IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2013-404-203
[2013] NZHC 2217

BETWEEN	DAVID JAMES MCALLISTER Appellant
AND	SOLICITOR-GENERAL Respondent

Hearing: 12 August 2013

Appearances: D P H Jones QC and K Venning for Appellant
M Downs and A R van Echten for Respondent

Judgment: 29 August 2013

JUDGMENT OF LANG J

This judgment was delivered by me on 29 August 2013 at 4 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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Introduction

[1] On 10 July 2013, Mr McAllister was selected to serve on a jury that was to hear a criminal case in the Auckland District Court. The case was to be presided over by Judge Dawson. Mr McAllister refused to take the oath or affirmation required to be taken by all persons who are selected to serve on a jury, and was stood down from the jury panel. After it subsequently became apparent that it would not be possible to select a juror to replace him, Mr McAllister relented and told the Judge he could serve on the jury after all. The Judge declined Mr McAllister's offer, and aborted the trial.

[2] The following day the Judge held Mr McAllister to be in contempt for his acts, and sentenced him to ten days imprisonment.

[3] Mr McAllister appeals to this court[1] against the Judge's determination that he was in contempt of court. He also contends that the penalty the Judge imposed was manifestly excessive.

Issues on appeal

[4] Counsel for Mr McAllister advances three issues on appeal. They are:

(i) Mr McAllister's acts did not amount to contempt in terms of s 365(1) of the Criminal Procedure Act 2011;

(ii) The procedure the Judge adopted was in breach of the principles of natural justice;

(iii) Viewed in the light of the information that is now available, the sentence was manifestly excessive.

[5] In order to properly understand these issues, it is necessary to set out in greater detail the events that unfolded between 8 and 11 July 2013.

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[1] Under ss 260 and 261(b) of the Criminal Procedure Act 2011.

The events leading up to the hearing on 11 July 2013

[6] On Monday 8 July 2013, Mr McAllister arrived at the Auckland District Court in answer to a summons requiring him to attend court to undertake jury service. He was not required for jury service that day, but was asked to return the following day at 9.45 am.

[7] A three week trial was starting on Tuesday 9 July, and Mr McAllister was initially selected to serve on the jury in that case. The presiding Judge excused him from serving, however, because of the effect that such a long trial would have on Mr McAllister's livelihood as an engineer. Before excusing Mr McAllister, the Judge asked him whether he would be able to serve on a jury for a shorter period of time. Mr McAllister confirmed that he was willing and able to do so. Mr McAllister also told the jury attendant that he would be available to serve on shorter trials later in the week.

[8] Before members of the jury pool were dismissed that afternoon, the jury attendant held a further ballot to select 30 persons who would be required to return to Court the following day. Mr McAllister was one of those persons.

[9] Mr McAllister duly returned to the Court the next morning, and went with other members of the jury pool to a courtroom where Judge Dawson was to empanel a jury to try a criminal case. Mr McAllister was the ninth or tenth juror balloted to serve on that jury. When his name was called, Mr McAllister approached the Judge and sought to be excused from serving on the jury as follows:

> **MR MCALLISTER:**
>
> Afternoon. I wish to be excused please. (inaudible) self-employed and a number of contracts have to be signed off (inaudible).
>
> **THE COURT:**
>
> That's not a basis for being excused, Mr McAllister. Just take a seat in the jury panel please.

[10] After the remaining jurors had been selected, the jury were asked to stand and take the required oath or affirmation that they would try the case to the best of their ability, and give their verdict according to the evidence. When the Registrar sought

to obtain Mr McAllister's assent to the oath, the transcript of the hearing reveals that the following exchange ensued:

REGISTRAR:

James David McAllister.

MR McALLISTER:

I think I am under duress, but I don't know if I can be impartial.

THE COURT:

Can you come forward, please; I need to speak to you. Mr McAllister, why have you decided you cannot be impartial.

MR McALLISTER: Ah, I tried to explain before there are a number of reasons why I don't think I should be here.

THE COURT

That is nothing to do with whether really you can be impartial or not

MR McALLISTER:

No, but because I don't feel I should be here, it's very frustrating.

THE COURT:

That is nothing to do with whether you are impartial or not.

MR McALLISTER:

I still don't think I can give an impartial response.

THE COURT:

You cannot give a just and fair verdict.

MR McALLISTER:

(No audible answer 13:00:26).

THE COURT:

You are very close to being in contempt of Court, do you realise that?

MR McALLISTER:

I –

THE COURT:

I am considering whether I need to stand you down and see a lawyer to get legal advice.

MR McALLISTER:

(Inaudible) …not intentionally…

THE COURT:

I do not see what you said to me before, means you cannot give an impartial verdict.

MR McALLISTER:

(Inaudible)…that I am here under duress.

THE COURT:

You are not here under duress, Mr McAllister. No one has a gun to your head. You are a citizen of this country. You have duties as a citizen. There are other people here who do not find it convenient to be here either but nevertheless they are serving.

MR McALLISTER:

Sir, I am not (inaudible) It's sort of not entirely for me that I find it inconvenient, but it's for all the sub-contractors and other people that can't continue their work because I'm …

THE COURT:

Everybody finds it inconvenient to be on a jury. Mr McAllister, you stand down and wait at the back of the Court. Do not leave the Court because I am going to consider whether or not to charge you with contempt. Stand down, please, wait at the back.

[11] Mr McAllister then went to the rear of the courtroom, and the Judge directed the Registrar to draw the name of a replacement juror from the ballot box. At that point the Registrar advised the Judge that there were no more names left in the ballot box. The Judge then saw counsel in chambers to discuss what should occur.

