their application for bail indicates very clearly that they were not only attacking him personally, but that they were at the same time attacking the integrity and independence of the judiciary as a body.

64 I feel that everyone will admit that courts must be the first to protect the right to make comment and to criticize, even where such comment or criticism has to do with their decisions and method of operation; at the same time, however, they are not only entitled to, but are obliged to take measures to curb activities intended to impede the free and uninterrupted administration of justice.

65 On this very difficult question, the majority of the Court in *Hébert v. Attorney General for Quebec*, [1966] Que. Q.B. 197, 50 C.R. 88, [1967] 2 C.C.C. 111, expressed much better than I could have done, certain views with which I agree entirely. Admittedly, the *Hébert* case concerned a book published three years after the trial in question, and when this is borne in mind, the distinction between that book and the letters addressed to the Judge in the instant case becomes obvious. In my view, however, there was no urgency in the proceedings in either case. The Judge disposed of the citation before him prior to finding it necessary to take action against the appellants, and he was not faced with the immediate need to take steps to maintain order during a hearing.

66 In *McKeown v. The Queen*, [1971] S.C.R. 446, 2 C.C.C. (2d) 1, 16 D.L.R. (3d) 390, Spence and Laskin JJ., although dissenting concerning the character of the contempt which was before the Supreme Court at that time, emphasized the very great care with which contempts not committed in the face of the court must be handled.

67 In my view, in the instant case, the insults hurled at the Judge in these letters at the very time at which he was obliged to deliberate and render judgment with respect to a matter which the appellants had brought before him, constituted inexcusable attempts to bring pressure to bear, and to launch attacks designed to heap scorn on the courts in the eyes of the public. It was all very well for the appellants to suggest, by way of excuse, that the Judge undertook to publicize these letters rather than the appellants themselves, but one is still left to wonder how the Judge could have allowed himself to put these letters in the record.

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68 On the other hand, I agree with my colleague, Deschênes J.A., for the reasons given by him, that these letters did not constitute contempts committed in the face of the court, so that the circumstances neither required nor justified resort to the summary process which was adopted. I say this with the greatest respect for the Chief Justice, whose efforts to serve the cause of justice are well known.

69 I would therefore hold that the convictions based on the letters must be quashed. Insofar as the verbal comments which Gagnon saw fit to make to the Court, I concur with the opinion expressed by Brossard J.A. in *Vallières v. The Queen* (not yet reported), and agree that the 1972 amendments [1972, c. 13, s. 4] to s. 9 of the Criminal Code, R.S.C. 1970, c. C-34, are not retroactive, and do not confer upon Gagnon a right of appeal.

70 Viewed objectively, however, Gagnon's conduct requires punishment, and I would be insulting his intelligence as well as that of his counsel, who, incidentally, sought to convince us that his client was correct in acting as he did, were I not to make the elementary distinction between the right of self expression and the vilest forms of attack against those charged with administering justice.

71 As for the sentence, account must now be taken of the circumstances in which Gagnon found himself both at the time of the offence and today, and an attempt must be made to determine how best to serve society's interests.

72 Accordingly, in my view, it must be borne in mind that the letter involved in this case was addressed to the Judge's office, so that the matter was not as serious as if a public statement had been involved, although it does not excuse Gagnon's statements in open court. It must also be remembered that one sentence was imposed with respect to both contempts.

73 Gagnon's criminal record must also be taken into account. On the day on which sentence was imposed, counsel for the Crown stated that he had only been sentenced to two years' imprisonment for conspiracy to commit robbery, a sentence which was affirmed by our Court. At the time, however, Gagnon had also been charged with seditious conspiracy and with belonging to an unlawful association, but he had been acquitted of both of these charges. He has also spent 47 months in prison, and has therefore served more than the two-year sentence imposed upon him. Accordingly, in my view, under this very special set of circumstances, neither the need to protect society nor the need for a deterrent require that he again be imprisoned.

74 In all fairness, I feel that it may be said that Gagnon has been indirectly punished for his actions, and I am not convinced that justice would be best served by adding to such punishment. In view of this very special situation I would release the appellant Gagnon.

Deschenes J.A.:

75 Il s'agit de deux affaires d'outrage au tribunal, qui trouvent leur origine dans les mêmes faits.

76 Dans chaque cas l'appelant a logé deux appels: le premier contre la déclaration de culpabilité prononcée le 18 décembre 1970, le second contre la sentence imposée le 3 mai 1971.

77 Vu certains commentaires publics qu'on a pu lire à la suite de l'arrêt prononcé par notre Cour le 28 février 1973 dans une autre cause concernant l'appelant Vallières, il ne paraît pas inopportun de souligner que le délai d'environ deux ans que s'est écoulé depuis l'inscription de ces appels n'est pas un "délai que le Tribunal s'est imposé avant de rendre jugement". L'appelant Gagnon a produit son dossier le 10 septembre 1971, l'appelant Vallières a produit le sien le 31 octobre 1972 et, pour des raisons qui ne relèvent que des parties elles-mêmes, celles-ci ne se sont déclarées prêtes à

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procéder que récemment. La Cour les a entendues aussitôt, soit le 19 janvier 1973.

