SUPPRESSION ORDERS EXIST IN RELATION TO ASPECTS OF THIS JUDGMENT PURSUANT TO S 205 CRIMINAL PROCEDURE ACT 2011: SEE PARAGRAPH [42].
http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360354.html

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-404-000318
[2019] NZHC 308

THE QUEEN

v

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Hearing: 1 March 2019

Appearances: Aaron Perkins QC for the Defendant

Judgment: 1 March 2019

[ORAL] JUDGMENT OF MOORE J

Introduction

[1] On 3 October 2018 I committed the defendant for contempt of Court. I now address the disposition of that matter.

[2] The defendant also makes an application for name suppression.

[3] By way of background and context, the defendant provided the Court with interpretation services during the trial of Alosio Taimo.[1] I was the presiding Judge. She did so only in respect of one Crown witness. The trial occupied 10 weeks. Mr Taimo faced 106 sexual charges relating to 18 complainants. On 24 October 2018 a jury found him guilty of 95 charges relating to all but one of the complainants. On 22 February 2019, I sentenced Mr Taimo to a total of 22 years' imprisonment.[2]

The events of 3 October 2018

[4] The conduct giving rise to the defendant's contempt occurred on 3 October 2018. The trial was then in its seventh week. All the complainants had given evidence. Mr Taimo was in the course of giving evidence-in-chief.

[5] At 2:15 pm that day I returned to Court after the lunchtime adjournment. The Registrar passed me a note. It was from two of the jurors and was timed at 1400 hours. I shall refer to the jurors as Juror A and Juror B. Their note read as follows:

> "Myself and [Juror B] were outside smoking and were approached by the [lady] that was providing translation for trial. She engaged in small talk and said, 'I know I'm not supposed to talk to you. I was unsure at the start but now I think the truth is coming out, I think he is telling the truth.' She also said something along the lines of, 'Makes you wonder if the real culprit is still out there.' She then left to go and get us muffins she had made."

[6] Juror B added the following:

> "After Juror A left myself and [S] were sitting outside and she had mentioned that she shouldn't be talking to us and that it could get herself and us in trouble."

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1 *R v Taimo* CRI-2016-085-002938.
2 *R v Taimo* [2019] NZHC 234.

[7] It is unclear whether the "[S]" referred to in the note was the defendant or one of the other jurors.

[8] The foreman signed the note. But he also added this comment:

> "This frustrates me as our Jury have tried our best to be professional during this long trial."

[9] I convened the Court in the absence of the jury to discuss these developments with counsel. As these progressed, a further note from Juror A was passed to me. It was timed 1420 hours. It read:

> "Just to confirm, Juror B and myself do not feel that we have been swayed or persuaded on our opinions on the case."

[10] The foreman signed the note adding:

> "This includes all the jurors."

[11] I resumed my discussions with counsel. Set out below are my own observations as well as those of counsels':

(a) While Mr Taimo was giving his evidence-in-chief, I noticed the defendant in the public gallery. I recognised her as the interpreter who had interpreted the evidence of one of the Crown's witnesses. I was a little surprised and puzzled by her re-appearance because I understood she had completed her duties as interpreter.

(b) Counsel for the Crown, Mr Rhodes, reported that he had earlier seen the defendant around the Court. She had engaged him in conversation regarding Mr Taimo's credibility; specifically, she said that she had read his "aura" and become convinced of his guilt. Mr Rhodes also reported seeing her approach the jury with a box of muffins. He shared his concerns with Mr Le'au'anae, for the defendant. But for the superseding events which gave rise to these proceedings, he had intended to bring the matter to my attention.

(c) Mr Le'au'anae reported that the defendant had also approached him. She asked him if she could go down to the cells and bless Mr Taimo. Unsurprisingly this request was refused. Mr Le'au'anae advised me he had known the defendant for some time. He said he was bewildered and very surprised by her behaviour which he described as being quite out of character.

[12] Counsel and I agreed that the defendant's conduct was entirely inappropriate. Despite that, we formed the collective view that the jury could still apply an independent and fair mind to its deliberations. We noted that it had already communicated its frustration at the defendant's intrusion and expressed a confidence and determination to ignore the defendant's comments and proceed to verdict.

