New South Wales
Court of Appeal

CITATION :	**Wilson v The Prothonotary [2000] NSWCA 23**
FILE NUMBER(S) :	**CA** 40928/99
HEARING DATE(S) :	16 February 2000
JUDGMENT DATE :	29 February 2000
PARTIES :	John Wilson (Appellant) The Prothonotary (Respondent)
JUDGMENT OF :	Meagher JA at 1; Sheller JA at 3; Heydon JA at 4

LOWER COURT JURISDICTION :	Supreme Court
LOWER COURT FILE NUMBER(S) :	CL 12914/97
LOWER COURT JUDICIAL OFFICER :	Wood CJ at CL

COUNSEL :	Appellant - R Toner SC/J Berwick Respondent - T Buddin SC
SOLICITORS :	Appellant - P J Weldon & Co Respondent - I V Knight

CATCHWORDS :	APPEAL - contempt of court - throwing paint at judge - appeal against two year term of imprisonment - failure to call any subjective evidence in relation to sentencing at trial - admission of fresh evidence on appeal - medical condition - hardship to family - obsessive compulsive personality disorder - time already served sufficient punishment - D
LEGISLATION CITED :	Supreme Court Act 1970
CASES CITED:	R v Edwards (1996) 90 A Crim R 510 R v Vachalec [1981] 2 NSWLR 351 Attorney-General for New south Wales v Whiley (1993) 31 NSWLR 314 Rich v Attorney-General for Victoria [1999] VSCA 14 Commonwealth Bank of Australia v Quade (1991) 178 CLR 134 Akins v National Australia Bank (1994) 34 NSWLR 155
DECISION :	See paragraph 53

THE SUPREME COURT

OF NEW SOUTH WALES
COURT OF APPEAL

CA 40928/99
CL 12914/97

MEAGHER JA
SHELLER JA
HEYDON JA
29 February 2000

JOHN WILSON v THE PROTHONOTARY

JUDGMENT

1 **MEAGHER JA**: I have read in draft the judgment of Heydon JA. I disagree with it.

The relevant facts are as follows:
1. Mr Wilson threw a bag of paint at a judge.
2. On that fact alone he had committed a serious contempt of court, a contempt in the face of the Court.
3. The learned Chief Judge at Common Law sentenced him to two years' imprisonment. That is the decision now appealed from.
4. At the hearing before the Chief Judge, Mr Wilson led virtually no evidence, although invited to do so several times by His Honour.
5. On appeal from His Honour, there was an application to lead further evidence, said to be of a "subjective" nature. This was acceded to by the court, although in my opinion wrongly so.
6. Neither before His Honour, nor on appeal, was there any apology, or any sign of contrition. It was made clear to the Court that this was not due to any inadvertence, but was a calculated decision. In my view this is a fact which on its own should preclude any alteration to his Honour's sentence.
7. There was nothing novel about the additional evidence led before this court. It could have been led before His Honour, who invited Mr Wilson to do just that. There has been no explanation why it was not led.
8 There is no evidence that Mr Wilson is mentally unbalanced: eccentric yes, obsessive certainly, but demented no. It follows that at all stages of the case, both below and before us, he knew exactly what he was doing.

2 In my view the appeal against sentence should be dismissed with costs.

3 **SHELLER JA:** I agree with Heydon JA.

4 **HEYDON JA:** On 9 November 1999 the appellant was convicted on two counts of contempt of court and sentenced on each count to a fixed term of imprisonment for two years.

5 The facts found were as follows.

6 On 24 July 1997 the appellant filed a Statement of Claim in the Supreme Court Registry, Common Law Division, against seven defendants.

7 On 4 August 1997 a Notice of Motion was filed in court on behalf of the defendants seeking that the proceedings be dismissed, or alternatively, that the Statement of Claim be struck out.

8 On 25 August 1997 the Notice of Motion was argued before an acting Justice of the Supreme Court. Judgment was reserved.

9 On 5 September 1997 the matter was listed for judgment to be delivered. The appellant appeared in person. The appellant brought into court a black folder inside which was a hidden cavity containing three plastic bags filled with yellow paint.

