SUPREME COURT OF QUEENSLAND

CITATION:	*R v Aristizabal Serna* [2015] QSC 371
PARTIES:	R **v** GILBERTO ARISTIZABAL SERNA (defendant)
FILE NO/S:	Indictment No 864 of 2011
DIVISION:	Supreme Court of Queensland
PROCEEDING:	Contempt hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 December 2015 – delivered ex tempore
DELIVERED AT:	Brisbane
HEARING DATE:	3 December 2015
JUDGE:	Mullins J
ORDER:	**The defendant is sentenced to imprisonment for a period of six months, concurrent with his existing sentence.**
CATCHWORDS:	PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT - WHAT CONSTITUTES – CONTEMPT COMMITTED IN FACE OF COURT – where defendant and co-offenders were charged on the same indictment – where defendant had been interviewed by police when arrested, but did not provide a statement to police – where defendant pleaded guilty and was sentenced – where defendant subpoenaed by the prosecution for a pre-trial application to ascertain if, and what evidence, he could give in the trial of the co-offenders – where defendant refused to be sworn or affirmed to give evidence at the pre-trial hearing and indicated that he would not answer questions or participate in the proceeding – where defendant ordered to show cause as to why he should not be punished for contempt of the court – whether pre-trial application for a direction or ruling could be used by the prosecution to ascertain if defendant would give evidence at the trial – whether defendant was in contempt of the court – whether defendant showed cause as to why he should not be punished for contempt of the court *Criminal Code* (Qld), s 590AA *R v Basha* (1989) 39 A Crim R 337, considered *R v Freeman* [1998] QCA 462, cited

R v Garland (1997) 95 A Crim R 264; [1997] QSC 145, cited
R v Lemmens [2010] QSC 271, cited

COUNSEL: G R Rice QC for the Crown
G McGuire for the defendant

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the Crown
Guest Lawyers for the defendant

.HER HONOUR: Please stand, Mr Serna. Mr Serna, you were subpoenaed to give evidence before me on a pre-trial hearing on 5 November 2014. On that occasion, you refused to be sworn or affirmed to give evidence and you made it very clear that you were not going to answer any questions that you were asked or participate in any way in the hearing. As a result, I found that you should show cause as to why you should not be punished for contempt of the court and the contempt was particularised as your failing to be sworn or affirmed when you were subpoenaed to give evidence on a hearing. I am satisfied that the contempt of court has been proved and that you have not shown cause as to why you should not be punished for contempt for that contempt that was committed on 5 November 2014. I sentence you to imprisonment for six months which will be concurrent with your existing sentence. So you may be seated now while I give the reasons for why I have reached that conclusion.

Mr Serna had not undertaken to give evidence against the co-defendants charged on the same indictment. He had not provided a statement to police, but he had undergone a record of interview when his offending was detected. The information that Mr Serna had provided in this record of interview would have been admissible evidence at the trial of Elfar, Golding and Sander. Mr Serna was sentenced in this court on 30 June 2014 for importing a commercial quantity of a border controlled drug with which he was charged with Elfar, Golding and Sander. He was sentenced to 25 years' imprisonment with a non-parole period of 15 years after pleading guilty on the eve of his trial. He was sentenced on the basis of the remorse that he had shown by the extensive admissions that he had made at the outset when he was apprehended and that those admissions provided assistance in the investigation by police of the offending of the others who were also charged. He was not sentenced on the basis that he would be providing evidence against the co-defendants.

It was a matter of proper procedure, however, for the prosecution to ascertain whether Mr Serna would give evidence at the trial. The prosecution was aware of the potential evidence that Mr Serna could give and therefore filed an application that was, in effect, an application for a pre-trial hearing under section 590AA of the Criminal Code 1899 (Qld) for the parties to have the opportunity to examine or cross-examine Mr Serna. The overriding purpose of the application was to facilitate the preparation of both the Crown and the defendants Elfar, Golding and Sander for the trial. It was of relevance to all parties whether or not Mr Serna was going to give evidence at the trial. Although Mr Serna's lawyer had conveyed his instructions to the Commonwealth DPP that Mr Serna would refuse to give evidence, the decision was made to continue with the pre-trial application in order to see whether, when Mr Serna was confronted with the solemnity of the court room, he would maintain his refusal to give evidence.