[13] I was advised that the defendant was still in the Court precincts. I asked the Registry to obtain a lawyer for her. Mr Perkins QC was engaged and arrived in short order. I now record the Court's gratitude to him for his timely involvement and his wise and conscientious representation of the defendant. The defendant was brought into Court. I asked her to tell me her name and confirm whether she had approached members of the jury and engaged them in conversation about Mr Taimo. The defendant responded by saying she was simply being friendly; all she told the jurors was that she wondered who the culprit was. I informed the defendant that I had received a conflicting account from those members of the jury she had engaged with. I advised her I was committing her for contempt. I directed that she surrender herself into the custody of the Court and asked Mr Perkins to accompany her downstairs to the cells where she remained for the rest of the day.

[14] I then retired to consider an appropriate jury direction. On my return to Court, I discussed with counsel what I proposed to tell the jury. Both approved of the proposed direction. I brought the jury back into Court and delivered the direction. I did not discharge the jury. Mr Taimo resumed giving evidence.

[15] At the end of the day, in the absence of the jury, I reconvened to determine how to proceed in respect of the defendant. Mr Perkins informed me that the defendant understood the seriousness of her situation. He observed that she was visibly upset

and greatly distressed. On the question of whether she should be admitted to bail he advised me that the defendant was responsible for the care of her children, one of whom suffers from Downs Syndrome and lung disease.

[16] I remanded the defendant on bail until 11 October 2018. I granted her interim name suppression and imposed conditions including an exclusion zone around the central business district, including the precincts of the District Court and the High Court.

Mental health issues

[17] On 11 October 2018 Mr Perkins reported that the defendant had been assessed by Mr Hutchinson, the Mason Clinic's Forensic Court Liaison Nurse. Mr Hutchinson questionedthe defendant's fitness to stand trial and recommended a formal screening report. Mr Perkins supported this suggestion. I thus ordered that a forensic report be prepared pursuant to s 38(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 ("the Act"), for the purposes of ascertaining whether the formal processes under that Act should be engaged.

[18] A report from Dr Duggal was received on 16 November 2018. He found that the defendant suffered from a psychotic illness, but was not unfit to stand trial. He opined that at the time of the offending the defendant was experiencing a "psychiatric disorder not otherwise specified". His report also concluded that the defendant was capable of understanding the charges she faced, her relevant plea options and the consequences of pleading not guilty. Further, she did not appear to incorporate the Court into any of her delusionary beliefs. Dr Duggal took the view that further evaluation of the defendant's mental condition was necessary. He referred her to a community mental health service.

[19] On 22 November 2018, I ordered that a further report pursuant to s 38(1) of the Act be prepared for the purpose of assisting me as to what sentence options were available and appropriate. I directed this report was to cover the following matters:

(a) the extent to whichthe defendant's mental health contributed to the index offending;

(b) what treatment or interventions have been undertaken in respect of the defendant's mental health and the extent to which these have worked;

(c) the defendant's long-term prognosis;

(d) any observations as to the type and length of sentence which might be imposed; and

(e) any other matters the report-writer regards as useful.

[20] The defendant failed to attend her scheduled appointment. The reasons for this are unclear, but I am satisfied they came about through inadvertence. As a consequence, the report-writer, Dr Heed, was obliged to complete his report without the defendant's input.

[21] Following receipt of Dr Heed's report I convened a telephone conference with Mr Perkins. My primary purpose in doing so was to determine whether a further adjournment of this matter was necessary in order for Dr Heed to examine the defendant. Mr Perkins did not seek an adjournment for that purpose. He advised his client was anxious to resolve matters as soon as possible. Mr Perkins submitted that the Court had sufficient information before it as to the state of his client's mental health and could proceed to disposition.

[22] Taking into account these matters, and bearing in mind that contempt proceedings should ordinarily be resolved swiftly, I agreed with Mr Perkins. That is how the defendant comes before me today.