[12] Whilst the Judge and counsel were out of the courtroom, Mr McAllister advised the jury attendant that he wanted to speak to the Judge. When the Judge and counsel returned, the following exchange occurred:

THE COURT:

Mr McAllister, I understand you wanted to speak to me.

MR McALLISTER:

Yeah.

THE COURT:

If you come forward up the Court please, up to here. Yes, Mr McAllister?

MR McALLISTER:

My aim is not to create a mis-trial, but if there is no other jurors available then I can, simply … the reasons put forward…

THE COURT:

You told me you could not be impartial, are you saying you now can be impartial?

MR McALLISTER:

The main reason is because, ah –

THE COURT:

Yes or no, Mr McAllister, I'm asking you a straight forward question.

MR McALLISTER:

I can be, yes.

THE COURT:

Just wait at the back of the Court please. All right, regrettably I have come to the conclusion that it is not possible to proceed with the trial today because we don't have enough jurors to obtain 12 jurors to start the trial with. I particularly apologise to those people who have made themselves available. The trial will not commence and a new jury panel will be empanelled tomorrow morning. The trial will then begin. Thank you, we are adjourned.

[13] The members of the jury pool were then dismissed for the day. They were required to return the next day, however, so that a new jury could be selected to try the case that Judge Dawson had been forced to adjourn.

[14] On the morning of 11 July 2013, the jury pool (including Mr McAllister) was taken back to Judge Dawson's courtroom. A new jury was then selected. Whilst the jury were selecting their foreperson, the Judge addressed Mr McAllister as follows:

[1] Would James David McAllister please come forward to the body of the Court on this side please? You Mr McAllister I am pointing to. Just stop there please.

[2] Mr McAllister I have given consideration to your behaviour yesterday. I am of the view that on two occasions your behaviour amounted to contempt of Court. You are remanded in custody. I will arrange a duty

> solicitor to see you and you will be brought before the Court later today. Stand down in custody please.

[15] The Judge subsequently asked the duty solicitor to be brought to his chambers, and he spoke to her there in the presence of counsel engaged in the trial. He advised the duty solicitor of the circumstances giving rise to the alleged acts of contempt, and asked her to provide Mr McAllister with legal advice regarding his position.

[16] Mr McAllister remained in the courthouse cells for the remainder of the day. During that time he received legal advice from the duty solicitor to whom the Judge had earlier spoken. He was also able to instruct Mr David Jones QC to act on his behalf. Mr Jones travelled to the Court late in the afternoon, and spoke to Mr McAllister in the cells.

The hearing on 11 July 2013

[17] The Judge called Mr McAllister back to the courtroom at approximately 4.50 pm. Mr Jones advised the Judge he had been instructed to act for Mr McAllister, and the duty solicitor obtained leave to withdraw. Mr Jones then made submissions to the Judge about the events that had led to Mr McAllister declining to take the oath the previous day.

[18] In essence, counsel for Mr McAllister explained that Mr McAllister's refusal to take the oath had been prompted by his concern about work commitments he had made for the afternoon of 10 July and later in the week. He had made those commitments in the mistaken belief that he would not be required for jury service from 10 July onwards. Mr McAllister had realised after being selected as a juror that he would not be able to meet those commitments if he was required to serve on a jury for the balance of the week.

[19] The Judge pointed out that this was a different explanation to that which Mr McAllister had given the previous day. He also observed that Mr McAllister had said that he would not be able to deliver a fair and just decision as a juror, and that he had no justification for saying that.

[20] At the conclusion of the submissions by Mr McAllister's counsel, the Judge delivered an oral decision in which he found Mr McAllister guilty of contempt. He then sentenced Mr McAllister to ten days imprisonment.

The acts comprising the alleged contempt

[21] Reading the Judge's decision as a whole, it is apparent that he considered Mr McAllister to have been in contempt for two separate acts. The first of these was Mr McAllister's initial refusal to take the prescribed oath. The second was his subsequent assertion that he believed he could, in fact, act impartially as a juror. Mr McAllister made that assertion after he knew it would not be possible to ballot a replacement juror.

[22] The fact that the Judge considered Mr McAllister to have committed two separate acts of contempt is evident from the following passage of his decision:

> … in my view your refusal to take the oath or affirmation was a contempt of court and then your later saying that you could be impartial, which was a complete denial of what you had said earlier, was a further contempt of court.

The Judge's decision

[23] The Judge considered that Mr McAllister's actions "were a deliberate attempt to improperly manipulate the situation to avoid serving on the jury because [he] preferred to be at work". The Judge then said:

> … I appreciate that you have pressures in your employment, but so do many people who serve on the jury. You have notice that you are on the jury panel, you have time to put your affairs in order so that you can serve. You need to be held accountable for your behaviour and, in my view, I need to consider imposing a sentence that reflects the need for deterrence. When people are summoned to serve on juries they need to make a positive effort to try and do so, rather than make a very deliberate and negative effort to try and avoid doing so. Under section 112 District Courts Act I have the power to fine or imprison for contempt of Court. The maximum fine is up to $1000 and, in my view, that does not adequately recognise the cost of the loss of a day's trial, or reflect the need for deterrence. The Court lost a day's sitting time, which is a huge cost to the taxpayer, who funds the running of the Courts, and everybody who appears in the Court. On both charges I am therefore sentencing you to 10 days' imprisonment. In my view it is appropriate that you should not be sentenced for a period less than the anticipated length of this trial that you wrongfully tried to avoid being on the jury as it would be

> wrong for you to obtain that which you have wanted to achieve through your contempt. Stand down in custody, please.