10 Before judgment was delivered, the appellant, who was holding a dictaphone in his hand, asked his Honour:

> “May I record or will there be a transcript?”

His Honour replied:

> “I will be handing down a copy of my reasons so there won’t be anything to record, other than that the proceedings are dismissed. I order the respondent to pay the applicant’s costs. I publish my reasons.”

11 Immediately upon those words being uttered by his Honour, the appellant threw one of the bags of paint towards him. The bag hit his Honour and landed on the bench before him, causing yellow paint to splash onto his Honour’s coat. The appellant then threw a second plastic bag of yellow paint towards his Honour. The second bag landed between the judge’s Associate and the Court Reporter, splashing paint on impact. The court staff thereafter restrained the appellant.

12 In consequence the trial judge made declarations as follows:

> “1. A declaration that the defendant is guilty of contempt of court in that on 5 September 1997 after judgment was handed down by the Hon. Acting Justice Murray in the matter of John Wilson -v- Terence Greenwood & six others in the Supreme Court of New South Wales, the defendant did throw a plastic bag filled with paint at Acting Justice Murray and did thereby conduct himself in a manner which tended to interfere with the administration of justice.
> 2. A declaration that the defendant is guilty of contempt of court in that on 5 September 1997 after judgment was handed down by the Hon. Acting Justice Murray in the matter of John Wilson -v- Terence Greenwood & six others in the Supreme Court of New South Wales, the defendant did throw a further plastic bag filled with paint at Acting Justice Murray and did thereby conduct himself in a manner which tended to interfere with the administration of justice.”

Appeal Against Conviction

13 The appellant’s Notice of Appeal appealed against conviction on eight grounds. Though he instructed his counsel to press them, neither written nor oral argument was directed to them. As is discussed below, evidence not tendered at the trial was admitted on the appeal. Part of it dealt with the consequences to the appellant of his conviction, but none of it affected the reasoning of the trial judge in relation to conviction, which on the evidence tendered at trial was inevitable. Accordingly the appeal against conviction must be dismissed.

Appeal Against Sentence

14 Though the appellant was represented on the appeal, he was not represented at the trial. Despite several invitations by the trial judge to do so, and though at the last moment he called a character witness who

proved almost useless, he failed to call any satisfactory evidence in relation to sentence to the effect of that tendered on the appeal.

15 The conduct of the appellant placed the trial judge under a serious disadvantage in arriving at a just sentence. What the trial judge knew, apart from the objective facts he found in his reasons for judgment on conviction, was set out thus in paragraph 1 of his reasons for judgment on sentence:

> "Some material has been placed before me on behalf of the defendant concerning his prior character; for example, it has been shown that he has no prior convictions of any kind, he has been a practising dentist and a friend of his, Ray Lovett, says that he regards him as a truthful man who does help people in the community, and who has a genuine belief in the injustices of the legal system. Beyond that, no material has been placed before me as to the general character of the defendant or concerning his mental state."

16 In addition, the trial judge, having had the experience of the appellant's oral submissions over thirteen pages of transcript, would have observed that the appellant was middle aged and apparently in good health; that the appellant was of the much-repeated view that the trial of him should have been by jury; that the appellant was of the view, also much-repeated, that the system of justice was corrupt; that the appellant was of the view that variable interest rates in contracts of loan rendered the contracts void for uncertainty; and that the appellant said he had been fighting for occupational safety for many years.

17 The following additional information came to light as a result of the further affidavit evidence tendered on appeal. Its credibility was not in contest, the deponents were not cross-examined, and no complaint was made about the reception of medical reports not verified on affidavit by their makers.

Evidence Tendered on Behalf of the Appellant on Appeal

18 First, the appellant had not only "been a practising dentist", but had been qualified for over thirty years. He had practised until 1970 in the Army, until 1978 in two practices in England, and since 1978 in North Rocks (Mrs Wilson, paras 8-11). According to Dr V Kirychenko, a medical practitioner of 22 years' standing who had practised in the same rooms as the appellant (para 2) and who is a patient of the appellant's, the appellant "is dedicated" to his practice. His "technical skills are excellent, from my personal experience having my pain and suffering eased on many occasions" (para 13). Dr Robinson, a dentist with 33 years experience who had known the appellant for 40 years, said the appellant "is a very caring dental practitioner who has had the loyal following of his patients for about the last 20 years in North Rocks" (para 4).

