IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2008-004-16181

QUEEN

v

ANDRE JOEL WILKIE MAIL

Hearing: 26 June 2009

Appearances: A Perkins for Crown
M Lowe for Offender

Judgment: 26 June 2009

SENTENCING NOTES OF ASHER J

Sentence imposed: **Attempting to influence a juror**
Two years three months' imprisonment

Solicitors:
Meredith Connell, Crown Solicitor, PO Box 2213, Auckland
M Lowe, Barrister, Auckland

[1] Mr Mail, you have pleaded guilty to one count of attempting to influence a juror, contrary to s 117(b) of the Crimes Act 1961. The maximum penalty for this offending is seven years' imprisonment.

[2] The charge arises from an event, which occurred during the second trial of Anthony Dixon. You had known Mr Dixon, who is your cousin, for a considerable period of time. Mr Dixon was being prosecuted for murder, wounding with intent, kidnapping and other serious charges.

[3] The trial had been going on for over three weeks when quite late at night, at 9:25 pm, you went to the home address of a member of the jury. It seems that you, by coincidence, had contact with a work mate of that member of the jury and become aware, after some effort, of his home address. You knocked on the front door of his home. The juror came to the door and he invited you inside. You said to him, "Dixon is my cousin, man, and I know what you are going through". You then gestured to the juror with your hand as if you were peeling notes of money off a roll of bills, while saying to him, "You know, you know". The juror was left in no doubt that you were trying to influence him in his role as a jury member. The juror said to you, "I can't talk about the case, you must go". You said, "I don't want to put pressure on you", to which the juror said, "If you don't want to put pressure on me why are you here and how did you get my address?" The juror made it clear to you that he would not talk to you about the Court case and he told you to leave. You did leave then, and you said when you left, "Can you give me your word you won't tell anyone that I have been to see you?"

[4] The juror immediately contacted his employer and then the police. He said that as a consequence of what you had done and said to him he genuinely feared for his own and his family's safety. The juror acted entirely properly throughout, having drawn the matter to the attention of the police. The next morning the matter was drawn to the attention of the trial Judge, and as a consequence of what you had done the juror had to be dismissed from the jury to avoid the risk of jury contamination.

[5] I have had very fair and able submissions from both the Crown and your counsel. The Crown submits that your offending is very serious indeed. It submits that taking into account the need to denounce what you did, and the need for deterrence, the appropriate sentence to adequately reflect what you have done is a starting point of four years. To this starting point a further period of imprisonment should be added to take into account your record and the fact that you offended on bail before, as the Crown accepts, a deduction of up to 25 percent is made because you have pleaded guilty.

[6] Your counsel, Ms Lowe, submits that a considerably lower starting point is appropriate in the circumstances. She has emphasised that in her submission your offending is not of the most serious type under s 117, and that the appropriate starting point is 18 months' imprisonment. She accepts that there has to be an uplift to take into account that you offended while on bail, and your background record. She submits that the sentence then could be two to two-and-a-half years' imprisonment, and from that there should be the discount for a guilty plea.

[7] Now the way a sentencing proceeds is that the Court first fixes a starting point looking at the culpability of the offending itself. At that stage it does not consider matters relating to you personally. It first reaches that starting point and then having determined it, it proceeds to consider aggravating and mitigating factors relating to you personally to fix the end point of sentence. So I turn to a consideration of the appropriate starting point.

[8] It must be said immediately how serious it is to try to interfere with the conduct of a juror. This is emphasised in the cases to which I have been referred by counsel. Juries lie at the heart of our system of criminal justice. They must decide the facts of the case and they determine whether a verdict of guilty or of not guilty is to be entered. The Crown referred me to a Law Commission paper: New Zealand Law Commission, *Juries in Criminal Trials Part: A Discussion Paper* (NZLC PP2 1998), which describes jury functions as: fact-finder, the conscience of the community, a safeguard against arbitrary or oppressive government, an institution which legitimises the criminal justice system, an educative institution, and a powerful democratic symbol.

[9] It was their deliberations that you sought to interfere with. You were seeking to corrupt the jury process. If that happens in our society wrong verdicts could be reached, and the public confidence in our system of criminal justice would break down. And, of course, if trials are stopped because of this sort of interference, there is not only the damage to the system but the enormous grief to the victims and witnesses who may well have to go through the whole process again.

[10] The serious nature of the offending is recognised in the maximum sentence of seven years' imprisonment that is contained in the section. On one occasion, as you have heard in submissions, that sentence was imposed. That was the case of *R v Moore* CA399/99 23 November 1999, which was a case involving a charge of conspiring to pervert the course of justice where the maximum penalty was seven years' imprisonment and the type of wrongdoing had similar features. There, an accused in a murder trial was acquitted when the defence evidence had included deliberately false testimony from a witness. There, the actions of the accused had actually derailed the trial entirely, and may have resulted in a wrongful acquittal. At a later trial the accused was convicted without that witness giving the false evidence. That offending was regarded as so serious that the maximum term of seven years' imprisonment was imposed. So that is a benchmark at one end.

[11] At the other end of the spectrum there have been some cases of the sort emphasised by Ms Lowe, where the offending has been much less serious. In *R v Robinson* [2007] NZCA 336, pamphlets were sent to jurors expressing a particular point of view about cannabis. There the sentence was 200 hours community work. So those are two ends of the spectrum. However, it has been said by our Court of Appeal in *R v Churchward* CA439/05 2 March 2006:

> … any attempt to disturb the process of the administration of justice is to be deplored and, following conviction, is, in all but the most exceptional circumstances, to be met with a moderately lengthy term of imprisonment.