Was the Judge entitled to conclude that Mr McAllister was in contempt?

[24] In New Zealand, the law of contempt has common law and statutory forms. This case concerns its statutory form, historically known as contempt in the face of the court. Contempt in the face of the court has been a statutory offence in New Zealand for many years, and is to be found in an array of overlapping statutes.[2] These statutory provisions leave untouched the common law branches of contempt, which include scandalising the court and breaches of the sub judice rule.[3]

[25] The acts giving rise to the alleged contempt in the present case occurred on 10 July 2013. The jurisdiction to find Mr McAllister in contempt was therefore governed by s 365 of the Criminal Procedure Act 2011, which came into force on 1 July 2013. Section 365 relevantly provides:

> **365 Contempt of court**
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> (1) This section applies if any person—
>
> (a) wilfully insults a judicial officer, or any Registrar, or any officer of the court, or any juror, or any witness, during his or her sitting or attendance in court, or in going to or returning from the court; or
>
> (b) wilfully interrupts the proceedings of a court or otherwise misbehaves in court; or
>
> (c) wilfully and without lawful excuse disobeys any order or direction of the court in the course of the hearing of any proceedings.
>
> (2) If this section applies,—
>
> (a) any constable or officer of the court, with or without the assistance of any other person, may, by order of a judicial

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2 See Judicature Act 1908, s 56C; District Courts Act 1947, s 112; Summary Proceedings Act 1957, s 206; Crimes Act 1961, s 401; Supreme Court Act 2003, s 35; and Criminal Procedure Act 2011, s 365. The Law Commission has recommended repeal of all current statutory provisions concerning contempt in the face of the court. It recommends a singular and overarching provision to be contained in a new Courts Act. This would be based on s 365 of the Criminal Procedure Act 2011: Law Commission *Review of the Judicature Act 1908: Towards a Consolidated Courts Act* (NZLC IP29, 2012) at [5.5]–[5.23].

3 See *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) and *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563 (CA) respectively.

> officer, take the person into custody and detain him or her until the rising of the court; and
>
> (b) the judicial officer may, if he or she thinks fit, sentence the person to—
>
> (i) imprisonment for a period not exceeding 3 months; or
>
> (ii) a fine not exceeding $1,000 for each offence.
>
> …

[26] Consideration of conduct that may amount to contempt under s 365(1) and its statutory predecessors has been limited. At common law, jurors have been held to be in contempt of court in England for refusing to take the oath.[4] However, there are no reported cases in New Zealand where jurors have been held in contempt at common law or otherwise.

[27] In a case concerning s 206 of the Summary Proceedings Act 1957, which mirrored s 365(1), Gendall J observed:[5]

> The sole purpose of proceedings for contempt is to give the Courts the power effectively to protect the rights of the public so as to ensure that the administration of justice is not obstructed or prevented. The purpose of the law of contempt is not to protect Judges but to protect the public in the due and proper administration of justice. Those who strike at it strike at the foundation of society. …

[28] The New Zealand authorities have taken a different approach to those in England. The English Court of Appeal has held that the conduct giving rise to the alleged contempt must not only be deliberate or wilful, but must also be committed with the intent of interrupting the proceedings of the court.[6] The courts in New Zealand do not appear to have imposed this requirement.

[29] The approach taken in *Pandey v Police*[7] illustrates this. In that case, Priestley J determined an appeal from a finding that the refusal by a witness to take the oath

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4 "Woman Refused Jury Service" *The Times* (London, England, 1 June); and *Griesley's Case* (1588) 8 Co Rep 38A, 77 ER 530.

5 *Greer v Police* HC Palmerston North AP53/97, 17 October 1997.

6 *Bodden v Metropolitan Police Commissioner* [1990] 2 QB 397 (CA) at 405.

7 *Pandey v Police* HC New Plymouth CRI-2010-433-26, 15 December 2010.

was an act of contempt in terms of s 206(c) of the Summary Proceedings Act 1957. He observed:[8]

> Looking at the terms of s 206(c), there can be no serious argument that the appellant deliberately disobeyed an order or 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, [counsel] 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 whanau 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.

[30] I take the law in New Zealand to be that a person will be in contempt for the purposes of s 365(1)(b) and (c) if he or she deliberately interrupts a court proceeding, or deliberately disobeys an order or direction of the court without lawful excuse. Once a person has been found to be in contempt, the presiding judge may direct that he or she is held in custody for the balance of the sitting day. In addition, the judge may impose a fine of up to $1000 or sentence the person to a maximum of three months imprisonment.

The first allegation: refusal to take the oath

[31] I consider that Mr McAllister's refusal to take the oath potentially amounted to contempt in terms of both s 365(1)(b) and (c). It could be viewed as a deliberate interruption of the criminal trial for which Mr McAllister had been selected. It could also amount to wilful disobedience of the Judge's direction that Mr McAllister was to serve as a juror. The latter would arguably be more serious than the former, because it would involve a direct challenge to the authority of the court.

Contempt under s 365(1)(b) – wilfully interrupting the criminal trial

[32] I see this issue as being relatively straightforward. There can be no dispute that Mr McAllister deliberately halted the jury selection process by refusing to take the oath. His conduct effectively stopped the trial in its tracks, because the Judge

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[8] Ibid,at [25].

was then required to attempt to select another juror to replace him. When that proved not to be possible, the trial had to be aborted. The conduct therefore clearly came within s 365(1)(b). Unlike s 365(1)(c), s 365(1)(b) does not allow the person in contempt to advance a defence based on the existence of a lawful excuse for the conduct giving rise to the contempt. This ground of appeal cannot succeed.