19 Secondly, the appellant served in the Army during the Vietnam War on two tours of duty. On the second tour he contracted hepatitis and he had to

be repatriated. According to Dr Robinson, his health was severely affected by the hepatitis attack, and he returned “in very poor health which has probably contributed to some of his present health problems” (para 3); see also Dr Kirychenko, para 17 and Mrs Wilson, para 9. Despite this, on his recovery from hepatitis he sought to return for further service in Vietnam but was prevented from doing so (Mrs Wilson, para 9). Dr Robinson said he is “fiercely patriotic” (para 10).

20 Thirdly, the family background and position of the appellant is as follows. The appellant’s parents separated when he was 11 and he was brought up thereafter by his mother. His father did not financially support his desire to go to the university and he had to work briefly in a bank before doing so. The appellant, who is now 57, has been married to Mrs Wilson for 34 years. The marriage has produced two sons and a daughter, and the appellant has a grand daughter. The daughter works in his practice as practice manager and dental nurse. One son is a full-time student at the Australian National University and has been in receipt of financial assistance from his parents. Another son is financially dependent on the appellant, being unemployed, essentially because he suffers from schizophrenia. He has been admitted to Cumberland Hospital for this on a number of occasions. Mrs Wilson says that he does not cope with external pressures and “has been seriously disturbed” by the appellant’s incarceration (paras 3 and 17). Dr Robinson observed the appellant to be a “very good supportive father to his three children and a very devoted grandfather” (para 5). His grand daughter is two years old and, according to Dr Kirychenko, “greatly dependent” on him (para 14). Dr Kirychenko also said that the appellant “is a father whose life revolves around the family and who would do everything and anything in his power to help the individual members in various difficulties or crises. The welfare and stability of his family is greatly dependent on him.” Mr W A Merton, MLA, said that the appellant was a man of “strong family values” (para 11). Dr Kirychenko said that the appellant was “always deeply concerned about the welfare of his family” (para 12). In the light of the financial difficulties which his conduct in relation to these proceedings and his wider conduct has placed his family, the support of Mrs Wilson in particular is noteworthy.

21 Fourthly, though the appellant appears physically healthy - as one of his doctors, Dr Ross, said, he is “a well looking man” - he is not in fact healthy. Dr Kirychenko, his general medical practitioner since 1980, summarised the position as follows. In August 1988 the appellant developed palpitations which on investigation were found to be a heart condition, namely, an atrial flutter with varying block. This condition deteriorated and was very difficult to treat with medication; surgical procedures were contemplated though they were experimental. In November 1993 Dr Uther, a specialist cardiologist, suspected that his right atrium was diseased. In December 1995 his condition became critical and “he was in heart failure with pulmonary oedema. The condition was life threatening”. Dr Kirychenko treated him with Digoxin and Lasix and he stabilised. Dr Leung reported after radiology that “cardiomegaly is present with a life ventricular

hypertrophy and a prominent ascending aorta. Pulmonary vascular congestion is present". On 22 December 1995 Dr Schembri concluded as follows:

> "Atrial enlargement in keeping with longstanding atrial fibrillation. No significant valvular disease. Anterior and septal hypokinesis is suggestive of previous infarction."

An echocardiogram taken in 1998 showed improvement with treatment. On 25 May 1998 Dr Walker reported:

> "Mild mitral and tricuspid regurgitation with mild left atrial enlargement. The left ventricle was within normal limits in size at this time. Atrial fibrillation."

Dr Kirychenko's affidavit continued:

> "He at present continues the treatment Digoxin 0.250 mg which gives him some control of his condition. The treatment is tenuous and loss of control may occur at any time, particularly if he is subjected to stress. The other problem is that the cardiac arrhythmia may result in blood clotting with the possibility of a stroke. Mr Wilson does not take anti coagulants for this because of their possible adverse side effects.
>
> His medical condition is tenuous as loss of control may lead to irreversible heart failure. He should not be exposed to undue stress. His condition may also precipitate if the arrhythmia becomes worse.
>
> I believe incarceration would be a stressful situation and the longer the incarceration the greater the risk for Mr Wilson. Research has shown that prolonged stress and anger can initiate an arrhythmia and has an effect on coagulation and heart perfusion."