78 Il y a maintenant lieu d'examiner les questions suivantes:

1. Les gestes reprochés aux appelants ont-ils été "commis en face du tribunal"?

2. Dans l'affirmative, les jugements de déclaration de culpabilité sont-ils appelables?

3. Dans la négative, les jugements de déclaration de culpabilité sont-ils bien fondés?

1. Les gestes reprochés aux appelants ont-ils été "commis en face du tribunal"?

79 Un bref rappel des faits s'impose.

80 En novembre 1970 les deux appelants ont été accusés, en même temps que trois autres personnes, d'avoir conspiré pour renverser le gouvernement du Canada, d'avoir tenu des propos séditieux et de s'être déclarés membres du Front de Libération du Québec.

81 Le 17 novembre 1970 les cinq accusés soumettaient une requête en cassation et en cautionnement. Cette requête fut ajournée du 20 novembre au 26 novembre alors qu'elle fut entendue par Mackay J. siégeant en Cour du Banc de la Reine, division criminelle. L'un des accusés amené devant la Cour plaida oralement et le Juge donna instructions au greffier de prévenir les quatre autres accusés, dont les deux appelants actuels, qu'ils pourraient lui soumettre leur argumentation par écrit avant le ler décembre.

82 Les deux appelants écrivirent à Mackay J.: Gagnon le 29 novembre, Vallières par une lettre non datée mais qui débutait comme suit: "Je refuse carrément de vous faire parvenir par correspondance des arguments écrits relativement à ma requête en cautionnement. Je ne plaide pas par correspondance ..." Le Juge reçut ces deux lettres avant d'avoir rendu jugement.

83 C'est sur la base de ces deux lettres que le Procureur général présenta une requête pour outrage au tribunal contre chacun des appelants.

84 L'affaire procéda devant Challies J.C.A. le 18 décembre 1970.

85 Sur la question qui nous retient pour le moment, le Juge en Chef adjoint décida:

> D'abord il (chacun des appelants) a allégué qu'on n'aurait pas dû procéder contre lui par procédure sommaire d'outrage au tribunal mais qu'on aurait dû procéder par plainte ordinaire ou par mise en accusation. Cet argument est mal fondé parce que la lettre envoyée à un juge comme argumentation écrite sur une requête pour cautionnement prise en délibéré équivalait, s'il y avait outrage au tribunal, à ce qu'on appelle 'contempt in the face of the Court' pour lequel la procédure sommaire a toujours été employée.

86 Il n'existe pas de définition de l'outrage "commis en face du tribunal", comme l'art. 9(1) du Code criminel, S.R.C. 1970, c. C-34, s'en exprimait à l'époque, ou "commis en présence du tribunal" comme il le prévoit maintenant. On ne peut que procéder par voie d'exemples et de comparaison avec avec l'espèce sous étude.

87 Il faut d'abord retenir que l'expression employée par le statut doit recevoir une interprétation restrictive: elle ne couvre définitivement que les événements qui se sont passés cour tenante, au vu et au su du président du tribunal.

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88 Dans *Re O'Brien; Regina v. Howland* (1889), 16 R.C.S. 197 à la p. 208, Strong J. disait:

> Contempts of a court of justice being a court of record, other than those committed in its presence (*sedente curiâ*), have received the name of constructive contempts and may be classed under two entirely distinct and very different heads.

89 Dans *Parashuram Detaram Shamdasani v. King-Emperor*, [1945] A.C. 264 à la p. 268, Lord Goddard, rendant le jugement du Conseil Privé, écrivait:

> The principle to be applied is clear enough. For words or action used in face of the court, *or in the course of proceedings, for they may be used outside the court*, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attempted. (Souligné par moi-même.)

90 L'arrêt *McKeown v. The Queen*, [1971] R.C.S. 446, 2 C.C.C. (2d) 1, 16 D.L.R. (3d) 390, ne nous avance guère. La Cour d'appel d'Ontario n'a pas déposé de motifs écrits. Les raisons de la majorité du Banc de la Cour suprême du Canada pour décider que les faits démontraient un outrage commis à la face du tribunal sont extrêmement succinctes et deux fortes dissidences suscitent une réflexion salutaire.

91 Rares sont les exemples rapportés d'outrage par voie de lettre au tribunal, comme ici.

92 Le Procureur de la Couronne nous a cite *Re Miller* (1921), 54 N.S.R. 529, mais rien n'y fait voir qu'on ait considéré qu'il s'agissait d'un outrage commis à la face du tribunal ou, à tout le moins, que l'intimé ait protesté contre la procédure sommaire à laquelle on l'avait astreint.

93 Le problème s'est soulevé devant la Cour suprême des Etats-Unis dans *Cooke v. United States* (1925), 267 U.S. 517 à la p. 536, 45 Sup. Ct. Rep. 390. Il s'agissait d'une lettre injurieuse qui avait été livrée à la Chambre du juge, durant un ajournement. Taft C.J., parlant pour la Cour, s'était d'abord référé à certains précédents desquels il a ensuite extrait la conclusion suivante:

> This difference between the scope of the words of the statute 'in the presence of the court,' on the one hand, and the meaning of the narrower phrase 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court,' or 'in facie curiae,' on the other, is thus clearly indicated and is further elaborated in the opinion.

94 La Cour suprême des Etats-Unis a finalement conclu que la lettre incriminée ne constituait pas "a contempt in open court" et elle a cassé le jugement de culpabilité qui avait pris la proposition contraire pour acquise.