Contempt under s 365(1)(c) – wilfully disobeying an order or direction of the court

[33] When the Judge initially declined to excuse Mr McAllister from serving on the jury, he directed Mr McAllister to take his place in the jury box. Implicit in that direction was a requirement that Mr McAllister was to comply with the obligations imposed on all jurors during the balance of the jury selection process. All jurors are required to indicate their assent to an oath or affirmation that they will try the case to the best of their ability, and that they will give their verdicts according to the evidence. Mr McAllister therefore breached the Judge's direction when he refused to provide his assent.

[34] There can be no dispute that Mr McAllister acted wilfully, in the sense that he deliberately declined to take the oath. Counsel for Mr McAllister contends, however, that Mr McAllister's genuine concerns about work-related issues meant that he had a lawful excuse for not complying with the Judge's direction.

[35] Generally speaking, work-related pressures are rarely likely to provide a lawful excuse for not taking the oath. The performance of jury service necessarily involves a considerable degree of inconvenience, because it requires those selected as jurors to devote the bulk of each day to that role. This means that jurors will inevitably be required to be absent from home and work, and often for extended periods. This can cause particular difficulty for jurors who are self-employed, or who perform an essential role for their employers.

[36] Those summonsed for jury service are assumed, however, to have adequate notice of their impending commitment to enable them to re-organise their work and personal affairs accordingly. If they cannot, they may apply to the Registrar to be

excused from jury service, or to have their obligation to perform jury service deferred.[9]

[37] Those selected to serve on a jury can also ask the presiding Judge to excuse them from serving as jurors because they cannot be absent from home or work for the duration of the trial. Any person taking that step will need to explain to the Judge why that is the case. If the Judge does not consider the explanation justifies the juror being excused, the juror must accept the Judge's decision. He or she will then be required to take the oath or affirmation, and to serve on the jury.

[38] Concerns about work commitments can often be met, in any event, by giving jurors sufficient time once they have been empanelled to re-organise their personal and work commitments. In the present case, jurors could have used the imminent luncheon adjournment for this purpose. This would obviously have been sufficient to meet Mr McAllister's concerns, because he was able to resolve his work-related issues by the time the Judge returned from meeting with counsel in chambers.

[39] There may be exceptional cases in which a juror will be justified in refusing to take the oath even after the presiding judge has ruled that he or she should serve on the jury. I am satisfied, however, that on the information Mr McAllister gave the Judge on 10 July 2013, the present case did not fall within that category. The explanations Mr McAllister gave that day were manifestly insufficient to justify the Judge excusing him from serving on the jury. As a result, Mr McAllister had no lawful excuse for refusing to take the oath. The Judge was therefore entitled to conclude on the morning of 11 July that Mr McAllister had been in contempt of court, and to exercise his power under s 365(2)(a) to require him to be held in custody for the balance of that day.

[40] The real issue in the present case arises out of the Judge's conclusion that Mr McAllister's conduct also warranted the further sanction of a sentence of imprisonment. Counsel for Mr McAllister contends that the Judge imposed that sentence in circumstances where he denied Mr McAllister important procedural rights.

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[9] Juries Act 1981, s 15.

Did the Judge breach the principles of natural justice when he sentenced Mr McAllister to a term of imprisonment?

The arguments

[41] Counsel for Mr McAllister submits that the process the Judge adopted at the hearing on the afternoon of 11 July was fundamentally flawed, because it failed to comply with the principles of natural justice. As a result, Mr McAllister was denied his rights under s 27 of the New Zealand Bill of Rights Act 1990, which provides as follows:

> **27 Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
>
> ...

[42] Counsel for Mr McAllister contends that the procedure adopted by the Judge in the present case fell well short of the standard required to ensure compliance with the principles of natural justice. In particular, he argues that the Judge did not articulate with sufficient particularity the nature of the acts giving rise to the alleged contempt. He also submits that the Judge had already decided to find Mr McAllister in contempt well before the hearing on the afternoon of 11 July 2013. As a result, Mr McAllister's counsel was making his submissions to a fact finder with a closed mind. Thirdly, counsel submits that the Judge ought to have given him more time to properly address factual issues that the Judge obviously considered to be important. Finally, the Judge did not at any stage indicate that he was considering the possibility of imposing a sentence of imprisonment.

[43] Counsel for the respondent accepts that the Judge was required to apply the principles of natural justice. He contends, however, that the Judge adopted a procedure that paid adequate regard to these. He points out that the Judge was careful to ensure Mr McAllister had access to legal advice at an early stage, and that this enabled him to properly understand the allegations he faced and the possible consequences of a finding of contempt. The Judge also heard submissions from Mr

McAllister's counsel, and took these into account before finding that Mr McAllister was in contempt.

