EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT CHRISTCHURCH

CRI-2016-009-000661
[2017] NZDC 25303

IN THE MATTER OF **A FINDING OF CONTEMPT AGAINST [HENRY BOOTH]**

Hearing: 7 November 2017

D Matthews for the Crown
M Cole for the Defendant

Judgment: 7 November 2017

NOTES OF JUDGE G S MACASKILL ON SENTENCING FOR CONTEMPT OF COURT

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[1] Mr [Booth], you were brought before the Court last week to give evidence in a criminal jury trial and you refused to be sworn or make an affirmation and to give evidence. You had the opportunity to obtain legal advice and took that opportunity. When you came back before the Court again, you again refused to give evidence. It was clear to me that you had made up your mind about that and there was no point in adjourning the matter further to enable you to reflect on the situation.

[2] The reality is that you are a sentenced prisoner, so that being held in custody really would have very little, if any, impact upon you. It was accepted that you should be dealt with under the contempt of Court provision, s 165. It was also agreed by counsel that it was appropriate to adjourn the matter until after the jury's verdict, in case that impacted upon the outcome of the contempt proceeding against you.

[3] You have again had the opportunity to take legal advice and Ms Cole has appeared as your counsel today and has filed submissions and produced authorities.

[4] Mr Matthews very properly accepts that it is unclear as to what the outcome of the jury trial might have been had you given evidence. The key issue in that case was whether or not the Crown had proved that the defendant was the offender with respect to four aggravated robberies. The other offender had been identified by you and by your partner. Neither you nor your partner had been able to identify the defendant from a photo montage. That procedure was carried out within a few days of the robberies.

[5] In my judgment, the outcome of the trial can be explained by this lack of evidence as to identity emanating from you and from your partner. Whether or not you had given evidence, the Crown would not have been able to cross that hurdle. The Crown did have a strong circumstantial case, but the jury was evidently not persuaded by that.

[6] So, your refusal to give evidence is unlikely, to have had a significant impact on the outcome. But it is possible, as Mr Matthews suggests, that if you had given the same sort of description of the offender as your partner did, or even a slightly better description, it might have raised the prospect of guilty verdicts.

[7] I take into account that you were one of the complainants and so it is not as if you had deprived anyone, other than your partner, of the satisfaction of seeing the offender against two of you being held to account.

[8] I also take into account that in refusing to give evidence you were entirely respectful. While you did not disclose the reason at the time it was reasonably clear that it was likely to have to do with your status as a serving prisoner. Your counsel now advises that the reason that you refused to give evidence was the risk that you might have some violence administered to you by other prisoners. It was no way suggested that the defendant had anything to do at all with your refusal to give evidence. I am satisfied that you had cause to fear retribution from other prisoners

because the experience of the Court is that is impossible for the prison authorities to prevent these events from happening. That is the sad truth.

[9] One of the decisions referred to me was a judgment of Priestly J in *Pandey v Police*[1]. In that case, at paragraph 25, His Honour said:

> Looking at the terms of s 206(c), there can be no serious argument that the appellant deliberately disobeyed an order of direction of the Court by refusing to take the oath. The mens rea element of "wilfully" was clearly present. There is no direct case law on the actus reus component of "without lawful excuse". However, Ms Sargeson was not able to point to any lawful excuse which might assist in the circumstances of this case. Fear of reprisal, threatened social isolation, misguided but understandable feelings of family or whānau loyalty, may all operate, as I am sure they did in this case. But such matters cannot be regarded as a "lawful excuse". Witnesses who, for whatever reason, take the line of least resistance when faced with hostility or threats are unwittingly or otherwise contributing to perversions of the course of justice.

[10] Those are, understandably, stern words, but it seems to me that the Court is justified in taking a more lenient approach in your case for the reasons I have already mentioned. And, again, I do not think that you could be fairly described as taking the line of least resistance because you are facing a serious threat from violence. In the end, while you might be thought of as possibly contributing to a perversion of the course of justice, in the sense that the jury did not bring a verdict favourable to the Crown, I think that would contain an element of hyperbole on the facts of this particular case.

[11] The other factor to be considered is that you are apologetic for the steps that you had to take. That is not to say you would have done anything different. You recognise, as I understand it, the importance of the Crown being able to call witnesses to give evidence and also that that importance extends to the defence's ability to call witnesses and to have them give evidence. However, I think there are strong mitigating factors in this case.

[12] Overall, taking into account all of these factors, I think that your refusal to give evidence must be marked by a significant outcome, but not one that is out of proportion to the seriousness of the case.

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[1] *Pandey v Police* High Court New Plymouth CRI-2010-433-26, 15 December 2010

[13] You are sentenced to one month imprisonment, to be served cumulatively upon the sentences to which you are currently subject.

G S MacAskill
District Court Judge