95 En l'espèce les appelants ont admis qu'ils avaient bien écrit les deux lettres dont il s'agit et Mackay J. a soutenu l'allégation qu'il les avait reçues durant sa période de délibéré. Est-ce suffisant pour conclure que, si ces lettres constituent un outrage, celui ci, a été commis à la face du tribunal?

96 Le raisonnement de Challies J.C.A. ne manque pas de vigueur. Mais quand on est en présence d'un cas où la liberté du citoyen est en jeu, le doute doit être résolu en faveur de celui-ci. Or je ne suis pas entièrement convaincu que les lettres incriminées répondent à la définition de l'outrage "commis en face du tribunal" qu'on peut lire dans les arrêts cités plus haut ou déduire de leurs considérants. Au contraire, il a même fallu que la Couronne recoure à des témoignages extérieurs pour étayer sa requête et elle n'a pu ensuite s'en dispenser en partie qu'après avoir obtenu certains aveux des appelants.

97 Aussi suis-je disposé à reconnaître aux appelants un droit d'appel des déclarations de culpabilité quant aux deux

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lettres dont il s'agit. C'est le sens de l'observation de Laskin J. dans l'affaire *McKeown*, supra, à la p. 472:

> In the same way, there may be direct contempts which are not in the face of the Court, as, for example, where a derogatory letter is delivered to a judge in chambers ...

98 Il va sans dire, cependant, que la conclusion contraire s'impose dans le cas de l'appelant Gagnon vis-à-vis le jugement qui l'a reconnu coupable en même temps d'un second outrage pour les paroles qu'il avait prononcées cour tenante.

99 Au cours de son plaidoyer l'appelant Gagnon déclare en effet:

> Je répète que la lettre qu'on a exhibée tout à l'heure au juge Mackay, elle lui a été adressée par moi et que je l'ai signée et je ne vois aucune raison aujourd'hui d'en retrancher quoi que ce soit. Et la suite des événements me montrera si je devrais plutôt en y ajouter qu'y retrancher.

100 Le premier Juge décide alors:

> A l'audition, l'intimé ne s'est pas excusé mais il a plutôt laissé inférer qu'il croyait encore avoir raison, ce qui constitue un autre outrage au tribunal.

101 Si les paroles de l'appelant Gagnon constituaient un outrage, il s'agissait certes alors d'un outrage "commis en face du tribunal".

102 La réponse à la première question que soulèvent ces appels doit donc être nuancée:

> i) si les lettres expédiées par les appelants constituent un outrage, celui-ci n'a pas été "commis en face du tribunal";
>
> ii) si le plaidoyer de l'appelant Gagnon constitue un outrage, celui-ci a été "commis en face du tribunal".

103 Dès lors, les jugements prononcés sur la base des lettres incriminées étaient appelables, en vertu de l'art. 9 du Code tel qu'il existait alors. Qu'en est-il toutefois du jugement consécutif au plaidoyer oral de l'appelant Gagnon?

2. Le jugement de déclaration de culpabilité de l'appelant Gagnon, consécutif à son plaidoyer oral, est-il appelable?

104 Ce jugement n'était pas appelable sous l'empire de l'art. 9 du Code tel qu'il existait à l'époque. L'est-il devenu rétroactivement par l'effet de la modification apportée à cet article en 1972, par c. 13, art. 4? Ou l'était-il déjà par le jeu de l'art. 2 *f*) de la Déclaration canadienne des droits, S.R.C. 1970, App. III?

105 A l'audience la Cour a fait savoir aux appelants qu'elle n'était pas disposée à recevoir favorablement l'argument basé sur la Déclaration canadienne des droits. Au soutien de cette prise de position, je fais maintenant miennes les considérations de Brossard J.A. dans l'opinion qu'il dépose dans *Vallières v. La Reine* (non publié), que notre Cour décide également aujourd'hui. Je n'ajouterai que la référence à l'arrêt de la Cour suprême du Canada, dans le même sens, dans *Regina v. Appleby*, [1972] R.C.S. 303, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325.

106 Quant à l'argument basé sur la rétroactivité de la modification de 1972: à l'art. 9 du Code, Brossard J.A. en dispose aussi à mon entière satisfaction dans l'arrêt ci-dessus cité. Je me contenterai de noter un élément additionnel qui milite en faveur de la même solution.

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107 La Loi 1972 (Can.), c. 13, comprend 70 articles qui apportent de très nombreuses modifications au Code criminel, dont celle qui nous intéresse à l'art. 9. Le Parlement était sans doute conscient du problème de rétroactivité qui pouvait se poser au sujet de l'un ou de l'autre de ces amendements.

108 Or il a expressément réglé la question quand il a voulu donner un effet rétroactif au par. 2 qu'il a ajouté à l'art. 508, en matière de nolle prosequi.

109 A son premier paragraphe, l'art. 43 modifie l'art. 508 puis, par un deuxième paragraphe, l'art. 43 décrète:

> (2) Le paragraphe 508(2) de ladite loi, édictée (sic) par le paragraphe (1), s'applique aux procédures arrêtées conformément au paragraphe (1) de cet article, soit avant soit après l'entrée en vigueur de la présente loi.