Relevant principles

[44] Acts that potentially amount to contempt can occur in many different ways. For that reason it is not possible to definitively prescribe the procedure to be followed in determining whether a person is in contempt and, if so, the appropriate penalty to be imposed. It has been accepted, however, that in determining whether a person is in contempt the judge is entitled to use a summary procedure that is quite different to the formal process used when a person is charged with a criminal offence.[10] There is, for example, no formal charge and no formal plea. This reflects the fact that contempt allegations are generally dealt with quickly, and with a minimum of formality. This may place the judge in a difficult position, however, because he or she is required to simultaneously assume the role of complainant, witness, prosecutor and judge. The authorities make it clear that a judge determining an allegation of contempt should therefore act with considerable caution, particularly where a person's liberty may be at stake.[11]

[45] Some minimum standards must therefore apply when a judge is considering an allegation of contempt. The judge must identify the act or acts giving rise to the alleged contempt with sufficient particularity to ensure that the person understands what is being alleged.[12] The person must also be given the opportunity to take legal advice so that he or she understands, and if appropriate has input into, the process to be followed and the possible range of outcomes.[13] The judge will then need to ensure that counsel appointed or engaged to advise the person is also aware of the nature of the allegations.

[46] It is also essential, particularly where a sentence of imprisonment is a reasonable possibility, for the judge to proceed on the basis of a reliable factual platform. In many cases this will not be an issue. Where a person has abused or

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10 *Siemer v Solicitor-General* [2010] NZSC 54, [2010] 3 NZLR 767 and *Nash v Nash, Re Cobb* [1928] NZLR 495 (SC).

11 *Attorney-General v Davidson* [1925] NZLR 849 (CA) at 863.

12 *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 (PC) at 397–398.

13 *Habib v Primus Financial Services* HC Rotorua CIV-2007-463-59, 11 July 2007 at [26]–[27].

insulted the judge in the courtroom, for example, the judge will usually have observed and heard the events giving rise to the alleged contempt. The acts in question are also unlikely to be susceptible to more than one interpretation, and the offender's motivation will usually be obvious. In such cases there is unlikely to be any need for further factual material to be placed before the judge before he or she determines whether an act of contempt has been committed.

[47] In other cases, however, the physical acts giving rise to the alleged contempt may not comprise the whole of the relevant factual matrix. A finding of contempt may depend, for example, upon the judge's conclusion as to why a person has acted in a particular way. In such a case, the judge will need to ensure that the person is given an adequate opportunity to provide an explanation for his or her actions. This may include giving the person an opportunity to provide the judge with further relevant evidence before a final decision regarding the issue of contempt is made.

[48] It may not be necessary in all cases for the judge to advise the person and/or counsel of the sentence that is likely to be imposed if the contempt is established. The only available options are imprisonment or a fine. In many cases the likely outcome will also be obvious both to the person and his or her counsel. In borderline cases, however, it may be advisable for the judge to indicate a tentative view of the possible range of outcomes. This may assist the person and his or her counsel to decide whether they wish to place further material before the court by way of submission or evidence.

This case

[49] I consider the Judge provided Mr McAllister with adequate advice regarding the acts in respect of which he was liable to be held in contempt. Mr McAllister would have readily understood, in any event, that his refusal to take the oath or affirmation lay at the heart of the Judge's concern. The Judge was also careful to ensure that he advised the duty solicitor of the allegations that Mr McAllister was facing. Presumably she passed those on to Mr Jones after he was engaged by Mr McAllister on the afternoon of 11 July. Mr Jones did not seek further particulars of

the allegations once he began addressing the Judge, so he must also have been content with the information he had received.

[50] I accept that the Judge had already determined that Mr McAllister was in contempt before the commencement of the hearing on the afternoon of 11 July. This is obvious from the Judge's comments when he required Mr McAllister to be taken into custody on the morning of 11 July.[14] Given the explanations that Mr McAllister had provided the previous day, however, it is not surprising that the Judge concluded that he had deliberately refused to take the oath in circumstances where he had no lawful excuse for doing so. From the Judge's perspective, the only issue to be determined at the hearing on the afternoon of 11 July was whether Mr McAllister's conduct warranted any further sanction.

[51] I consider that the situation changed during that hearing. Counsel for Mr McAllister provided the Judge with much greater detail about Mr McAllister's earlier explanation that work commitments lay behind his refusal to take the oath. Mr McAllister had not articulated this explanation at all well the previous day. The Judge also learned of Mr McAllister's assertion that members of the jury had been told on the afternoon of 9 July that they were unlikely to be required to serve on a jury the following day, and that Mr McAllister had re-scheduled his work commitments based on that understanding.

[52] The Judge's comments during the hearing demonstrate that he was sceptical regarding the truth of both aspects of Mr McAllister's explanation. This is evident from the following exchange between the Judge and counsel for Mr McAllister:

> **MR JONES:**
>
> As far as Mr McAllister's attendance this week was concerned, he attended both on Monday and Tuesday, prepared to sit on a jury if selected. He was not so selected. It appears that when being dismissed on Tuesday afternoon the jury panel was told that there would either not be, or very unlikely to be, a trial on Wednesday, and so no preparations had been undertaken by Mr McAllister, who is self-employed, in relation to his Wednesday affairs. He considered, as indeed it seemed the rest of the jury panel did, that he would only be detained possibly for half an hour on Wednesday morning. That situation changed, as Your Honour is aware, and a trial was to proceed. Mr McAllister was called on –

[14] Set out above at [14].

THE COURT:

Well is there any evidence of that?

MR JONES:

Any evidence of what, Sir?

THE COURT:

Of him being told the trial wouldn't be proceeding on Wednesday. As far as I am concerned that trial was always going to be set on Wednesday.

MR JONES:

I have asked Mr McAllister this and he said that everybody on, the 30 in the jury panel, were told this.

THE COURT:

Then why were they brought back to Court on the Wednesday?

MR JONES:

He doesn't know. He was told they had to come back simply to sign in or to come back as far as jurors were concerned.

