IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2017-404-000126
[2017] NZHC 1325

BETWEEN	DERMOT GREGORY NOTTINGHAM Appellant
AND	SOLICITOR-GENERAL Respondent

Hearing: 12 June 2017

Appearances: D Nottingham in person
R K Thomson for Respondent

Judgment: 15 June 2017

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 15 June 2017 at 4.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors:
Crown Law, Wellington

Copy to: D Nottingham

Introduction

[1] On 7 March 2017, Judge Collins, in the District Court at Auckland, found the appellant, Mr Nottingham, in contempt of Court for wilfully insulting a judicial officer. That is an offence pursuant to s 212 of the District Court Act 2016, and the maximum penalty is three months' imprisonment, or a fine not exceeding $1,000. Judge Collins did not impose any penalty.[1]

[2] Mr Nottingham appeals Judge Collins' decision finding him in contempt.

Application to adduce further evidence

[3] Mr Nottingham appeared on his own behalf. Immediately prior to the hearing, he lodged a document headed:

> Application seeking the Courts observance of the minimal standards of criminal procedure and the disclosure of evidential material that will prove the provenance of the Judges allegations that the allegations were flagrantly untrue, as to the Judge tampering with a transcript, or ordering the tampering of a transcript, and thus the appellant committed criminal contempt, and was not merely recording this belief based on evidence he held that the allegation was properly made in the circumstances surrounding his right to have his rights to justice determined by an impartial and honest Judge.

[4] In the course of his submissions, it became clear that what Mr Nottingham was seeking by this application was disclosure of what he referred to as the "metadata" sent by the National Transcription Service to the Ministry of Justice in the course of an earlier hearing. As I understand it, Mr Nottingham is asserting that Judge Collins tampered with that metadata.

[5] This issue had already been dealt with by Downs J, in a minute issued in these proceedings dated 27 April 2017, when Mr Nottingham sought the same material. I agree with the observations there made. The matter at issue in this appeal is whether or not Mr Nottingham committed a contempt by wilfully insulting Judge Collins. That falls to be determined by reference to the transcript of the hearing which occurred on 7 March 2017. That is available. Mr Nottingham does not challenge it.

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1 *R v Nottingham* [2017] NZDC 4586.

[6] I decline Mr Nottingham's application for further disclosure.

The hearing on 7 March 2017

[7] Mr Nottingham faces seven charges. It is alleged that between 2010 and 2015, Mr Nottingham published, or had published, numerous articles on a blog site called "Laudafinem.com". The Crown asserts that articles were published in breach of a suppression order, and that other articles were published with intent to harass, contrary to s 8(1)(a)(i) and (b)(i) of the Harassment Act 1997.

[8] Mr Nottingham has also been conducting a private prosecution of one of the victims the subject of the harassment charges. Various pre-trial directions and rulings were made in the course of these proceedings by Judge Collins. Ultimately the charges brought by Mr Nottingham were dismissed by Judge Paul.[2] Mr Nottingham disagreed with these rulings. He appealed the rulings; he also filed a judicial review application, alleging misconduct by Judges Paul and Collins.

[9] The charges against Mr Nottingham were called before Judge Collins in a mentions hearing on 7 March 2017. The purpose of the hearing was to set a trial date. Mr Nottingham appeared in person.

[10] In open Court, Mr Nottingham raised the issue of whether or not Judge Collins should preside at the mentions hearing. He stated as follows:

> I've filed a judicial review of your decision and of Judge Paul's decisions in the prosecution of Mr Honey, where I was prosecutor, I'm alleging that you misconducted yourself in relation to the legal finding that a person who is a accused cannot be cross examined on an affidavit they have produced in support of an application for the continuing name suppression. Serious allegations are made against you, the High Court is to hear those allegations, there is a strike out being (inaudible) which we are confident of getting rid of, so it's submitted Sir, with your knowledge of that, the allegations against you will be improper for you to continue to make any directions and that this matter of a callover should be adjourned to another date where another Judge can read that, my submissions on a memoranda …

A little later Mr Nottingham said as follows:

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2 *Nottingham v Honey* [2016] NZDC 9272.

> Sir, you're aware of the allegations against you. The allegations include you tampering with the transcript. …
>
> If you consider it's fit for you to stand here when there's a prima facie case that you tampered with the transcript. To remove the very material that proves that you made a decision –

The Judge then said as follows:

> Are you in Court saying to me that I have tampered with a transcript?

Mr Nottingham replied:

> I am saying there is a prima facie case for it, yes …
>
> Well a Judge cannot sit with a prima facia case of him tampering with evidence on a factually related matter and that he's aware of the allegations and they are [laid] before the supervisory Court of this Court. I can have a judicial review filed within four weeks.

The Judge went on to say as follows:

> Do not interrupt and I'm going to give a judgment for a ruling in a moment on a question of contempt of Court.

The Judge then proceeded to allocate a fixture date for the trial.