110 Il s'agit là d'une disposition qui donne clairement un aspect rétroactif à l'amendement apporté par l'art. 43.

111 Or c'est le seul endroit dans c. 13 où le Parlement a expressément prononcé la rétroactivité.

112 Il ne me paraît pas illogique de déduire que, si le Parlement avait voulu donner aussi un effet rétroactif à l'amendement de l'art. 9, il l'aurait dit expressément de la même façon et qu'en l'absence d'une telle disposition, cet amendement ne doit pas recevoir un semblable effet rétroactif.

113 Pour tous ces motifs je conclus qu'il n'y a pas d'appel du jugement déclarant l'appelant Gagnon coupable d'outrage au tribunal pour les paroles qu'il a prononcées, cour tenante, le 18 décembre 1970.

3. Les jugements de déclaration de culpabilité basés sur les lettres des appelants sont-ils bien fondés?

114 Dans *Hébert v. Procureur Général de Québec*, [1966] B.R. 197, 50 C.R. 88, [1967] 2 C.C.C. 111, notre Cour a fait un tour d'horizon complet de la doctrine applicable en cette matière.

115 Tout d'abord Owen J. a tracé un portrait extrêmement vivant des différences entre la procédure ordinaire et la procédure sommaire, à la p. 227:

> There are two ways in which a person may be tried for contempt of court: *a*) by ordinary process, or *b*) by summary process.
>
> In criminal matters ordinary process is the rule and summary process the exception.
>
> A person tried for contempt of court by ordinary process enjoys the traditional rights and safeguards accorded to a person tried for any other offence. He is accused of a specific offence. If he pleads not guilty he has the right to a full and fair trial. He is presumed innocent until he is proven guilty. The Crown has the burden of proving his guilt beyond a reasonable doubt. In serious cases he is entitled to a trial by jury. He has the right to call witnesses in his defence. He cannot be compelled to testify.
>
> A person tried for contempt of court by summary process is deprived of these rights and safeguards. He is called upon to appear before the court and show cause why he should not be condemned and punished for contempt of court. In effect he is presumed to be guilty. The burden is on the accused to show why he should not be convicted and punished. He is not given a full and fair trial as the term is understood. He has no right to a trial by jury. He is not entitled to call witnesses. He may be obliged to testify.
>
> The use of this summary process to deal with and punish contempts of court which are committed not in the face of

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> the court is of relatively recent origin in England (18th century). The matter is dealt with exhaustively by Sir John Fox in two articles published in 1908, 24 L.Q.R. pp. 184 and 266.
>
> The courts, both in England and in Canada, have repeatedly expressed the warning that this summary process with respect to contempt of court should be used sparingly and only in cases of urgency.

116 De son côté, après avoir reconnu le pouvoir de la Cour du Banc de la Reine, juridiction criminelle, de punir sommairement l'outrage au tribunal, Tremblay C.J.Q. ajoutait à la p. 216:

> Ce pouvoir ne doit être exercé qu'avec une très grande prudence, avec angoisse, et seulement dans les cas où il est nécessaire d'agir avec urgence pour permettre aux tribunaux de continuer à remplir leur fonction.

117 Comme résultat, notre Cour cassa le jugement de culpabilité au motif principal que les circonstances ne justifiaient pas le recours à la procédure exceptionnelle d'assignation sommaire.

118 Or que s'était-il passé ici qui permît à la Couronne de recourir à cette même procédure? Voici la chronologie des événements:

```
1970
17 novembre:  requete    en cautionnement;
26 novembre:  audition devant Mackay J.;
29 novembre:  lettre de l'appelant Gagnon;
(?)  :        lettre de l'appelant Vallieres;
 3 decembre:  jugement de Mackay J.;
 4 decembre:  deux requetes pour outrage au tribunal;
 8 decembre:  signification des deux requetes aux appelants;
18 decembre:  audition des requetes et jugements de declara-
              tion de culpabilite;
1971
3 mai:        sentences.
```

119 Il saute aux yeux que rien ne permet de justifier le recours par la Couronne à la procédure sommaire qu'elle a adoptée et par laquelle elle concluait comme suit:

> **POUR QUOI PLAISE A CETTE HONORABLE COUR:**
>
> (a) ORDONNER à l'intimé de comparaître et de démontrer les raisons pour lesquelles il ne serait pas trouvé coupable d'outrage au tribunal, et
>
> (b) A défaut par l'intimé de ce faire, de le condamner pour outrage au tribunal et d'imposer les peines jugées appropriées.

120 Le geste de chaque appelant avait consisté dans l'expédition d'une lettre qui n'a pas empêché Mackay J. de rendre son jugement. Ce n'est que quatre jours plus tard, après la clôture de la procédure, que les requêtes pour outrage au tribunal seront signifiées. Enfin, fait remarquable, le Juge en Chef adjoint reportera ses sentences à quatre mois et demi, ce qui paraît bien démentir l'urgence dont la Couronne doit faire état pour justifier la procédure qu'elle avait choisie.

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121 Aussi bien est-ce sans la moindre hésitation que j'arrive à la conclusion que les requêtes de la Couronne étaient entachées d'un vice radical, les appelants en ont subi préjudice et ils ont droit en conséquence à un jugement cassant les deux jugements a quo et rejetant les requêtes pour outrage au tribunal, en autant que sont concernées les lettres expédiées par les appelants à Mackay J.