The appellant must take Lanoxin for the rest of his life (Mrs Wilson, para 5). He has refused other medication or treatment, though he has been advised to have the anti coagulant drug Warfarin and to have a pacemaker inserted or have an operation on his ventricle (Dr McMurdo's report, page 2).

22 Fifthly, the new material reveals the following about the appellant's mental state, a matter about which the trial judge was understandably concerned (reasons for judgment on sentence, para 1) and on which he was not favoured with any material. A report of Dr McMurdo dated 9 January 1998 (that is, four months after the contempts) said that though the appellant was not suffering from a mental illness he:

> "has an Obsessive Compulsive Personality Disorder as defined in the DSM-IV classification of mental disorders. This is not strictly a mental illness but as defined in the above classification it is seen as - personality traits which are

inflexible. They are based on enduring patterns of perceiving, relating to, and thinking about the environment and oneself."

Dr McMurdo enclosed the following definition of the Disorder:

"A pervasive pattern of preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency, beginning by early adulthood and present in a variety of contexts, as indicated by four (or more) of the following:
(1) is preoccupied with details, rules, lists, order, organization, or schedules to the extent that the major point of the activity is lost
(2) shows perfectionism that interferes with task completion (e.g. is unable to complete a project because his or her own overly strict standards are not met)
(3) is excessively devoted to work and productivity to the exclusion of leisure activities and friendships (not accounted for by obvious economic necessity)
(4) is overconscientious, scrupulous and inflexible about matters of morality, ethics, or values (not accounted for by cultural or religious identification)
(5) is unable to discard worn-out or worthless objects even when they have no sentimental value
(6) is reluctant to delegate tasks or to work with others unless they submit to exactly his or her way of doing things
(7) adopts a miserly spending style toward both self and others, money is viewed as something to be hoarded for future catastrophes
(8) shows rigidity and stubbornness".

23 Dr McMurdo said that the appellant met the following criteria of the Disorder:

· "He is preoccupied with details, order, and rules.

· He is excessively devoted to work and productivity to the exclusion of leisure activities. He said that he believed he was the best dentist in Australia.

· He presents as overconscientious and inflexible about matters of ethics and values.

· From the history he gave to me had had difficulty working with colleagues and dismissed several dentists when working in a joint practice in Britain and it seems that he has problems delegating tasks.

· He shows a rigidity and stubbornness which could certainly lead to his own detriment in the end."

24 He said that "it is exceedingly unlikely that the appellant's personality disorder would benefit from any treatment given his age and persistence in

attitude." He concluded:

> "It is very probable that [the appellant] will pursue his cause to the bitter end even if he knows he will be convicted. This does not mean that he is mentally ill. There is a number of individuals in the community who take on causes and pursue the issue with tremendous vehemence as opposed to other individuals who are very lackadaisical about moral or ethical issues. He is at one end of the continuum and therefore deserves the label of Obsessive Compulsive Personality Disorder, but this renders him perhaps eccentric, but not mentally ill."

25 Mrs Wilson said she believed this report described the appellant's personality:

> "He gets obsessive about things at times and has a strong passion to do something about the convictions he holds. His primary concern is for victims of medical, legal or financial problems. He does not engage in these issues in a haphazard fashion. He enters into each subject in great detail and often goes to great lengths in research." (para 7)

26 The concerns of which she spoke can be summarised as follows:

(a) For 10 years the appellant has campaigned against variable bank loan interest rates and contended that these render contracts uncertain. The origins of this apparently lay in the experience of the appellant and his wife in relation to a home loan which left them owing more money after 13 years than they had borrowed despite having paid off substantial sums. The appellant became particularly concerned by the plight of borrowers who were worse off than himself such as destitute farmers and young home owners "who are losing their properties and experiencing considerable personal distress" (Mrs Wilson, para 26). For some time his campaign involved writing to the newspapers, to politicians and to interest groups; speaking on talkback radio; writing to holders of public office; moving motions at Liberal Party conventions; and making submissions to public bodies. From 1996 the campaign was pursued in the courts. Mrs Wilson estimates the direct and opportunity costs of this at approximately $100,000 (para 29). The appellant and Mrs Wilson have been ordered to pay legal costs to the St George Bank of at least $58,000. Dr Robinson summarised the appellant's conduct in this regard thus:

> "He has studied legal books from libraries and represented himself in court due to an overwhelming stubborn streak that makes him do things his way." (para 9)

(b) The applicant has "campaigned to ensure the safe handling of mercury by dental workers in dental surgeries. He believed that dental workers, especially nurses, risked poisoning physically,

mentally and gynaecologically from contact with, or breathing of, mercury vapours". Mrs Wilson says that the campaign lasted over 12 years, involved extensive research, the development of safety boxes, the taking out of patents, numerous appearances on media, contact with sympathisers in the United States, including travel there, and publication of an article in "The Lancet". Mrs Wilson estimates that the campaign cost $500,000, and forced the Wilsons to re-finance their mortgage (para 30). See also Dr Robinson (para 8).

(c) The appellant's other causes have included campaigns against smoking, to reduce speeding, against drugs in sport, in favour of rule changes in squash and changes in the size of the squash ball, in favour of the placement of traffic lights on roundabouts (Mrs Wilson, para 31), against an Australian Republic (Dr Robinson, para 10), in favour of a return to Privy Council appeals, against the Dentists Act, against behaviour at rock concerts, against television advertising and against aspects of shopping centre leases (Mr Merton, paras 5-12).

27 Mr Merton, the appellant's local member of the New South Wales Legislative Assembly, gave evidence of the variety of subjects on which the appellant made representations to him and the numerous occasions on which he did so (paras 5-12).

28 Sixthly, Mrs Wilson has pointed out that the conviction may cause the appellant to be removed from the roll of dental practitioners (para 12).

29 Seventhly, Mrs Wilson has given detailed evidence as to the financial position of the family. They face eviction by the St George Bank unless payment of a debt of $356,380 is made. This can only be done by selling the appellant's dental practice, which since his imprisonment has been operated by a *locum* and produces $250-$300 per week. If sale is effected, nothing will be left of the proceeds after the bank debt and a tax bill are paid. If sale is effected, it is likely that a covenant in restraint of trade will prevent the appellant from practising in the North Rocks area even if he is allowed to remain on the roll. If sale is effected, the appellant's daughter may become unemployed. After sale, the Wilsons will be left with only $85,000 in superannuation funds as provision for their retirement.

30 Eighthly, the evidence tendered establishes the faith of various people in the appellant's character as a man of high principles. Thus Dr Kirychenko says that the appellant is fearless, honest, dependable and extremely strong in his beliefs; that he will struggle without fear for his own welfare if he believes he is right on a principle affecting the welfare of the community; and that he contributes to the welfare and stability of society. Mr Smith, a local real estate agent, who is closely familiar with the appellant, says that he has always found him to be forthright, kind and caring though somewhat eccentric. He says that he has found the appellant to be "very highly respected" by the local community at large (paras 3 and 6). Dr Robinson

said that the appellant has “tremendous integrity and honesty” (para 6).

31 The material tendered on appeal establishes a wholly new picture of the appellant’s subjective circumstances. Section 75A(10) of the *Supreme Court Act* 1970 provides:

> “The Court may make any finding or assessment, give any judgment, make any order or give any direction which ought to have been made or which the nature of the case requires.”

> The subsection applies to an appeal in proceedings in the Court: s 75A(1). It cannot rationally be said that, by reason of the fresh evidence, the trial judge “ought to have made” a different order in view of the fact that the fresh evidence was not tendered to him. But the subsection does give this Court power to make any order which “the nature of the case” as it now appears in the light of the fresh evidence requires.

