SUPREME COURT OF QUEENSLAND

CITATION:	*Scott v FC* [2016] QSC 178
PARTIES:	**MICHAEL JOHN SCOTT** (applicant) **v** **FC** (respondent)
FILE NO:	SC No 5136 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX-TEMPORE ON:	22 July 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2016
JUDGE:	Douglas J
ORDER:	**1. Being satisfied beyond reasonable doubt that the respondent was in contempt of the applicant on 20 May 2016, the respondent be imprisoned for eight months such imprisonment to be served wholly within a corrective services facility.** **2. The following material be placed in an envelope, which is to be sealed and marked "not to be opened except by order of the court":** **(a) Originating Application dated and filed 23 May 2016;** **(b) Certificate of Contempt dated 20 May 2016 and filed by leave on 22 July 2016;** **(c) Affidavit of Ian Galpin sworn 8 June 2016 and filed by leave on 22 July 2016;** **(d) Outline of submissions of the applicant dated 8 July 2016 and filed by leave on 22 July 2016; and** **(e) Outline of submissions of the respondent dated 18 July 2016 and filed by leave on 22 July 2016.**
CATCHWORDS:	COURTS AND JUDGES – CONTEMPT – PARTICULAR CONTEMPTS – INTERFERENCE WITH COURSE OF JUSTICE AND ADMINISTRATION OF LAW – EXERCISE

OF STATUTORY POWER TO OBTAIN INFORMATION – where the respondent refused to answer a question in terms of the certificate of contempt of the applicant – where the respondent does not contest that he is in contempt – where the contempt occurred in the context of a major crime investigation – where the respondent was not the principal target of the inquiry – assessment of appropriate term of imprisonment

Crime and Corruption Act 2001, s 176, s 180(3), s 197(5), s 198(4)(c), s 199, s 199(8B), s 199(8F)

Callanan v F (unreported, Byrne SJA, 16 February 2010), cited
O'Connor v CD [2016] QSC 37, considered
O'Connor v OP [2016] QSC 38, cited
O'Connor v Witness G [2013] QSC 281, considered
O'Connor v Witness I [2014] QSC 82, considered
R v Freeman [1998] QCA 462, cited
Scott v M (unreported, Boddice J, 29 August 2011), considered
Wood v Staunton (No 5) (1996) 86 A Crim R 183, applied

COUNSEL: B J Power for the applicant
S L Kissick for the respondent

SOLICITORS: Crime and Corruption Commission for the applicant
Fallu McMillan Lawyers for the respondent

[1] This is an application to punish the respondent for contempt of the applicant, a presiding officer at a Crime and Corruption Commission hearing. The contempt alleged pursuant to s 176 of the *Crime and Corruption Act* 2001 is that the respondent refused to answer a question in terms of the certificate of contempt of the applicant dated 20 May 2016. The respondent admits that he is in contempt and does not argue against a finding by me that he is in contempt beyond reasonable doubt, the necessary standard.

[2] The contempt occurred in the context of a major crime investigation into weapons trafficking, drug trafficking and money laundering involving a number of listed persons and their associates. The respondent was one of the listed people although it is fair to say that the main focus of the investigation was on one of the other nominated persons. He was represented by experienced practitioners before the applicant after having been personally served with a notice explaining the general nature of the questions to be asked of him. The presiding officer, the applicant, made an order pursuant to s 197(5) of the

Act that all the answers given were given under compulsion and that the answers given were not admissible against the respondent in other proceedings. The applicant also made an order under s 180(3) of the Act that there be no publication of any answer given or document produced to any prosecuting agency having the carriage of or involvement in the prosecution of any charge against him.

[3] The respondent answered questions at the hearing initially by denying the involvement of the principal subject of the inquiry in the manufacture or sale of drugs, said that he had seen him with other people where he was shown a shotgun but where he did not know whose shotgun it was and that he had not been approached by the main subject of the investigation or anyone else in the last three years to source any parts for firearms. He said he had no knowledge of that person being involved in the sale of firearms or trafficking in drugs.