Les sentences

122 Le jugement du 3 mai 1971 imposant une sentence de deux mois d'emprisonnement à l'appelant Vallières, sur la base de sa lettre à Mackay J., doit donc être annulé.

123 Le cas de l'appelant Gagnon est plus complexe. Le 18 décembre 1970 la Cour l'avait trouvé coupable de deux outrages au tribunal: pour sa lettre et pour sa déclaration dans sa plaidoirie orale.

124 Le 3 mai 1971 la Cour lui a imposé une sentence de trois mois d'emprisonnement. Le premier Juge a alors remarqué que "les accusations, si on peut les appeler ainsi, contenues dans la lettre (de Gagnon) sont beaucoup plus insultantes que celles qui sont trouvées dans la lettre signée par Vallières ..." et il a immédiatement prononcé sa sentence, sans se référer en rien au deuxième outrage dont il avait auparavant trouvé l'appelant coupable.

125 Il est impossible de distinguer quelle partie de cette sentence se rapporte au premier outrage, dont l'appelant est acquitté, et quelle partie se rapporte au second outrage pour lequel il reste condamné. Mais puisque le premier Juge avait trouvé la lettre de l'appelant Gagnon plus outrageante que celle de l'appelant Vallières et qu'il venait de condamner celui-ci à deux mois d'emprisonnement, il paraît logique d'appliquer à la lettre de l'appelant Gagnon la plus grande partie, sinon même la totalité de la sentence de trois mois d'emprisonnement qui lui fut imposée.

126 Je suis donc d'opinion d'annuler également la sentence de trois mois d'emprisonnement prononcée contre l'appelant Gagnon, vu son acquittement de l'accusation d'outrage au tribunal sur la base de sa lettre à Mackay J.

127 Quant à sa déclaration de culpabilité pour outrage basée sur le passage de sa ploidoirie que j'ai cité précédemment, je suis disposé, compte tenu de toutes les circonstances et des enseignements que l'appelant a sans doute tirés de cette affaire, à le libérer inconditionnellement.

128 Pour ces motifs, je suis d'opinion que:

1. Quant à l'appelant Vallières: ses deux appels doivent être accueillis, les deux jugements a quo doivent être cassés et la requête de l'intimée pour outrage au tribunal doit être rejetée.

2. Quant à l'appelant Gagnon:

   a) son appel no 3576 doit être accueilli en partie quant à l'accusation d'outrage au tribunal basée sur sa lettre à Mackay J., et la requête de l'intimée pour outrage doit être rejetée pro tanto mais l'appel doit être rejeté quant à l'outrage basé sur la plaidoirie orale de l'appelant;

   b) son appel no 3711 doit être accueilli, la sentence prononcée par le jugement a quo doit être annulée, et l'appelant doit être aussi libéré inconditionnellement suite à sa déclaration de culpabilité d'un outrage au tribunal dans sa plaidoirie orale.

[Translation]:

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129 We are concerned here with two charges of contempt, both of which arose from the same set of facts.

130 In each case the appellant has launched two appeals: the first against conviction on 18th December 1970, and the second against the sentence imposed on 3rd May 1971.

131 In view of certain written comment disseminated publicly following the decision of our Court on 28th February 1973 in another case involving the appellant Vallières, it would seem appropriate at this point to emphasize that the delay of approximately two years following the filing of the notices of appeal in the instant cases is not a "delay imposed by the Court prior to delivering judgment". The appellant Gagnon produced his factum on 10th September 1971, and the appellant Vallières produced his on 31st October 1972, and for reasons concerning only the parties themselves, the latter were not ready to proceed until recently. They were heard as soon as possible thereafter however, i.e., on 19th January 1973.

132 It now becomes necessary to examine the following questions:

1. Did appellants' actions amount to a "contempt committed in the fact of the Court"?

2. If the answer to Q. 1 is affirmative, are the convictions subject to appeal?

3. If the answer to Q. 2 is negative, are the convictions proper?

1. Did appellants' actions amount to a "contempt committed in the face of the Court"?

133 A brief summary of the facts is required at this point.

134 In November 1970 both appellants were charged along with three other persons with conspiring to overthrow the Government of Canada, with entertaining seditious intentions, and with declaring themselves to be members of the Quebec Liberation Front.

135 On 17th November 1970 all five accused moved for a dismissal, and applied for bail. The motion was adjourned until 20th November and again until 26th November when it was heard by Mackay J. of the Court of Queen's Bench, Crown Side. One of the accused before the Court presented his argument orally, and the Judge instructed the clerk to advise the four other accused, including the two appellants herein, that they could submit to him their written arguments prior to 1st December.

136 Both appellants wrote to Mackay J.: Gagnon's letter was dated 29th November and Vallières's was undated, but began as follows: "I absolutely refuse to submit to you, by way of correspondence, written arguments concerning my application for bail. I will not plead via correspondence ..." The Judge received both of these letters prior to delivering his judgment.

137 It was on the basis of these two letters, however, that the Attorney General laid a charge of contempt of court against each of the appellants.

138 The matter came before Challies A.C.J. on 18th December 1970.

139 The Associate Chief Justice made the following finding with respect to the question which is now before us:

> At the outset, he (each of the appellants) argued that summary proceedings for contempt ought not to have been instituted against him, but that the proceedings should have been by way of ordinary complaint, or indictment. This ar-

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gument, however, is not well-founded, because a letter sent to a judge embodying written argument on an application for bail which is under consideration constitutes, where contempt is involved, what is termed 'contempt in the face of the court', and in this situation summary proceedings have always been used.