32 The appropriate course for this court is to approach the sentencing task afresh, taking into account the trial judge’s findings on the objective circumstances, which are plainly correct, but also taking into account the new evidence of subjective circumstances not available at the trial. The other possibilities are to attempt to estimate what the trial judge would have done if the new evidence had been tendered to him, or to order a new trial on sentence. The former is an exercise in speculation. The latter is a waste of time in view of the uncontroversial nature of the trial judge’s findings on conviction and the uncontested credibility of the new evidence.

33 The evidence shows the appellant to be, in every respect but one, an entirely worthy human being and an admirable citizen. He is a war veteran. He has had a long and successful professional career of great value to his local community. He has an extremely stable and happy life with his family and has sought to cope with the problem of his schizophrenic son. He pursues with idealism numerous causes: none of them could be said to be irrational or unworthy, though the methods he employs are sometimes reckless from the point of view of his family’s financial security. His health may be damaged by a prolonged period in gaol - indeed, it may cause a heart attack, a stroke or sudden death. The sentence has ruined the family financially and appears to have damaged the health of the second son. The fact of conviction may have imposed upon the appellant the extremely severe sanction of total loss of livelihood. If he is prevented from practising as a dentist, given his age and lack of alternative experience, it is highly unlikely that he will ever become employed again.

34 While the weight to be given to each of these matters may vary, they all deserve some weight. The respondent submitted that in the entire circumstances of the case no weight should be given either to family hardship or to the appellant’s medical condition.

35 It is a truism that many convicted persons who are gaoled (including

persons of previous good character) and their families suffer financial or other detriments or suffer ill health. The question is whether to impose a sentence inflicting these detriments on the appellant and his family beyond the point already reached is necessary to secure legitimate sentencing purposes in all the circumstances. The hardship to Mrs Wilson and to the other members of the appellant's family may be taken into account if the circumstances are, as here, "highly exceptional": *R v Edwards* (1996) 90 A Crim R 510 at 516-7.

36 The respondent's submission in relation to the appellant's medical condition was supported by the citation of *R v Vachalec* [1981] 1 NSWLR 351. That case held that it was not the function of an appellate court to fulfil a continuing supervisory role over the effect of imprisonment on an individual; rather the responsibility for providing adequate and proper medical treatment for prisoners lay with the prison authorities. However, that case is not in point. It was a case where the failure of the authorities to provide special medical and dietary treatment was said to be intolerably harsh. The problem for the appellant is rather that however well the authorities treat him, the stress of imprisonment may trigger a heart attack or stroke with fatal consequences.

37 The one respect in which the appellant is not an entirely worthy citizen is his conduct on 5 September 1997. No challenge was made or could be made to the trial judge's characterisation of the conduct in his reasons for judgment on conviction:

> "It is obvious beyond question that a physical assault upon a judicial officer in connection with the performance of his or her duty constitutes not only a contempt in the face of the court but a very serious contempt ….
> The conduct of the defendant in the present case is of that kind. His acts … were intended, in the sense that he deliberately threw a plastic bag of paint at [the judge], some of which struck his clothing and then threw a second container in the direction of the bench. These acts occurred while his Honour was announcing his decision in a proceeding, in which the defendant was a party, and while he was publishing his reasons for that decision before proceeding to the other matters listed for hearing that day. It occurred in the presence of other litigants. It was of a kind that was likely to occasion serious alarm, and it was such as to interfere with the administration of justice, and to undermine the authority of the Court.
> I am satisfied that the actions of the defendant were premeditated and that he came to the court with the paint concealed in a folder containing a number of documents which had been cut out in order to create a cavity to contain the bags of paint. The only rational inference open is that he came to court prepared to throw the paint at [the judge] in the event of proceedings being decided adversely to

himself." (paras 23-24)

> On 12 November 1999 the trial judge further noted the appellant's "refusal to acknowledge the criminality involved in the throwing of paint bombs at a judicial officer", and noted "the absence of any sign of contrition or of insight on his part into the wrongness of his conduct" and also noted "his belligerent defiance of the Court". The appellant told the trial judge that he regarded his conduct as a "harmless gesture". The appellant was apparently indifferent to the fact that those present while his conduct was taking place were defenceless. The Associate thought the liquid in the first bag thrown was acid. Counsel for the appellant very properly conceded, in relation to every person present, that "the moment must have been terrifying for each of them. They cannot have known what was in the 'bombs' and could well have imagined a frightful outcome.'"