THE COURT:

Well he wouldn't have been –

MR JONES:

That he was told that –

THE COURT:

- Brought back to Court if there wasn't a likelihood of the trial proceeding, or a possibility of the trial proceeding.

MR JONES:

- all I can tell you, Sir, is his understanding based on what he was told by the Court staff.

THE COURT:

Which is evidence I am hearing from the bar.

MR JONES:

Well it's not evidence, Sir, with respect I am simply –

THE COURT:

No, it's not either, you're quite correct.

MR JONES:

- explaining to you what his position is.

THE COURT:

Yes.

MR JONES:

On that basis he –

THE COURT:

But there is no evidence to back it up.

MR JONES:

Sorry, Sir?

THE COURT:

But there is no evidence to back that up.

MR JONES:

Not at this stage, Sir, no, but I am sure that that can be obtained. It's been impossible to obtain in the time available, with respect.

[53] This exchange makes it clear the Judge doubted Mr McAllister's claim that he had been told on 9 July that he might not be required for jury service the following day. The Judge was also clearly concerned that counsel was providing Mr McAllister's explanation from the bar, and that there was no evidence to support it. This prompted counsel for Mr McAllister to advise the Judge, reasonably in my view, that in the very short time available it had not been possible to file any evidence.

[54] I consider the explanation tendered by Mr McAllister's counsel raised issues that needed to be considered further by the Judge. It potentially affected the ultimate issue of whether or not Mr McAllister had been in contempt. The process by which a judge determines whether a person is in contempt must necessarily be fluid. It was entirely open to the Judge to revisit his earlier conclusion based on the new information provided by Mr McAllister's counsel during the hearing. That information may have affected the Judge's initial assessment that Mr McAllister had

refused to take the oath merely because he preferred to be at work rather than serve on a jury.

[55] By this stage the Judge was also obviously considering the imposition of a custodial sentence. For that reason he needed to ensure that Mr McAllister was given an opportunity to advance important mitigating factors in a manner that did not rely upon the unsupported assertions of his counsel. There was no real urgency about the matter, because by the afternoon of 11 July the contempt proceeding was a court proceeding in its own right. It was entirely separate from the criminal trial in which Mr McAllister had initially been selected as a juror. It would have been a simple matter for the Judge to adjourn the hearing to another date so as to enable Mr McAllister to file evidence supporting his explanation.

[56] I consider the fact that Mr McAllister was not given this opportunity created the risk that the Judge would reach his decision on the basis of an unreliable factual platform. Counsel for the respondent points out that Mr McAllister did not ask the Judge to grant an adjournment so that evidence could be presented in proper form. It needs to be remembered, however, that matters moved very quickly at the hearing on 11 July 2013. In addition, counsel for Mr McAllister had only recently been instructed. Furthermore, the Judge had given no indication during the hearing that he was considering the imposition of a custodial sentence. With the benefit of hindsight, it would have been preferable for the Judge to have indicated his tentative view during the hearing. It is not at all clear that Mr McAllister's counsel appreciated that Mr McAllister was at risk of losing his liberty. Had the Judge flagged this as a realistic possibility, Mr McAllister's counsel may well have sought further time to address the Judge's obvious concerns about Mr McAllister's explanation.

[57] I consider the appropriate way in which to address this issue is for this Court to reach its own conclusion as to whether Mr McAllister was in contempt having regard to the evidence that is now available.

Was Mr McAllister in contempt of court having regard to the evidence that is now available?

[58] Counsel for Mr McAllister filed three affidavits in support of the appeal. The first of these was an affidavit by Mr McAllister. The second was by one of his work colleagues, Mr Peter Best. The third was by Ms Patricia Deacon, the member of court staff who dealt with the jury pool on 9 July 2013.

The new evidence

Mr McAllister

[59] Mr McAllister describes his attendances at court on 8, 9 and 10 July 2013. He says that on 9 July the jury attendant told members of the jury pool who were balloted to return the next day that no cases were scheduled to commence on 10 July. They were required to return to court in case a trial "fell over," and had to begin again. He recalls that the jury attendant also said that they would in all likelihood be finished by 10.30 am the next day.

[60] Mr McAllister deposes that he then arranged work commitments for the rest of the week on the assumption that he would not be required for jury service beyond 10.45 am the following day. He frankly concedes that he made these arrangements without giving sufficient thought to the possibility that he might still be required to serve on a jury later in the week.

[61] Mr McAllister also discovered when he returned to work on 9 July that his work colleagues had arranged for him to attend a site visit at a rural location on Friday 12 July 2012. This arose out of the fact that Mr McAllister is a registered engineer. He works on a part time basis for Kordia, which operates a national telecommunications network. Mr McAllister is the senior structural engineer in Kordia's networks division, and is primarily responsible for the welfare of numerous telecommunications transmission sites around the country.

[62] The site visit was to be to Wharite, a remote hilltop location near Palmerston North where Kordia operates a transmission tower. An incident had occurred at the

Wharite site the previous week, when a contractor severed a major electrical connection. Mr McAllister says this was classified as a "near miss," and until the damage was repaired there was potential risk to the safety of persons in the vicinity of the tower. He was required to supervise the repair work, which required the involvement of numerous other contractors and riggers. All of those persons needed to be on site at the same time. In all, Mr McAllister estimates that 15 to 20 people would be present at the site on 12 July.