[11] The Judge did not give Mr Nottingham the opportunity to be heard before finding that he was in contempt of Court. Rather, he ruled as follows:[3]

> I come to the question of Mr Nottingham's contempt of Court this morning. Section 212 District Courts Act 2016 makes it an offence for any person to wilfully insult a judicial officer. The maximum penalty for such is three months' imprisonment or a fine not exceeding $1,000.
>
> Mr Nottingham in Court this morning has effectively accused me of deliberately tampering with a Court transcript. … Mr Nottingham, in my view, has clearly wilfully insulted a judicial officer. …
>
> I find him in contempt but there will be no penalty.

[12] For the sake of completeness, I record that the review application alleging misconduct by Judges Paul and Collins was subsequently struck out by Gilbert J on 27 April 2017.[4] The Judge observed that Mr Nottingham's claim:

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3 *R v Nottingham*, above n 1, at [3]-[5].

4 *Nottingham v Auckland District Court* [2017] NZHC 777 at [16].

> … is replete with scandalous and outrageous allegations without any attempt having been made to provide supporting factual particulars. Further, almost all of the relief sought could not be granted in the context of an application for judicial review.

The appeal

[13] The appeal is brought under s 260 of the Criminal Procedure Act 2011. It provides a right of appeal "if a court finds a person guilty of a criminal contempt of Court". Inter alia, the person found guilty of contempt can appeal that finding. The appeal proceeds as if it were a first appeal against conviction.[5] Accordingly, the appeal must be allowed if the Judge erred in his or her assessment of the evidence, or a miscarriage of justice has occurred for any reason. In any other case, the appeal must be dismissed.[6]

Analysis

[14] The District Court is a statutory body. It does not have inherent power to punish for contempt. It has, however, long had statutory provisions which enable it to enforce control over proceedings before it.[7]

[15] Here, Judge Collins relied on the current provision – s 212 of the District Court Act 2016. Relevantly, it provides as follows:

> **Contempt of court**
>
> (1) This section applies if any person—
>
> (a) wilfully insults a judicial officer, … during his or her sitting … in court …
>
> (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 Judge, take the person into custody and detain him or her until the rising of the court; and
>
> (b) a Judge may, if he or she thinks fit, sentence the person to—

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5 Criminal Procedure Act 2011, s 263(1).
6 Criminal Procedure Act, s 232(2) and (3).
7 Judicature Act 1908, s 56C; District Courts Act 1947, s 112; Summary Proceedings Act 1957, s 206; Criminal Procedure Act 2011, s 365.

(i) imprisonment for a period not exceeding 3 months; or

(ii) a fine not exceeding $1,000 for each offence.

…

[16] Judge Collins found that Mr Nottingham's conduct on 7 March fell within s 212(1)(a).

[17] The provision raises three core issues –

(a) was Judge Collins a judicial officer sitting in Court when the comments were made?;

(b) were Mr Nottingham's comments wilful?; and

(c) were they insulting?

I deal with each in turn.

Was Judge Collins a judicial officer sitting in Court?

[18] Mr Nottingham accepted that Judge Collins is a judicial officer and that the comments were made when he was sitting in Court.

Were the comments made wilfully?

[19] An intention to insult will suffice, as will recklessness as to the insulting effect of the conduct.[8] The High Court of Australia has held that wilfully means intentionally or deliberately in the sense that what was done was intended as an insult. The Court said that "the mere voluntary utterance of words is not enough. Wilfully imports the notion of purpose".[9] Whether or not a comment or action is wilful can be inferred from conduct.[10] It can also be inferred from the nature of the comment made or action undertaken.

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8 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [69]-[77].

9 *Lewis v Ogden* (1984) 153 CLR 682 (HCA) at 688, cited with apparent approval by Court of Appeal in *McAllister v R*, above n 8, at [76].

10 For example *R v White* [2007] NZCA 64 at [23].

[20] Mr Nottingham submitted that he was simply explaining to Judge Collins his reasons for objecting to the Judge dealing with the charges against him, and requesting that the Judge recuse himself.

[21] Honest and considered allegations of bias against a Judge will not necessarily amount to a contempt; indeed they may even serve a higher public purpose.[11] It will often be perfectly appropriate to query whether a Judge should recuse him or herself. That can be done politely.[12] That is not, however, what occurred here. Rather, Mr Nottingham made extravagant allegations in open Court. He directly accused Judge Collins of tampering with the Court record. While he couched his accusations as "allegations", he also asserted that there was a "prima facie" case that tampering had occurred. The accusations had apparently been made in letters to the Chief Justice and the Chief District Court Judge. That does not give them any greater credence. They had not been made in proceedings issued for the purpose. As Gilbert J observed in the judicial review proceedings – "No one is entitled to make allegations of serious misconduct … without being in possession of sufficient evidence to establish a prima facie case to prove it".[13] There was no such prima facie case, and there was no considered basis for the accusations.