140 There is no definition of contempt "committed in the face of the court" as those words appeared in s. 9(1) of the Criminal Code, R.S.C. 1970, c. C-34, at that time, nor is the phrase "commis en presence du Tribunal" as it appears in the present version of s. 9(1) defined. Accordingly, an analysis of the instant case can only involve the study of examples and comparisons.

141 At the outset it must be remembered that the expression used in the Code must be narrowly interpreted: it relates only to events currently taking place in the presence of, and with the knowledge of the judge presiding over the court.

142 In *Re O'Brien; Regina v. Howland* (1889), 16 S.C.R. 197 at 208, Strong J. made the following observation:

> Contempts of a court of justice being a court of record, other than those committed in its presence (*sedente curiâ*), have received the name of constructive contempts and may be classed under two entirely distinct and very different heads.

143 In *Parashuram Detaram Shamdasani v. King-Emperor*, [1945] A.C. 264 at 268, Lord Goddard, delivering the judgment of the Privy Council, made the following comments:

> The principle to be applied is clear enough. For words or action used in face of the court, *or in the course of proceedings, for they may be used outside the court*, to be a contempt, they must be such as would interfere, or tend to interfere, with the course of justice. No further definition can be attemped. (The italics are mine.)

144 *McKeown v. The Queen*, [1971] S.C.R. 446, 2 C.C.C. (2d) 1, 16 D.L.R. (3d) 390, on the other hand, is of little assistance. There the Ontario Court of Appeal gave no written reasons, and the reasons given by the majority of the Supreme Court of Canada in holding that the facts justified a finding of contempt committed in the face of the court were extremely succinctly stated; but the two strong dissenting judgments provide substantial food for thought.

145 There are very few reported cases involving contempt arising from a letter written to the court, as in the instant case.

146 Counsel for the Crown referred us to *Re Miller* (1921), 54 N.S.R. 529, but there is nothing in the report of the case to indicate whether the contempt was one committed in the face of the court, or whether the respondent had objected to the summary proceedings with which he was confronted.

147 The problem did arise, however, in the United States Supreme Court in *Cooke v. United States* (1925), 267 U.S. 517 at 536, 45 Sup. Ct. Rep. 390. That case involved an insulting letter delivered to the Judge's Chambers during an adjournment. Taft C.J., speaking for the Court, referred first of all to certain precedents, from which he then drew the following conclusion:

> This difference between the scope of the words of the statute 'in the presence of the court,' on the one hand, and the meaning of the narrower phrase 'under the eye or within the view of the court,' or 'in open court' or 'in the face of the court,' or 'in facie curiae,' on the other, is thus clearly indicated and is further elaborated in the opinion.

148 The United States Supreme Court then concluded that the letter in question did not constitute "a contempt in open court", and it quashed the conviction which had involved a finding to the contrary.

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149 In the instant case appellants have admitted that they wrote the two letters in question, and Mackay J. corroborates their allegation to the effect that he received these letters while the matter was under deliberation. But is this sufficient to justify a finding that if the letters do amount to contempt, such contempt was committed in the face of the court?

150 The reasoning of Challies A.C.J. is not without some merit. But when a person's liberty is in jeopardy, any doubt must be resolved in his favour. And I am not entirely convinced that the letters in question fall within the definition of a contempt "committed in the face of the court", as those words have been construed in the jurisprudence which I have just cited. On the contrary, the Crown was forced to resort to outside testimony in support of its case, and even then it was unable to put the whole of its case forward successfully without obtaining certain admissions from the appellants.

151 In addition, I am inclined to hold that appellants are entitled to appeal from their convictions in respect of the two letters in question. This accords with what Laskin J. was attempting to say in the *McKeown* case, supra, when making the following comment on p. 472:

> In the same way, there may be direct contempts which are not in the face of the Court, as, for example, where a derogatory letter is delivered to a judge in chambers ...

152 It goes without saying, however, that the very opposite is true in the appellant Gagnon's case, insofar as his simultaneous conviction on a second contempt charge in respect of the words spoken by him in open court is concerned.

153 In his argument Gagnon made the following statement:

> I repeat that the letter which was just shown to Judge Mackay was addressed to him by myself, that I signed it, and that I see no reason today to retract any part thereof. And the ensuing sequence of events will demonstrate that I should add to it, rather than retracting any part of it.

154 The trial Judge then held:

> At trial, respondent did not seek to excuse himself, but left the inference that he felt that he was still right, and this constitutes another contempt of court.

155 If Gagnon's words amounted to contempt, the contempt was certainly one "committed in the face of the court".

156 The answer to the first question raised in these appeals, therefore, must be as follows:

> i) if the letters sent by the appellants amount to contempt, it was not "committed in the face of the court";
>
> ii) if the comments addressed by Gagnon to the Court amount to contempt, such contempt was "committed in the face of the court".

157 Accordingly, the convictions based on the letters in question were subject to a right of appeal, pursuant to the provisions of Code s. 9 as it stood at that time. What, however, is the situation with respect to the appellant Gagnon's other conviction based on his verbal commentary?