Disposition

[23] There is an adequate evidential foundation upon which the committal for contempt was made. That is acknowledged by Mr Perkins. He recognises that, on its face, the defendant's conduct constitutes a serious case of contempt.

[24] When determining whether a person is in contempt of Court, a Judge is entitled to use a summary procedure that is neither fundamentally civil or criminal.[3] There is no formal charge or plea. That is because contempt allegations are meant to be dealt with quickly. However, a number of minimum standards must apply. These were helpfully listed by Lang J in *McAllister v Solicitor-General*:[4]

(a) the Judge must identify the act giving rise to the alleged contempt with sufficient particularity to ensure that the person understands what is alleged;

(b) the person must be given the opportunity to take legal advice so that he or she understands the process to be followed and the range of possible outcomes;

(c) the Judge must ensure that the counsel engaged to represent the person also understands the nature of the allegations; and

(d) where a sentence of imprisonment is a reasonable possibility, the Judge must proceed on a reliable factual foundation.

[25] Although Mr Perkins advises that the defendant accepts that all these threshold standards have been met, there is no suggestion that she was not in contempt of Court. I thus proceed to determine the appropriate penalty.

Penalty

[26] The imposition of a penalty for contempt of Court is a matter for the Court's discretion, taking into account, amongst other things, the extent of the contempt and the motive of the contemnor.[5]

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3 *Siemer v Solicitor-General* [2012] NZCA 188, [2012] 3 NZLR 43 at [95]-[96].
4 *McAllister v Solicitor-General* [2013] NZHC 2217, [2013] 3 NZLR 708 at [45]-[46].
5 *Smith v Smith* [2018] NZHC 3405 at [5].

[27] As to this, Mr Perkins sets out a number of mitigating factors which he says I should take into account in setting the appropriate penalty. As a consequence he submits a sentence of imprisonment is neither necessary or appropriate.

[28] From the outset, I accept that the defendant's contempt was committed against the background of serious mental health issues. These appear to have been acute but I am satisfied to some extent they still linger. The defendant has been working as an interpreter for the Courts since 2013 without incident. She is now aged 56. She has never offended previously. My understanding of the various psychiatric reports is that, at the relevant time, she was labouring under a distorted understanding of social interactions and the integrity of the criminal justice system. In respect of the latter she has some experience through her vocational history as a Court interpreter over four years. This is evidenced by the fact that she acknowledged to Jurors A and B she should not be speaking to them. The defendant's decision to do so despite this, having just acknowledged that it would be wrong, is inexplicable unless viewed against the background I have just described. Offending of this sort on its face would inevitably attract a sentence of imprisonment. That the defendant would knowingly take on such a risk is otherwise impossible to rationalise. I am thus of the view that the bizarre nature of the defendant's contempt confirms the psychiatric diagnosis. It is consistent also with Mr Le'au'anae's comments to me at the time; namely, that having known her for a number of years, her conduct was most out of character. In these circumstances, I am easily persuaded that the defendant was suffering from some form of acute psychotic episode at the time of the offending which robbed her of her understanding and judgement.

[29] This conclusion is further supported by her own position in relation to the contempt. The defendant says she recalls some aspects of what the jurors reported. Those parts she does not recall, she does not dispute. By and large, she accepts the account of events as set out above, but struggles to articulate why she did what she did. This, along with the fact that the defendant does not clearly remember what she did, further reinforces my view that she was clearly not mentally well when she committed the contempt.

[30] Adding to this bizarre presentation Mr Perkins also points out that apart from the discharge of her professional duties, the defendant was completely unconnected to the trial. She knows none of the parties. She has no motive to interfere as she did.

[31] Balanced against these considerations, however, is the potential impact of her contempt. On its face this was a very serious case of contempt. Wilfully attempting to influence or interfere with jurors in the discharge of their functions is conduct which strikes at the heart of our justice system. However, in this case, the sheer brazenness of the defendant's contempt reflects its true nature. This was a grossly inept, overt and unsophisticated attempt to engage the jury. It was not accompanied by threats, bribes, sinister motive or other insidious means. It was not accompanied by any rational, improper motive. On any analysis, absent psychiatric influences, the defendant's conduct is simply inexplicable. Why would a mature and apparently intelligent woman with no previous convictions and with no connection to the case or its parties, engage in such irresponsible and out of character conduct?