[4] He was then shown an audiovisual recording of a conversation between him and that person after which there was an adjournment for him to receive legal advice. On the resumption he gave an explanation of what was shown on the video. The applicant noted that his explanation conflicted with some of his earlier evidence after which the respondent gave some further evidence before stating that he would not answer a particular question asked of him relating to a conversation about firearms with the main subject of the investigation and whether the respondent could himself get firearms. He was then told by the applicant that he was required to answer questions and replied that he did not want to answer any more questions at all. He said that he was in fear of his life from other people and refused to do it. He said: "You can do me for contempt." He continued "You can do me for contempt. I'd rather go to jail than be dead."

[5] The matter was then adjourned because the applicant indicated that he wished the respondent to have the opportunity to give consideration to his decision and to get legal advice, explaining that a refusal to answer questions was a criminal offence under the Act or could be dealt with as contempt in Supreme Court proceedings. His counsel indicated, after a brief adjournment that same day, that the respondent did not wish to answer questions but sought an adjournment to another date so that his client could contemplate his position. The matter was then adjourned to another date and the respondent was

permitted to go at large until that hearing subject to his continued obligation under the attendance notice.

[6] On 20 May 2016 the hearing was resumed. The applicant explained the protections that were in place for the respondent and the consequences if he continued to refuse to answer questions and the respondent then refused to answer any further questions. When asked about his knowledge of the trafficking and possession and/or supply of firearms by the main target of the investigation he said he had no comment and did not wish to answer that question or any more questions.

[7] Section 198(4)(c) makes a failure to answer a question put to the person at the hearing by the presiding officer without reasonable or lawful excuse a contempt which may be certified in writing to this court under s 199 by the presiding officer. That has been done. Section 199(8B) prescribes the minimum punishment the court must impose for a first contempt as imprisonment for a term decided by the court. Second and subsequent contempts attract minimum penalties of two years and six months imprisonment and five years' imprisonment respectively.

[8] As I have indicated, the respondent does not contest that he is in contempt. Accordingly, I find that he has acted in contempt of the presiding officer and make that finding beyond reasonable doubt.

[9] Factors relevant to the assessment of the proper punishment for contempt were considered by Dunford J in *Wood v Staunton (No 5)*[1] where his Honour set out the following non-exhaustive list of relevant factors:

1. The seriousness of the contempt proved.

2. Whether the contemnor was aware of the consequences to himself of what he did.

3. The actual consequences of the contempt on the relevant trial or inquiry.

4. Whether the contempt was committed in the context of serious crime.

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[1] (1996) 86 A Crim R 183 at p 185.

5. The reason for the contempt.

6. Whether the contemnor has received any benefit by indicating an intention to give evidence.

7. Whether there has been any apology or public expression of contrition.

8. The character and antecedents of the contemnor.

9. General and personal deterrence.

10. Denunciation of the contempt.

[10] Those factors have been applied by judges of this court in similar circumstances in *O'Connor v Witness G*[2] and *O'Connor v Witness I*.[3] It is said for the applicant that this contempt is serious as it came about when the respondent became aware that there was audiovisual surveillance evidence relating to a particular conversation with the main target of the investigation and that he then refused to give evidence after an attempt to dissemble.

[11] One of the principal investigating officers in the operation said that the conversation the subject of the audiovisual evidence showed the respondent making hand gestures consistent with him representing the possession of a firearm and perhaps a silencer in circumstances suggesting to the investigators that the respondent had supplied a firearm and a silencer to an unknown person. The allegations relate to alleged serious criminal activity by the respondent relating to drug and weapons offences. Although the reason given for the contempt was fear of reprisal the applicant submitted that the respondent had named another person who, he said, was violent and threatening towards him. The respondent has not received any benefit by indicating an intention to give evidence. He has not apologised or made any public expression of contrition although his counsel made the point that his demeanour and behaviour before the Commission and the court was otherwise appropriate.

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2 [2013] QSC 281 at p 4.
3 [2014] QSC 82 at [29].

[12] He has a relatively minor prior criminal history for drug offending in particular and has not previously served any actual time in custody. The applicant also submitted that general and personal deterrence were important aspects of the punishment of this particular type of contempt and denunciation of contempt was also an important aspect of sentencing for the matter. I was referred to a number of decisions in respect of the appropriate sentence including *O'Connor v Witness I* and *O'Connor v Witness G* to which I have already referred. I was also referred to *Scott v M*,[4] a decision of Boddice J to the effect that where a person without relevant criminal history who is not the main target of the Commission's investigation committed contempt a sentence in the order of six to nine months would normally be imposed.