[63] The repair work was dangerous, and needed to be carried out in good weather. The weather forecast for 12 July was promising, and this dictated the choice of date. Mr McAllister says that when his colleagues told him about the proposed site visit, he did not consider it would be a problem. He expected to be free of any jury commitments well before 12 July.

[64] Mr McAllister says he became stressed when he was sent to Judge Dawson's courtroom, because he knew that a jury was about to be selected for a trial that would last until at least the end of the week. If he was selected to serve on the jury, the repair work at Wharite would need to be postponed. This would create substantial inconvenience for all the contractors and sub-contractors who had made arrangements to be present at the site on 12 July. He says he endeavoured to explain this problem when he spoke to the Judge after refusing to take the oath or affirmation.

[65] In addition, Mr McAllister became aware that the jury trial could extend into the following week. This would create further difficulties because Mr Best, who was Kordia's network infrastructure manager, was due to be absent from work that week. Mr McAllister had agreed to assume responsibility for Mr Best's duties whilst he was away.

[66] Mr McAllister says he was pre-occupied with these issues, and therefore felt he could not honestly take the oath because he did not think he could be impartial. He accepts that he did not explain his position well when he spoke to the Judge. In particular, he acknowledges that he probably used the wrong word when he told the Judge he was at court under duress. He says, however, that he felt under significant

pressure because of the work-related issues that were troubling him. He goes on to say that he was able to think about his work commitments with greater clarity when the Judge was talking to the lawyers in chambers. During that period he found a way to juggle his work schedule so as to be able to accommodate his duties as a juror. For that reason he asked to speak to the Judge when he returned from chambers, and then told the Judge he believed he could take his place on the jury.

Mr Best

[67] Mr Best confirms Mr McAllister's evidence about the serious nature of the damage to the telecommunications tower at Wharite, and says that Mr McAllister was to play a vital role in supervising the repair work. He also confirms that it would probably have been necessary to postpone the repair work if Mr McAllister had been unable to attend. Mr Best regards Mr McAllister as a responsible and hard working employee who does not shirk from his obligations, whatever they may be. He has always found Mr McAllister to be responsible, reliable and reasonable.

Ms Deacon

[68] As noted above, Ms Deacon was the member of court staff responsible for dealing with the jury pool on 9 July 2013. She says she told those members of the pool who were required to come back the following day that there was currently no jury trial scheduled to commence the next day. She also told them that a standby panel was required to attend in case the court was required to restart a trial, or another trial was scheduled to begin. She says she also told those who were required to return that they should know what was going to happen by approximately 10.30 am the next day.

[69] Ms Deacon says that the trial for which Mr McAllister was originally selected as a juror was initially scheduled to run for three or four days, and was ultimately concluded in three days.

Decision

[70] Mr McAllister's evidence persuades me that his refusal to take the oath was motivated primarily by his concern about the consequences his role as a juror would have in respect of important work commitments that affected many other people. I therefore differ from the Judge's assessment that Mr McAllister refused to take the oath merely because he preferred to be at work rather than serving on a jury. That significantly understates the position in which Mr McAllister found himself on 10 July.

[71] Ms Deacon's evidence also confirms that Mr McAllister had a basis for his belief that he was unlikely to be required for jury service on 10 July 2013. I therefore do not share the Judge's scepticism about this aspect of Mr McAllister's explanation. As Mr McAllister now accepts, however, Ms Deacon's advice did not justify him rearranging his work commitments on the basis that he would definitely not be required for jury service for the remainder of the week.

[72] Although the new evidence significantly lessens the seriousness of Mr McAllister's conduct, it does not go so far as to lead me to conclude that he had a lawful excuse for refusing to take the oath. I do not consider Mr McAllister took that step because he genuinely believed he could not be impartial if he was selected as a juror. I consider his primary concern throughout was ensure that he was released from the jury so as to be able to honour his work commitments.

[73] Reduced to essentials, Mr McAllister's explanation contains three elements. First, he was concerned about appointments he had made for the afternoon of 10 July. He does not say, however, that any of these were of pressing importance. He could have used the luncheon adjournment to cancel or re-schedule them.

[74] Secondly, he was concerned about the possibility that it might be necessary to postpone the repairs to the Wharite telecommunications tower. That would have been unfortunate, and it would also have caused inconvenience to other people. Although the tower needed to be repaired urgently, Mr McAllister does not say that this needed to be done on 12 July. That date was only selected because of the

favourable weather forecast. As Mr Best confirms, the proposal was always weather dependent. As matters turned out, it was not possible for the repairs to be carried out on 12 July because of bad weather. The site visit on that date was therefore ultimately cancelled. I therefore take the correct position as at 10 July to be that the repair work could have been postponed, albeit with considerable inconvenience to other persons. Mr McAllister would have had ample time on 10 and 11 July to arrange for the repairs to be postponed until the following week.

[75] Thirdly, Mr McAllister was concerned that the trial might run into the following week. If that occurred, it might clash with the period during which Mr Best was to be absent from work. Two points need to be made about this issue. First, the trial was scheduled to last three to four days. Ms Deacon confirms that it was ultimately completed in three days. It was therefore a matter of speculation on Mr McAllister's part that the trial would run into the following week. More importantly, Mr Best deposes that he was not due to go overseas until Wednesday 17 July 2013. As a result, the prospect that the trial would run into the period during which Mr Best was due to be away from work must be regarded as remote.

[76] Whether considered individually or in combination, I do not consider that Mr McAllister's concerns about work-related issues can be regarded as sufficiently pressing to amount to a lawful excuse for failing to take the oath. Nor would they have justified the Judge excusing him from serving on the jury, because Mr McAllister could easily have dealt with them during luncheon or evening adjournments.