[32] I also regard it as relevant that even if it was the defendant's intention to influence the jury, it was inevitably futile; it could never have succeeded. The clumsy volunteering of her opinions was never going to influence the jury as the trial approached its conclusion. The jurors' notes, conveyed to me within such a short time of the events, plainly demonstrate that.

[33] It follows I conclude, despite how it initially appeared, the defendant's contempt is of limited criminality. In assessing the appropriate penalty, I also have regard to the following three matters:

(a) The defendant spent much of 3 October 2018 in custody in the cells beneath this Court. This caused her considerable distress. I consider this distress would have been elevated by her psychotic state resulting in a reduced ability to process and understand what was happening to her and why. I am satisfied this confinement would have served to reinforce the seriousness of her predicament.

(b) Since 3 October, the defendant has been subject to bail conditions. This is a period which covers almost five months.

(c) The defendant has already suffered severe financial consequences for her contempt. She accepts she will no longer be able to provide interpretation services for this Court, resulting in a substantial loss in income. Further, her prospects of being able to continue interpreting in the lower Courts hang in the balance. The defendant is the sole income earner for her family. She supports three children and her husband who apparently does not work. As noted, one of her children suffers from Downs Syndrome and chronic lung disease.

[34] In these circumstances, I have decided not to impose a penalty. Imprisonment would not accurately reflect the criminality of the defendant's conduct although as I have already noted absent the unique features of this case, imprisonment will almost have been inevitable. Similarly, a community-based sentence would be disproportionate and would also unfairly disadvantage her family. A fine would be unduly punitive given her parlous financial circumstances and her role as the family's sole bread winner. My finding of contempt is sufficient penalty.

Name suppression

[35] Mr Perkins seeks continued name suppression for the defendant. In order to grant such an order, I must first be satisfied that there is an appreciable risk that publication would cause extreme hardship to her, or someone connected to her.[6] If I am so satisfied, I must then weigh her interests against those of the public, taking into account the principles of open justice.[7]

[36] Extreme hardship presents as a high hurdle.[8] It must involve something beyond the ordinary consequences of conviction.[9] But the assessment cannot take

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6 Criminal Procedure Act 2011, s 200(1) and (2)(a); see also *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9]; *Robertson v Police* [2015] NZCA 7 at [40]-[42]; and *H v R* [2015] NZHC 1501 at [17]-[18].

7 *Fagan v Serious Fraud Office* at [9]; *Robertson v Police* at [40]-[42]

8 *Robertson v Police* at [48].

9 At [49].

place in a vacuum; its outcome will depend on the unique factual and personal circumstances surrounding each application.[10]

[37] Mr Perkins advances the application on the basis of financial and psychiatric considerations. As I have mentioned, the financial well-being of the defendant and her family has already been dealt a significant blow through her inability to continue working in the Courts. Mr Perkins submits that if the defendant's name was published, not only would her ability to provide interpretation services in the justice sector be compromised but so too would her ability to access work in other fields. There is merit in that submission. The nature of the defendant's offending is limited. While the index offending was serious, it was limited to potentially influencing fact-finders in a unique context. The same risk does not extend to other judicial processes or other contexts in which she may offer her services. Publication of her name is likely to result in a complete cessation of instructions despite the limited, if not unique, nature of the circumstances of this case.

[38] Mr Perkins also points to the hardship that will likely be suffered by the defendant's son. Given his condition, it is expected that he will have difficulty processing the information about his mother's committal for contempt of Court which, despite name suppression to date, has attracted considerable media attention.

[39] The Courts have often held significant economic consequences to be insufficient to reach the threshold of extreme hardship. That is because financial loss is often a direct consequence of offending and an ordinary consequence of publication.[11] However, I consider that these are unique circumstances justifying the exceptionality label where the threshold for extreme hardship is met. That is for the following three reasons:

(a) First, I have discharged the defendant without further penalty. That is because I assess her overall criminality as low. It follows that grave economic hardship brought about by such offending could not reasonably be said to be an ordinary consequence of conviction.