38 The difficulty is that these contempts of court, serious as they were, have their origin in the appellant's Obsessive Compulsive Personality Disorder. It may not be a mental illness, but it is a mental or personality disorder which, according to Dr McMurdo, is exceedingly unlikely to be treatable.

39 For present purposes it may be accepted, though it is not necessary to decide, that the only proper outcome was a sentence of imprisonment. The trial judge, in conventional terms, described the purpose of a sentence of imprisonment for the appellant as being:

> "both to punish the defendant for the serious incidents of contempt of which he has been convicted, to provide him with an encouragement towards rehabilitation, to deter him and others from similar conduct, and to mark the community disapproval of the offences."

40 Despite the seriousness of the offences, the fresh evidence leads to the conclusion that the period which has elapsed since the appellant was sent to gaol is a sufficient punishment, has sufficiently provided him with encouragement towards rehabilitation and sufficiently marked the community disapproval of the offences. If general deterrence of persons not suffering from the obsessions of the appellant which Dr McMurdo identified as Obsessive Compulsive Personality Disorder can be achieved by imprisoning those who do so suffer, the period already served does so sufficiently. A further period in gaol for the appellant would not appear to operate as a legitimate means of deterring persons who do not suffer from that Disorder. If the appellant were not suffering from the Disorder, the time already served would sufficiently deter him from similar conduct in the future. There is no reason to suppose that continuance of the term will deter the appellant any more than it has done already. To endeavour to do so appears futile.

41 Much of the difficulty in this appeal stems from the appellant's failure

to offer an apology at any stage, or otherwise to manifest contrition for or awareness of his serious wrongdoing, or to indicate appropriate acceptance of the court's authority. In the case of an offender who did what the appellant did but did not suffer from the Disorder, that would weigh heavily against a sentence as light as that which is proposed below. But given that the appellant does suffer from the Disorder, a failure to apologise loses significance given that it appears to flow from the Disorder as much as did the contempts themselves.

42 The respondent drew attention to three cases in which attacks on judges or other officers of justice were involved. Apart from the fact that there is little point in comparing sentences in a field of criminal conduct which is rarely committed, each is distinguishable since in each the criminality was greater than that of the present appellant. In *R v Herring* (Supreme Court of New South Wales, unreported, 3 October 1991) the sentence was two years on a prisoner who ran towards the judge with the intention of physically attacking him. The accused did not suffer from the appellant's personality disorder. In *Attorney-General for New South Wales v Whiley* (1993) 31 NSWLR 314 the contempt consisted in threats by a father, party to litigation concerning the custody of his son, to kill the foster parents. The father, who was sentenced to a minimum term of two years and an additional term of eighteen months, had a long history of violent and criminal behaviour, some of it while on parole. In *Rich v Attorney-General for Victoria* [1999] VSCA 14, the defendant in a criminal trial threatened the prosecutor with murder and was sentenced to twelve months' imprisonment. If there is to be a comparison of sentences there are English cases in which sentences comparable to what is proposed below have been given: an accused who threw an egg at Malins V-C served five months; a litigant who threw tomatoes at the Court of Appeal was gaoled for six weeks; a physical attack on Brabin J, in which his wig and glasses were knocked off, led to a sentence of nine months (see *C J Miller, Contempt of Court*, p 104).

43 In my judgment the term of imprisonment which the appellant has served by the date of the publication of these reasons is adequate punishment for the two contempts.

Admission of Fresh Evidence

44 Counsel for the appellant moved on a notice of motion and an affidavit of the appellant's solicitor, Philip John Weldon, of 6 January 2000 to have the Court admit further evidence pursuant to s 75A(7) and (8) of the *Supreme Court Act*. This evidence consisted of affidavits of Wayne Ashley Merton, the appellant's wife, Laraine Joy Wilson, Dr Valentine Kirychenko, the appellant's general practitioner since about 1980, Dr Graham Alfred William Robinson and Graeme Henry Smith and a medical report of Dr McMurdo. In his affidavit, Mr Weldon deposed that in his view the appellant lacked the skills and appropriate legal knowledge to properly meet the proceedings brought against him, and in particular, address by way of evidence issues of

sentence. The proceedings in the court below were therefore conducted by the appellant in a manner which failed to provide proper and relevant evidence to the court.