[77] Like the Judge, I am therefore satisfied that Mr McAllister did not have a lawful excuse for declining to take the oath. For that reason, and notwithstanding the evidence that is now available, I am not prepared to disturb the Judge's conclusion that Mr McAllister was in contempt when he refused to take the oath.

The second allegation: Mr McAllister's subsequent comments

[78] As noted above, this allegation is based on Mr McAllister's subsequent advice to the Judge that he had re-organised his work schedule, and could now serve

impartially on the jury. The Judge obviously viewed this as a further act of contempt.

[79] Counsel for Mr McAllister submits that, rather than being viewed as an act of contempt, Mr McAllister's offer ought to be recognised as a belated attempt to rectify the unfortunate situation he had created by refusing to take the oath.

[80] I agree with this submission, and I did not take counsel for the respondent to argue strongly against it. The Judge may have been entitled to view Mr McAllister's offer as a further act of contempt if he considered Mr McAllister was not sincere in making it. There is nothing to suggest, however, that this was the case. All of the evidence points to Mr McAllister making a genuine offer to serve on the jury because he had re-organised his work schedule. That could not amount to an act of contempt under any of the limbs of s 365(1) of the Criminal Procedure Act 2011.

[81] The appeal must accordingly succeed in relation to this allegation.

Was the sentence manifestly excessive?

[82] Viewed overall, I would characterise Mr McAllister's conduct as an ill-judged attempt to ensure that he honoured pressing and important work commitments at the expense of his civic obligation to perform jury service.

[83] Several other factors are relevant in assessing Mr McAllister's overall culpability, and the appropriateness of the sentence the Judge imposed. First, the sentence must reflect the fact that Mr McAllister committed one act of contempt rather than two separate acts as the Judge considered was the case.

[84] Secondly, Mr McAllister did not wholly disregard his jury service obligations. He was at court and available for jury selection on 8 July 2013 from 8.45 am until approximately 11.45 am. He returned to court for that purpose and for approximately the same period of time the following day. He then came back on 10 and 11 July, when the events giving rise to the contempt allegations occurred.

[85] Thirdly, Mr McAllister cannot bear the entire blame for the fact that the trial had to be aborted so that a day's hearing time was lost. He was part of a pool comprising thirty members. Assuming the Crown and defence both exhausted their peremptory challenges,[15] the Judge must have stood approximately ten persons aside because he accepted their explanations as to why they should not serve on the jury. In part, therefore, the problem arose because the jury pool was not large enough to accommodate the challenge and excusal procedures.

[86] It was also open to the Judge to recall members of the jury pool who had been stood aside earlier in the jury selection process. During the hearing before me, part of the audio recording of the jury selection process was played back. This revealed that the Judge stood one potential juror aside because of his work commitments. This occurred after he had refused to excuse Mr McAllister. The Judge stood that person aside on the express basis that he might call upon him again later if necessary. Counsel for Mr McAllister advised me that the Judge stood other jurors aside on the same basis earlier in the jury selection process. Those persons remained potentially eligible to serve on the jury, but the Judge did not take steps to reconsider whether they should do so. It is likely, in my view, that the events that followed Mr McAllister's refusal to take the oath diverted the Judge's attention away from this available option.

[87] Fourthly, Mr McAllister does not present as a person who ordinarily shirks his obligations as a citizen. As Mr Best confirms, this is best demonstrated by the fact that Mr McAllister was one of approximately 100 engineers who voluntarily assisted with building assessment and demolition work in the Canterbury region immediately after the devastating earthquakes that occurred there in February 2011. Mr Best says that this was dangerous work, but Mr McAllister was prepared to give up his time to do it. Mr McAllister has also provided numerous character references attesting to his integrity and reliability. Prior good character may be taken into account when a person is sentenced in respect of a criminal offence, and I see no reason why the same principle should not apply in the context of contempt proceedings.

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[15] The Crown and defence were each entitled to challenge four jurors without cause.

[88] Finally, it is necessary to take into account the fact that Mr McAllister attempted to atone for his conduct by offering to serve on the jury after the Judge returned from speaking to counsel in Chambers. It would obviously not have been appropriate for the Judge to accept that offer given Mr McAllister's earlier claim that he could not be impartial. Nevertheless, the offer to serve on the jury was probably the only practical step Mr McAllister could have taken to make amends for his earlier conduct. Furthermore, Mr McAllister apologised to the Judge through his counsel, and said that he sincerely regretted what he had done.

[89] These factors persuade me that the deterrent sentence of imprisonment was not required, particularly given the facts as they are now known to be.

[90] I consider that Mr McAllister's conduct can be adequately punished by the day that he spent in the courthouse cells, together with the imposition of a fine.

Summary: result

[91] I now summarise my conclusions and make the following orders:

1. Mr McAllister was in contempt when he refused to take the oath. His conduct was deliberate, and it interrupted the court process. It also disobeyed the Judge's earlier direction requiring him to serve on the jury, and occurred in circumstances where Mr McAllister had no lawful excuse for doing what he did. The appeal against the Judge's conclusion that Mr McAllister was guilty of contempt for refusing to take the oath is accordingly dismissed.

2. The appeal against the Judge's conclusion that Mr McAllister was guilty of contempt for subsequently saying he could serve impartially on the jury is allowed.

3. The appeal against sentence is allowed, and the sentence of imprisonment is quashed. In its place Mr McAllister is fined the sum of $750.

Lang J

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