[22] In my judgment, Mr Nottingham either intended to insult the Judge, or was, at the least, reckless as to whether Judge Collins would be insulted. Either way, the comments were wilfully made.

Were the comments insulting?

[23] As Lord Reid has observed, an ordinary and sensible man knows an insult when he sees or hears it.[14]

[24] Here, the allegation made was that Judge Collins had tampered with the recording of a Court hearing. That is tantamount to alleging that the Judge perverted

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11 *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 230-231.

12 See *Taka v Auckland District Court* HC Auckland CIV-2014-404-3323, 8 May 2015 (a polite request by Mr Nottingham).

13 *Nottingham v Auckland District Court*, above n 4, at [11].

14 *Brutus v Cozens* [1973] AC 854 (HL) at 862.

the course of justice. That was an extremely serious allegation. It calls into question the integrity of the Judge.

[25] Accusing a Judge of not telling the truth and then implying that the Judge cannot count, may, in context, qualify as a contempt.[15] Calling a Judge a "criminal" can be a contempt.[16] Telling a Judge that one will appeal to a higher Court and calling the Judge a "dickhead" is a contempt.[17] A single swear word spoken towards the back of the Courtroom may not be a contempt, but it may be if it is accompanied by a rude gesture.[18]

[26] In my view, the comments made by Mr Nottingham, were, in context, insulting.

[27] Comments of the kind made, if not denounced, threaten public confidence in the administration of justice. Contrary to Mr Nottingham's assertions, it is not a Bill of Rights issue. Contempt is a justified limitation on freedom of expression, because the purpose of contempt proceedings goes far beyond protecting the interests of individual Judges. As this Court has noted:[19]

> ... contempt of Court plays a key role in protecting the administration of justice. ... It is not there to protect the sensitivities of individual Judges. It is there for the protection of the administration of justice. It requires people who appear before Court to act in appropriate ways when they are before the Court. Because most people accept that and act in appropriate ways then even those accused facing the most serious charges in this Court are able to be treated with respect and dignity as human beings. But if people coming before the Court fail to treat the process with a proper degree of respect then those rights will be endangered.

Conclusion - contempt

[28] Accordingly, I find that Judge Collins was correct when he found that Mr Nottingham wilfully insulted him, in his capacity as a Judge, whilst he was sitting in Court. The various elements of contempt under s 212(1)(a) were made out.

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15 *De Montalk v District Court at Dargaville* [2012] NZHC 444, [2012] NZAR 346.
16 *Tamihere v Police* [2016] NZHC 539 at [27].
17 *Greer v Police* HC Palmerston North, AP53/97, 17 October 1997.
18 *Heta v R* [2015] NZHC 144; *Wanahi v R* HC Hamilton CRI-2007-419-061, 3 May 2007.
19 *Wanahi v R*, above n 18, at [11]. And see *Greer v Police*, above n 17, at 3-4.

Process followed

[29] I do, however, have reservations about the process followed by Judge Collins. As I have noted above in [11], Judge Collins did not give Mr Nottingham the opportunity to be heard before finding that he was in contempt of Court.

[30] In my view, this was in breach of the rules of natural justice which are enshrined in s 27 of the New Zealand Bill of Rights Act 1990. Relevantly, that section provides as follows:

> **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.
>
> …

[31] Lang J, in this Court, has held that, because contempt can occur in many different ways, it is not possible to definitively prescribe the procedure to be followed in determining whether a person is in contempt.[20] He observed that a 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. There is, for example, no formal charge and no formal plea, because contempt allegations are generally dealt with quickly and with a minimum of formality. Nevertheless, because the Judge is required to simultaneously assume the role of complainant, witness, prosecutor and Judge, he or she should act with considerable caution. Lang J observed as follows:[21]

> 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. 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. 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.

[32] This procedure was not followed in the present case.

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[20] *McAllister v Solicitor-General* [2013] NZHC 2217, [2013] 3 NZLR 708 at [44]. Point not dealt with on appeal, *McAllister v R* above n 8.

[21] At [45].

[33] Ms Thomson, for the Solicitor-General, asked me to infer from the documents that have been filed by Mr Nottingham since 7 March 2017 that it is unlikely that Mr Nottingham would have apologised for and purged the contempt, even if he had been given the opportunity to do so.

[34] I am not prepared to make that assumption. In my judgment, Judge Collins should have followed the normal procedure and told Mr Nottingham that he was considering finding him in contempt, identified the words which the Judge considered capable of being contemptuous and given Mr Nottingham the opportunity to take legal advice and consider his position. He should then have heard from Mr Nottingham, or his counsel, before making the finding that there had been a contempt under s 212 of the District Court Act.

[35] Because this procedure was not followed, I allow the appeal, and set aside the finding that Mr Nottingham was in contempt of Court on 7 March 2017.

[36] For the sake of completeness, I note that Mr Nottingham in his notice of appeal sought a large number of other orders. Most are beyond the jurisdiction of the Court in appeal proceedings. I decline to make any of the further orders sought.

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Wylie J