[13] In *O'Connor v Witness G*, Margaret Wilson J imposed a sentence of seven months less time spent in custody that could not be declared in respect of the refusal of a witness to reveal the location of a large sum of money that had come into his possession after the murder of his brother-in-law.

[14] Applegarth J in *O'Connor v Witness I* summarised a number of prior sentencing decisions of this court and, in effect, imposed a further punishment of six months in respect of a respondent who had already served six months in custody in a case where the evidence withheld related to an alleged murder. At [50] his Honour also drew attention to observations of Pincus JA in *R v Freeman*[5] that a contempt in the form of a witness refusing to give evidence strikes at the foundation of the criminal justice system and the principal reason for imposing a substantial sentence is to discourage other persons similarly minded to refuse to cooperate. Although those remarks related principally to a criminal trial they are still relevant to a proceeding of this nature. Applegarth J also discussed at [36] the issue that the respondent's contempt there was due in part to a fear of retribution and said that that would not necessarily attract much weight by way of mitigation.

[15] The applicant submits that it is also relevant that the respondent committed his contempt only after realising that his prior testimony was not compatible with covertly recorded evidence, was given a number of opportunities to consider his decision before the

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4 (unreported, 29 August 2011).
5 [1998] QCA 462.

contempt was certified and argued that this was a serious example of contempt and that general deterrence required the imposition of a substantial sentence.

[16] The respondent's counsel accepted that it was a serious contempt but pointed out that the respondent was not the principal target of the inquiry. He argued that it was difficult to quantify the actual consequence of the contempt on the relevant inquiry, partly because of the secrecy of the proceedings, but conceded that the contempt was committed in the context of serious crime. He pointed out, however, that the respondent's alleged involvement in the serious crime or the extent of his actual knowledge of the conduct of others was not able to be quantified. He drew attention to the respondent's fear of reprisal and pointed out that his disclosures of fear of another person were not associated with this investigation. He argued that the disclosed nature of the investigation and the primary target support the respondent's fear of reprisal as genuinely held.

[17] The respondent is now 28 years of age and unemployed but had previously worked in a number of occupations. His counsel accepted that there must be denunciation of the contempt and drew my attention to the imposition of a sentence of three months by Henry J in *O'Connor v OP*[6] where a 24 year old respondent was being required to testify against his father and refused to do so. Henry J had considered that six months was suggested as a penalty for this type of contempt but said that it should not be considered a rigid range.

[18] Again, in *O'Connor v CD*[7] Henry J imposed a cumulative four month sentence on a man with a bad criminal history including a variety of sentences in jail over the years, reducing the sentence from a notional figure above the six month mark to four months because it was cumulative.

[19] Counsel for the respondent submitted that a sentence in the order of four to six months should be imposed on the respondent.

[20] It is significant in a case like this that the respondent has not provided information about potentially very serious criminal conduct involving trafficking in drugs and weapons.

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6 [2016] QSC 38.
7 [2016] QSC 37.

Bearing in mind the nature of the damage that can be caused to members of the public by both drugs and weapons it seems to me that a significant sentence is called for. Where he has refused to provide further evidence it also seems to me to be relevant that the court may order a respondent's discharge from prison before the end of the term originally imposed if satisfied the person has purged his contempt: see s 199(8F) of the Act.

[21] Because of the history of this respondent in refusing opportunities to give evidence after he had decided not to do so it was submitted by both parties that there was little point in sentencing him to an indeterminate sentence in the hope that he would purge his contempt, even though he had not served a custodial sentence previously. Bearing in mind the potential consequences of a failure to give evidence in a case like this, because of the serious nature of the criminal conduct alleged and cases such as *Callanan v F*[8] where a sentence of eight months imprisonment was imposed on an individual who was not the target of the investigation and the observations of Boddice J in *Scott v M*[9] that a respondent who is not the main target of the Commission's investigations and had no relevant criminal history, where the hearing involved drug offences, would normally receive a sentence in the order of six to nine months it seems to me that an appropriate sentence in this case is eight months' imprisonment.

[22] Accordingly, I shall impose such a penalty but remind the respondent that he has the opportunity to purge his contempt with the likely result that his discharge from prison at an earlier stage would be ordered if the court is satisfied that he has purged his contempt.

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8 (unreported, Byrne SJA, 16 February 2010).
9 (unreported, 29 August 2011).