[12] Both counsel have referred extensively to the nearest comparable case, the case of *R v Bowling* HC WN CRI-2007-032-3065 3 May 2008 Dobson J, which was a case about interference with a juror. There, the offender had been an associate of four white supremacists on trial. A note was prepared with a swastika symbol on it and with the words "Not Guilty" on it. A different person to the offender delivered

that to the house of the complainant juror, who appears to have been targeted because he was Mäori. Again, there the juror did the right thing and had to be discharged from the trial. The juror was very affected by what had happened. There, a sentence of one year nine months' imprisonment was fixed as the starting point, uplifted to two years on account of previous offending and the fact that the offending had occurred while the offender was on bail.

[13] So having referred to those cases, I turn to what you did. Your action was clearly deliberate. It was not spontaneous. There might have been an element of serendipity in you learning about the juror. Eventually, after some effort on your part, you found out his address. Having learnt of a way to access the juror you pursued that, got the juror's address, and you made your way there. By your actions you unmistakably indicated that a bribe might well be available should the juror be compliant with your wishes in Mr Dixon's cause. You signalled that a sum of money was available by showing the sign of counting cash on your fingers.

[14] You said that you went to see the juror believing that the juror had knowledge of Mr Dixon and about him, and should have disclosed this to the Court or stood down. But I do not accept that explanation. It is simply inconsistent with what you did and what you said to the juror. You made no mention to the juror of those matters. You just indicated by your words and actions that you were a supporter of Mr Dixon and that you had money available. And the juror saw your actions for what they were, an attempt to pressure him to acquit Mr Dixon.

[15] The juror was discharged from the jury. If he had not acted in the way he did, the trial would have been derailed. Even given the fact that he acted properly in the way he did, the trial was imperilled because the jury was then reduced to 11 in number, and that in itself could have had very bad results if any other jurors for any other reason had not been able to stay on the jury. So, although your actions did not have the worst consequence of causing a corrupt verdict or forcing yet a third trial, they did have an affect on the trial. And they had a real affect on the juror, and this is a relevant factor that I have to assess when considering culpability.

[16] The victim impact report shows that the juror, as one would expect of a member of our community, was taking his obligation most seriously. He said that when he got the letter indicating he was going to be on the jury, he arranged time off with his boss early so that he could do his duty. He said, "I thought it was important for me and a privilege for me to be asked to do my civic duty". Your action prevented him from doing that, and has clearly left him and his family upset and traumatised. They were very fearful after your visit. It was not just a matter of being aware that someone was trying to influence them. They were scared, and they have been living in fear since this event. So you have really affected their lives.

[17] I regard your actions as more serious as those of the offender in *R v Bowling*. In *R v Bowling* the offender was only a party. The offender had assisted in preparing the offending document but another person delivered it, and there was never going to be any personal meeting with the juror. Here you were the instigator and you carried out the offending, and you did go and see the juror and applied personal pressure. I also accept Mr Perkins' submission that it is relevant that the trial that you were seeking to influence related to our most serious crime, that of murder. The offences in *Bowling*, although serious, were not of that category.

[18] However, I also accept Ms Lowe's submission that your case could be seen as less serious than cases such as *R v Turner* [2008] NZCA 217, and *R v Ahomiro* HD TAU CRI-2005-070-006818 17 August 2006 Venning J, (upheld on appeal in *R v Ahomiro* CA316/06 26 February 2006), where an offender's efforts to get witnesses to give false evidence were over quite a period of time and resulted in false evidence being actually given. There, starting points of three-and-a-half years and three years' imprisonment were imposed. I also have to bear in mind that in the spectrum of offending it is easy to see far more serious offending than yours. In your case, by good fortune your offending did not end up in this trial being in some way corrupted or having to be terminated and there having to be a third trial.

[19] I consider that in all the circumstances the starting point for sentence should be two years and nine months' imprisonment. I now turn to aggravating and mitigating factors relating to you personally. I have the benefit of a pre-sentence report that outlines your background. You clearly have some positive qualities. You

are able to hold a job and you have on occasions. You have since pleading guilty expressed regret about your offending. However, against this you have 27 prior convictions involving violence and dishonesty offences. Although they are not of the most serious type, they have been serious enough to earn you terms of imprisonment in the past. You are assessed by the probation officer as being at a high risk of offending. When you carried out this offence you were on bail, and you were indeed facing a charge for breaching bail at the time.

[20] There must be an uplift in relation to these matters, as they show that you have not learned from the lessons that our community has tried to teach you in the past when you have offended. I have considered an uplift of six months, which I consider would be justifiable, but I have been persuaded by Ms Lowe that there are positive aspects that I should also counterbalance against your record. In all the circumstances I am going to uplift your sentence only by a further three months to take into account these factors, to a sentence of three years. From that I must deduct for the guilty plea that you have entered. That guilty plea was entered after depositions and indicated at the time when this matter was first called. I consider in the circumstances that a discount of approximately 25 percent is appropriate. Could you stand up please Mr Mail.

[21] Mr Mail, your actions constituted an insult to our system of criminal justice. Fortunately, and as can be expected of our jurors, the juror you approached behaved entirely properly and as a consequence of that the effects of your actions on the trial were, in the end, minor. That is your good fortune because if they had been more serious you would have been facing a very long sentence of imprisonment indeed. But in the circumstances, and for all the reasons that I have set out, the sentence that I impose upon you is two years and three months' imprisonment.

[22] I order that the name of the juror be permanently suppressed.

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Asher J