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10 *RM v Police* [2012] NZHC 2080 at [43].
11 See, for example, *H v R* at [41].

(b) Secondly, there is also the mental health aspect. As I have mentioned, I consider that the defendant's contempt was committed in the context of a psychotic episode. The nature of a defendant's culpability, if influenced by physical or neurological disability, may mean there is no discreet need to hold her accountable to society by publishing her name.[12] In this regard I consider that there is no principled difference between offending while subject to a neurological disability and offending committed in the course of a psychotic episode.

(c) Thirdly, I am concerned that the defendant's son's condition may place him in a "special category" of vulnerability, such that he does not have the mechanisms for dealing with the burden of having his mother's name published as would usually be the case in the ordinary consequences of conviction.[13]

[40] On its own and taken in isolation any one of these factors would not have satisfied me that the threshold of extreme hardship was reached. Combined, I am satisfied they are sufficient to do so.

[41] As for the exercise of discretion, I do not consider that public interest should overrule the need to protect the defendant and her family from extreme hardship. But that statement needs to be tempered. The defendant unwittingly jeopardised a lengthy and complex criminal trial of major significance. I am satisfied she did not intend to do so and that her actions were the unfortunate result of her psychotic presentation. Until the defendant undertakes treatment there can be no confidence there will not be a repetition. In these circumstances it is unlikely she will continue to provide interpretation services to the Courts.

[42] I note that the High Court has already dispensed of her services. The lower Courts, I am told, have put her assignments on hold. I do not believe it is in the public interest to deprive the Ministry of Justice ("the Ministry") of the relevant information required to make an informed decision as to the defendant's continued employment.

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12 *DP (CA418/2015) v R* [2015] NZCA 476, [2016] 2 NZLR 306 at [42].
13 *DP (CA418/2015) v R* at [24].

For that reason, I grant a tailored suppression order; publication of the defendant's name and any details which might lead to her identification are suppressed but with the condition that the relevant arm of the Ministry is provided with a copy of this decision. I am advised this is the Centralised Processing Unit. It will be for the Ministry, having regard to all the circumstances, to determine the extent to which it is prepared to engage the defendant's services as an interpreter in the future.

Conclusion

[43] The defendant would you please stand. As you will have gathered I have decided despite the apparent seriousness of what you did, that there were factors operating at the time of your offending which meant that you were severely compromised in terms of your ability to understand what you were doing or its potential consequences.

[44] I am satisfied that you have suffered enough since the events in October last year that to impose a separate penalty would be unduly harsh, not only on you but also on your family who would be innocent victims.

[45] To a very considerable extent my treatment of you has been influenced by the responsible and persuasive submissions of your lawyer, Mr Perkins. You have much to be grateful to him for.

[46] However, despite the way I have decided to deal with you I think it not only fair, but essential, to record that I share with Mr Perkins some residual concerns about you and your mental health. It is possible that the events on 3 October 2018 occurred as a consequence of a diabetic imbalance. But there is very little that the Court can do in these circumstances if there is a more organic basis to explain what you did on the day. My hands are all but tied. But the opinions of the experts, combined with my own observations and the comments of others who know you, leave me concerned that you have untreated mental health issues, whether those are founded in your diabetes or whether they are more organic in origin. I strongly recommend you, as I am confident Mr Perkins will also have, that you seek help; that you see family doctor or local health practitioner to point you in the right direction because, in my view, it is

essential that these issues are addressed. It has already cost you dearly. You have effectively lost your job.

[47] I am confident that you have the capacity to turn your life around if you confront these issues. You are a good person. You have previously made positive contributions to our society. You have never been in trouble before. This behaviour on any analysis was bizarre and inexplicable. And so I am confident that you can continue to make positive contributions to our society but you must make efforts to ensure that your health is restored. And that can only be achieved if you have the insight to see the problem and the commitment to address it.

[48] You are discharged without penalty and I have granted you name suppression subject to conditions.

[49] You may stand down and leave the Court.

Moore J

Solicitor:
Mr Perkins QC, Auckland