2. Does Gagnon have a right of appeal from his conviction in respect of his verbal commentaries?

158 Appellant's conviction on this charge was not subject to appeal under Code s. 9 as it existed at that time. But has the 1972 amendment to the section introduced by c. 13, s. 4, altered the situation? Or has there always been a right of appeal under s. 2(*f*) of the Canadian Bill of Rights, R.S.C. 1970, App. III?

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159 During the course of argument appellants were told that this Court was not favourably disposed to accept the argument based on the Canadian Bill of Rights, and in support of this position, I would adopt as my own the reasons given by Brossard J.A. in *Vallières v. The Queen* (not yet reported), also decided by this Court today. To this I need add only one other reference, that is to the decision of the Supreme Court of Canada in *Regina v. Appleby*, [1972] S.C.R. 303, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325, in which the same reasoning was applied.

160 Insofar as the argument based on the alleged retroactivity of the 1972 amendment to Code s. 9 is concerned, Brossard J.A. dealt with this to my entire satisfaction in the case which I have just cited, and I shall therefore be content with mentioning one other factor militating in favour of the same conclusion.

161 1972 (Can.), c. 13, comprises 70 sections involving numerous amendments to the Criminal Code, one of which affects s. 9 which is relevant here. In addition, Parliament was no doubt aware of the retroactivity problem which might arise with respect to any one of these amendments.

162 But Parliament expressly dealt with the question when seeking to make retroactive subs. 2 of the amending legislation, respecting nolle prosequi, which was added to s. 508.

163 The first paragraph of s. 43 carries an amendment to s. 508 and then, s. 43(2) goes on to read as follows:

> (2) Subsection 508(2) of the said Act, as enacted by subsection (1), applies to proceedings stayed in accordance with subsection (1) of that section either before or after the coming into force of this Act.

164 This is a provision which clearly confers upon the amendment contained in s. 43 a retroactive effect.

165 And this is the only place in c. 13 at which Parliament has expressly dealt with the question of retroactivity.

166 In my view, therefore, it would not seem illogical to conclude that, had Parliament also wished to give retroactive effect to the amendment to s. 9, it would have expressly said so in the same manner, and in the absence of such a specific provision, the amendment cannot be given a similar retroactive effect.

167 For all of these reasons I have come to the conclusion that Gagnon has no right of appeal from his conviction for contempt in respect of the comments made by him on 18th December 1970 in open court.

3. Are appellants' convictions in respect of the letters written by them proper?

168 In *Hébert v. Attorney General for Quebec*, [1966] Que. Q.B. 197, 50 C.R. 88, [1967] 2 C.C.C. 111, this Court undertook an exhaustive analysis of the law applicable to this question.

169 At the outset Owen J. outlined extremely clearly the distinctions to be drawn between ordinary process, and summary process, expressing himself as follows at p. 227:

> There are two ways in which a person may be tried for contempt of court: *a*) by ordinary process, or *b*) by summary process.
>
> In criminal matters ordinary process is the rule and summary process the exception.
>
> A person tried for contempt of court by ordinary process enjoys the traditional rights and safeguards accorded to a person tried for any other offence. He is accused of a specific offence. If he pleads not guilty he has the right to a full and fair trial. He is presumed innocent until he is proven guilty. The Crown has the burden of proving his guilt bey-

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> ond a reasonable doubt. In serious cases he is entitled to a trial by jury. He has the right to call witnesses in his defence. He cannot be compelled to testify.
>
> A person tried for contempt of court by summary process is deprived of these rights and safeguards. He is called upon to appear before the court and show cause why he should not be condemned and punished for contempt of court. In effect he is presumed to be guilty. The burden is on the accused to show why he should not be convicted and punished. He is not given a full and fair trial as the term is understood. He has no right to a trial by jury. He is not entitled to call witnesses. He may be obliged to testify.
>
> The use of this summary process to deal with and punish contempts of court which are committed not in the face of the court is of relatively recent origin in England (18th century). The matter is dealt with exhaustively by Sir John Fox in two articles published in 1908, 24 L.Q.R. pp. 184 and 266.
>
> The courts, both in England and in Canada, have repeatedly expressed the warning that this summary process with respect to contempt of court should be used sparingly and only in cases of urgency.

170 Tremblay C.J.Q. after dealing with the power possessed by the Court of Queen's Bench, Crown Side, to punish contempts summarily, added the following remarks at p. 216:

> This power ought only to be exercised with very great care, with reticence, and only in those cases where it becomes necessary to act urgently, in order to permit the court to continue to fulfil its function.

171 Accordingly, this Court quashed the conviction primarily on the ground that the circumstances did not warrant resort to the exceptional remedy of summary process.

