**In the Court of Appeal for the Northwest Territories**

**Citation: *R v Burles*, 2022 NWTCA 3**

**Date:** 2022 10 31

**Docket:** A1-AP-2021-000004

**Registry:** Yellowknife, N.W.T.

**Between:**

**His Majesty the King**

Respondent

- and –

**Bryce Burles**

Appellant

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**The Court:**

**The Honourable Justice Jack Watson**

**The Honourable Justice Elizabeth Hughes**

**The Honourable Justice** **Suzanne Duncan**

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**Memorandum of Judgment**

Appeal from the Conviction by

The Honourable Justice D.F. Molloy

Convicted on the 14th day of July, 2021

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**Memorandum of Judgment**

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1. Mr. Burles appeals his conviction for contempt of court. We agree the conviction cannot stand.
2. The background facts are straightforward. At the commencement of the trial of a friend of the appellant, the friend’s trial counsel advised the trial judge:

Ms. MALONE: Good morning, Your Honour. I’m here with my client, Mr. Rainer Erasmus. We are in most respects prepared to proceed to trial. There is a witness [the appellant] who is in custody at NSCC. I did obtain a removal order last week for his attendance. He was present on the last court date. He is apparently not coming to court today.

THE COURT: Well, that is not his choice. I direct Madam Clerk to notify NSCC to extract him from his cell and bring him here.

Ms. MALONE: Thank you, Your Honour.

1. Later in the morning, the trial judge advised counsel:

THE COURT: Ms. Malone, before you begin, I can update you. Court staff or registry staff advised me that the NSCC was refusing to comply with the removal order. I advised that they better send someone over here because if they refuse to comply someone will be held in contempt of court.

1. When Mr. Burles was called in the case for the defence, he appeared, was sworn, and testified. At the completion of cross-examination, the following exchange occurred:

THE COURT QUESTIONS THE WITNESS:

THE COURT: Mr. Burles, I understand, Sir, you refused to come to court this morning?

A Yeah.

THE COURT: Why?

A I had an exam to take this afternoon, which I missed, so...

THE COURT: When do you get out of jail?

A I don’t know, probably October.

THE COURT: Would you like another 90 days?

A If you want to slap it on, go ahead.

THE COURT: Well, I tell you now, and you tell your buddies over at the pen, if you do not come to court when you are required, you will get 90 days tacked on to your sentence.

A That’s fine with me, man.

THE COURT: All right. Well, then you --

A The last thing I need is a lecture from you, you know.

THE COURT: You can have an extra 90 days.

A Okay. That’s fine. No worries.

THE COURT: Take him out. Under 708(2).

A It’s already time served anyways.

1. The above exchange illustrates that the appellant did not have counsel nor was the Crown given an opportunity to participate. Because the Crown did not participate, the Crown was permitted to appear as *amicus* on the appeal.
2. The law is clear: a court has authority to summarily deal with contempt. However, before the court proceeds summarily, the circumstances must make it urgent and imperative to act immediately to convict and sentence a party for contempt of court, understanding that the use of a court’s contempt power “should be restrained by the principle that ‘only [t]he least possible power adequate to [end the contempt]’ should be used”: *R v K(B)*, [1995] 4 SCR 186, 129 DLR (4th) 500 at para 13; see also *R v Arradi*, 2003 SCC 23.
3. If a court uses the summary procedure, and in the absence of exceptional circumstances, natural justice requires that: 1) the party be cited for contempt in that the party be advised they must show cause why they should not be found in contempt; 2) the party be given an opportunity to be advised by counsel, and if they choose to be represented by counsel; and 3) if the party is found in contempt, the party must have an opportunity to make submissions as to an appropriate sentence: see *K(B)* at paras 15-16and *Arradi* at para 30. *R v Lavallee*, 2022 MBCA 79 at para 12 states:

A number of safeguards to prevent a misuse of criminal contempt powers exist.  The alleged contemnor is entitled to fair notice of the alleged contempt, time to answer the allegation with the assistance of counsel (absent the need for immediate action because of their disruptive conduct), and a fair and public hearing where they enjoy the typical protections afforded any accused person, including the right to silence, the right to non-compellability, the right to make full answer and defence, the right to be tried by an independent and impartial tribunal, and to be presumed innocent until proven guilty beyond a reasonable doubt (see *Regina v Cohn* (1984), 15 CCC (3d) 150 at 157-58, 162, 165-66 (Ont CA); and *Regina v Ayres* (1984), 15 CCC (3d) 208 at 215 (Ont CA)).

1. There are a number of concerning elements in this case.
2. The process followed by the trial judge was inquisitorial about past facts, and the facts he relied upon were based on multiple forms of hearsay. The conscriptive inquiry by the trial judge denied the witness a right to choose whether to speak: compare *R v Chambers*, [1990] 2 SCR 1293, 59 CCC (3d) 321. The approach followed was inconsistent with the entitlement of the appellant to have allegations of misconduct explained to him and once familiarized with the allegations to choose to have the misconduct proven against him.
3. It is not open to a trial judge to impose a guilty plea for contempt upon a witness who is merely reticent about coming to court: compare *R v Wong*, 2018 SCC 25 at para 3. Here, the appellant was offering some sort of explanation when his ability to do so was interrupted by the trial judge. Further, it is not open to a trial judge to truncate the opportunity of the witness to explain the alleged contempt, or to purge the alleged contempt, or to argue the alleged contempt was purged, or to speak in mitigation of the alleged contempt. As the appellant attended court and did in fact give evidence in the trial of his friend, there was a live issue whether the contempt, if it happened, was purged. The trial judge short circuited all of that.
4. To summarize, there were no circumstances that justified use of the summary procedure. The appellant, when called as a witness, entered the courtroom, was sworn, and testified. The appellant demonstrated no contemptuous behaviour while in the courtroom. The only issue was whether the appellant, by stating earlier in the day that he would not appear in court, was in contempt. This issue was not urgent or imperative to the proceeding itself. Further, the trial judge erred in that he did not afford the appellant any of the procedural guarantees as required.
5. The conviction for contempt was a miscarriage of justice.
6. Accordingly, we allow the appeal and quash the conviction for contempt. As the appellant has served his sentence, we stay the proceedings. We also note that on the facts of this case, a prerogative writ may have been available to the parties.

Appeal heard on October 25, 2022

Memorandum filed at Yellowknife, NWT

this  day of , 2022

Authorized to sign for: Watson J.A.

Hughes J.A.

Authorized to sign for: Duncan J.A.

**Appearances:**

B. MacPherson

for the Respondent - *Amicus*

K. Oja

for the Appellant

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IN THE COURT OF APPEAL

FOR THE NORTHWEST TERRITORIES

**Between:**

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- and -

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MEMORANDUM OF JUDGMENT