

# RIGHT OF APPEARANCE OF COUNSEL — POWERS OF A JUDGE

A member sought a ruling as to the powers of a Judge to interfere with the right of appearance of counsel on behalf of a party to the proceedings.

The Bar Council gave the following ruling.

A Judge's power to control the conduct of counsel appearing in his court depends upon the law relating to contempt committed in the face of the court.

This type of contempt is dealt with comprehensively in *Borrie and Lowe* "The Law of Contempt" 1973 at pp9-34. See also *Ex Parte Bellanto re Prior* 63 SR 190 at 192, 198-208.

The matter is the subject of long standing local authority. In *Reg. v. O'Neill* (1885) 6 NSWLR 43 at 45 Martin C.J. said: *There can be no doubt that a Judge of the District Court, as well as the Judges of this and all other Courts, have necessarily entrusted to them the power to preserve order and decency in the courts where they preside. If any person appeared as an advocate before a Judge, whatever his position might be, and used expressions which were insulting to the Bench, or misconducted himself in any way — for instance, by persisting in doing things which were contrary to the ruling of the Judge . . . or interfering in any way with the administration of justice — the Judge had power to exclude him and in some cases had power to do more than exclude him . . .*

*I am of opinion that the Judge had power to exclude from the Court, or prevent appearing in a case, any person who came before him.*

Subsequently in *Reg. v. Matthews* (1887) 8 NSWLR 45 the Full Court explained and distinguished the decision in *Reg. v. O'Neill* (above).

In that case a Chairman of Quarter Sessions had refused to allow two attorneys to jointly conduct the defence of a prisoner and had insisted on the defence being conducted by one only of those attorneys.

There was no suggestion that either or both of the attorneys had misconducted themselves in any way in the course of the proceedings.

Local legislation provided that every accused person should be allowed to make full answer and defence in all Courts by counsel, and counsel was defined as including an attorney.

The Full Court set aside the conviction on the ground that the Judge had deprived the accused of a statutory right in relation to the conduct of his defence and that this amounted to a substantial wrong or miscarriage of justice. Referring to the judgement of Martin C.J. in *Reg. v. O'Neill* (above) Darley C.J. said at pp 49-50:

*I do not think that the late Chief Justice himself thought of going to the full extent to which these words would seem to go — that a Judge should have the power, without giving any reason for it, to say to a counsel who was conducting himself properly — I shall*

*not hear you Mr So and So, I desire to hear somebody else — nor in my opinion has a Judge any right to say to counsel appearing before him on behalf of the client — I will only hear the junior counsel or the senior counsel in the case.*

*Unless there be some special or general rule of Court, such as that by which only one counsel is heard on each side in demurrers, the Judge has no power to refuse to hear counsel . . . (His Honour then referred to the earlier part of the passage quoted above from the judgement of Martin C.J. and continued). Now it was cases of this sort that were in His Honour's mind when he spoke of the power of a Judge to exclude anyone who came before him. With that limitation there can be no doubt as to the law laid down in that case. Here there is no pretence that these two gentlemen misconducted themselves in any way . . . or interfered in any way with the administration of justice. This is simply an arbitrary rule laid down by the Judge . . .*

In the same case Innes J. said at page 52:

*I concur with what their Honours have said about Reg v O'Neill. It seems to me that it is only in reference to acts or misconduct or breaches of decorum that the Judge has a right to refuse to hear counsel. It is obvious that such a principle is well founded.*

The principle that it is the duty of counsel to comply with rulings and directions of the presiding Judge was also stated by Lord Goddard in *Shamdasani v. King Emperor* (1945) AC 264 at 269 where His Lordship said:

*If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge he may very properly be adjudged guilty of contempt of Court, but then the offence is the disregarding of the ruling and setting the Court at defiance.*

See also *Ex parte Bellanto re Prior* 63 SR 190 at 195.

The relevant principles accordingly seem to be as follows:

- (i) An accused person has a right to be represented at his trial by the counsel of his choice and in the absence of any misconduct on the part of that counsel the presiding Judge is not entitled to refuse to hear him in the conduct of the case. See *Hired v. The King* (1944) AC 149 at 155 and *Smith v. Commissioner of Corrective Services* (1978) 1 NSWLR 317 at 325-6.
- (ii) It is the duty of counsel appearing in proceedings to observe and comply with the rulings and directions of the presiding Judge, however erroneous they may be, and failure or refusal to do so can constitute a contempt in the face of the Court. In these circumstances the Judge would be entitled to decline to further hear that counsel and counsel could be ordered to leave the court or even fined or committed to prison. See authorities cited above and compare also *Lloyd v. Biggin* (1962) VR 593.