172 In the instant case, however, we must ask ourselves what transpired to justify the Crown's recourse to this same procedure, and in answering this question, the following chronology of events becomes relevant:

```
  1970
  17th  November:  application for bail;
  26th  November:  appearance before Mackay J.;
  29th  November:  letter from the appellant Gagnon;
  (?):  letter from the appellant Vallieres;


  3rd  December:  judgment rendered by Mackay J.;
  4th  December:  two citations for contempt;
  8th  December:  service of citations on the appellants;
  18th  December:  hearing following citations and convictions
for contempt;
  1971
  3rd May:  sentences imposed.
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173 It is readily obvious that there is nothing here to justify the Crown's resort to the use of summary process, in which it has asked for the following order:

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PRAYS THAT THIS HONOURABLE COURT:

(a) ORDER respondent to appear and show cause why he should not be found guilty of contempt of court, and

(b) Upon respondent's failure so to appear, and/or to show cause, to convict respondent of contempt, and to impose whatever sentence it may deem appropriate.

174 The offences committed by each appellant consisted in the forwarding of a letter which did not preclude Mackay J. from rendering judgment, but it was not until four days later, at the end of the proceedings, that the citations for contempt were served. And, what is even more surprising, the Chief Justice delayed imposing sentence for four and one-half months, which would seem to belie any urgency which the Crown would have to prove, in order to justify its resort to the proceedings which it chose.

175 I therefore have no hesitation whatever in concluding that the citations for contempt filed by the Crown were invalid, and that the appellants were prejudiced thereby, so that they are entitled to a judgment quashing the two convictions, and dismissing the citations for contempt, insofar as these relate to the letters sent by them to Mackay J.

Sentences

176 The judgment rendered on 3rd May 1971, based on the letter sent to Mackay J. and imposing a sentence of two months' imprisonment on the appellant Vallières, must therefore be quashed.

177 Gagnon's case, however, is more complex. On 18th December 1970 he was convicted of two contempts: one in respect of his letter, and the other arising out of his verbal comments.

178 On 3rd May 1971 the Court imposed upon him a sentence of three months' imprisonment and at that point the trial Judge remarked that "the charges, if they can be called that, contained in Gagnon's letter are much more insulting than those to be found in the letter signed by Vallières ...", whereupon he immediately imposed the sentence, without making any reference whatever to the other contempt charge on which he had convicted the appellant.

179 Accordingly, it is impossible to discern which part of this sentence relates to the first charge, on which the appellant has now been acquitted, and which relates to the second charge with respect to which his conviction has been affirmed. But since the trial Judge found Gagnon's letter more insulting than Vallières's, and since he had just sentenced the latter to two months' imprisonment, it would seem logical to apply to Gagnon's letter the major part, if not the whole of the three months' sentence imposed upon Gagnon.

180 I am therefore of the opinion that the three months' sentence imposed on Gagnon ought also to be quashed, since he has now been acquitted on the charge based on his letter to Mackay J.

181 Insofar as his conviction for contempt based on the passage which I have already quoted from his verbal comments is concerned, I am inclined to release the appellant without imposing any conditions, taking into account all the circumstances, and bearing in mind the lessons which the appellant must have learned as a result of this case.

182 For these reasons, I am of the opinion that:

1. Insofar as the appellant Vallières is concerned: both appeals must be allowed, both convictions must be quashed, and respondent's citations for contempt must be dismissed.

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2. Insofar as the appellant Gagnon is concerned:

a) appeal No. 3576 must be allowed in part, as it relates to the charge for contempt based on his letter to Mackay J., and respondent's citation for contempt must be dismissed pro tanto, but the appeal as it relates to the contempt charge based on appellant's verbal comments must be dismissed;

b) appeal No. 3711 must be allowed, the sentence imposed in the Court below must be quashed, and the appellant should be released unconditionally, following his conviction for contempt in respect of his verbal comments.

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KEYCITE

R. v. Vallières (No. 1), 47 D.L.R. (3d) 378, 25 C.R.N.S. 217, 17 C.C.C. (2d) 375, 1973 CarswellQue 12 (C.A. Que., May 18, 1973)

History

Direct History

=> 1 **R. v. Vallières (No. 1),** 47 D.L.R. (3d) 378, 25 C.R.N.S. 217, 17 C.C.C. (2d) 375, 1973 CarswellQue 12 (C.A. Que. May 18, 1973) **(Judicially considered 7 times)**

Negative and Cautionary Citing References (Canada)

Recently added (treatment not yet designated)

2 R. v. Froese, 1980 CarswellBC 895, 5 W.C.B. 17 (B.C. C.A. Jul 07, 1980)

Distinguished in

3 R. v. Froese (No. 2), 17 B.C.L.R. 284, 50 C.C.C. (2d) 115, 1979 CarswellBC 417, 15 C.R. (3d) 209 (B.C. S.C. Oct 31, 1979) (Negative Treatment Available) **(Judicially considered 2 times)**

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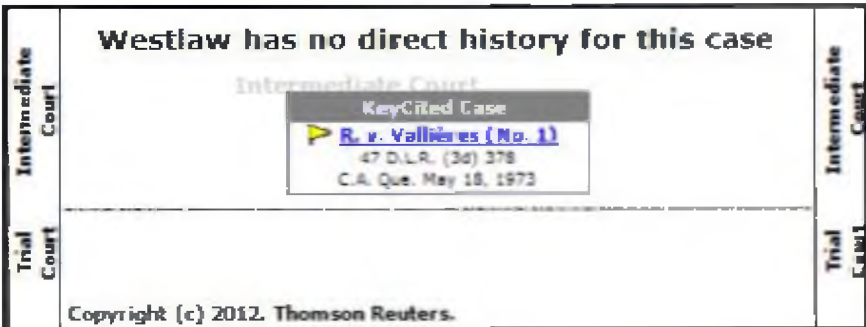
Westlaw has no direct history for this case
Intermediate Court
KeyCited Case
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Trial Court
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11 CED Contempt of Court II.3, §13-§16

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