45 Despite the opposition of the respondent Prothonotary, the Court admitted this evidence.

46 In general, under s 75A(7) and (8) of the *Supreme Court Act* 1970, three conditions must be met before fresh evidence can be admitted:

> "(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
> (2) The evidence must be such that there must be a high degree of probability that there would be a different verdict;
> (3) The evidence must be credible.": *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160.

47 It was common ground that the first condition was not satisfied and that the third was. It was controversial whether or not the second was. The tests are general principles, or conditions applying to the generality of cases, but the statutory discretion is capable of being exercised even if the tests are not all satisfied although such an exercise might only occur in exceptional circumstances: *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140. The circumstances of the present case are extremely unusual.

48 In opposing the application to tender the new evidence, the respondent first contended that the burden on the appellant was very heavy for sound reasons of policy. In particular, it was said to be necessary to ensure that the principle of finality of decision was not subverted and necessary to avoid giving encouragement to litigants to run cases at trial on one basis and, if that failed, to conduct the appeal on another basis with material which had been earlier kept up the sleeve. It was submitted that to admit the evidence would be to send a wrong signal and encourage tactics of that kind. However, the respondent disavowed any submission that the appellant's conduct was to be explained in that way. The discretion must be exercised from case to case in the particular circumstances of each case, and it will be up to each court to which an application is made to assess whether an impermissible attempt to use the trial as a dummy run is being made. The decision of this Court to admit the evidence should in no way be regarded as a precedent whereunder someone appearing in person on sentence can defer the calling of available evidence until the matter comes before the Court on an appeal against any sentence imposed. In the course of his reasons for judgment the trial judge, speaking of the rightness or wrongness of the complaints which the appellant had in relation to the justice system accepted "that such beliefs as he expresses are firmly held by him." There was no guile or machination about the appellant's approach. He said to the trial judge: "So far as the severity of the sentence goes, you can say what you like but I intend to pursue truth and justice wherever I am, in gaol or out of gaol." He thus left the trial judge little course to do other than he did.

49 Secondly, the respondent pointed to the absence of any affidavit from the appellant explaining why he conducted the trial as he did. This position is unsatisfactory, but the same mental state which stimulated the conduct of the appellant at the trial, including the conduct which amounted to contempts of court, appears to have led to his failure to give evidence on the appeal.

50 Thirdly, the respondent contended that there was nothing in an analogy, relied on by the appellant, between the appellant's position and that of a victim of poor legal representation. It is unnecessary to debate the merits of the analogy, either in general or in the circumstances of the case. The appellant, unrepresented at trial, failed to call evidence of some materiality on subjective factors, because he was fixated on a contention, repeatedly put to the trial judge, and which he had earlier put unsuccessfully to Hidden J, to this court, to the High Court and to Sully J, that he was entitled to trial by jury. For that reason he did not turn his mind, despite suggestions by the trial judge, to the importance of calling evidence of the type his advisers on appeal eventually prepared, beyond suddenly calling an almost useless witness who scarcely knew him.

51 The respondent suggested that the evidence in relation to the Obsessive Compulsive Personality Disorder was immaterial because the obsessive nature of the appellant would have been plainly obvious to the trial judge. The suggestion lacks force. Inferences that might be drawn from observing the appellant's behaviour at the trial are inherently less significant than the conclusions asserted by a qualified medical expert backed by the evidence of primary fact supporting that conclusion from witnesses who had known the appellant for many years.

52 The interests of justice thus favoured the admission of the evidence in a very unusual case.

Orders

53 I would make the following orders:

1. Appeal allowed.
2. Quash the sentences imposed on the appellant on 9 November 1999.
3. In lieu thereof sentence the appellant on each count to a fixed term of imprisonment of 3 months and 20 days to commence from 9 November 1999 to be served concurrently.
4. Order that the appellant be released on the making of these

orders.

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