The first issue that I had to decide today was whether procedure of a pre-trial application for a direction or ruling under section 590AA was able to be used by the Commonwealth DPP for ascertaining whether Mr Serna would give evidence at the trial and providing for both his examination and cross-examination at that hearing in advance of the trial. Mr Serna was being brought along, in effect, for a Basha enquiry: *R v Basha* (1989) 39 A Crim R 337. Although a Basha enquiry is usually used to permit a defendant to cross-examine a witness whose evidence has not been

tested at a committal when it is considered appropriate for that to be done pre-trial, there is no logical reason why a Basha enquiry should not be used in the circumstances where it benefits both the Crown and defendants to ascertain the ambit of the evidence that the witness is likely to give at the trial in circumstances where the prosecution has been unable to obtain a statement from the witness, but otherwise knows that the witness has information that is of relevance to the trial.

The point was taken by Mr McGuire of counsel on behalf of Mr Serna that the use of section 590AA must be consistent with an application to make a direction or ruling as to the conduct of the trial or any pre-trial hearing and so the process should not have been used pre-trial to ascertain whether Mr Serna would give evidence at the trial. It was submitted that the prosecution should have waited until the trial, subpoenaed Mr Serna and then, in the absence of the jury, ascertained whether Mr Serna would refuse to give evidence or not. Mr Rice of Queen's Counsel for the Commonwealth DPP pointed out that a Basha enquiry in the normal course impliedly incorporates a direction or ruling by the court that the examination of a witness pre-trial is an appropriate procedure to be undertaken in advance of the trial. The argument on behalf of Mr Serna would have the logical consequence that any witness who was called pre-trial for a Basha enquiry, whether by the prosecution or the defence, would not involve a direction or ruling and then could not be the subject of the pre-trial hearing. I accept Mr Rice's submission that the use of the process does encompass an implicit ruling by the court that the procedure can be used for that purpose. A pre-trial hearing is intended for applications that would otherwise have taken up time during the trial causing additional time for the trial while the matter was otherwise dealt with in the absence of the jury.

There was no impediment to the Crown using the procedure under section 590AA for the examination and cross-examination of Mr Serna on a pre-trial hearing and the subsidiary purpose of ascertaining whether or not he would refuse to give evidence, if called at the trial. Even though Mr Serna had not provided a statement to the police, the prosecution had the benefit of his record of interview and the ambit of the evidence that he was likely to be able to give, if he were prepared to give evidence at the trial. It was appropriate that Mr Serna therefore be called by the prosecution on the pre-trial hearing and the refusal of Mr Serna to be sworn of affirmed upon being subpoenaed to give evidence on the pre-trial hearing is a contempt of court. Through his counsel, Mr Serna has apologised to the court. Although it is no excuse for his refusal to be sworn or affirmed, he was cognisant that he was the one who had recruited the defendant Sander and felt that he had already got him into enough trouble and did not want to be further involved in compounding the trouble for at least that co-defendant. There is also the reality of the matter that Mr Serna is serving a lengthy term of imprisonment.

The criminal justice system, however, has to be preserved in the sense that it depends on witnesses who have relevant knowledge of criminal offending giving evidence when called to do so. It is not in issue that it is a serious contempt of court when a witness with knowledge of the commission of an offence does refuse to cooperate to the extent of refusing to be sworn or affirmed when subpoenaed to give evidence. In determining the seriousness of the contempt, although it remains serious, it is

relevant that Mr Serna did not purport to gain a benefit on his sentence by giving a statement that would indicate he was prepared to give evidence against his co-defendants.

I have been referred to comparable authorities for sentences including *R v Garland* (1997) 95 A Crim R 264, *R v Freeman* [1998] QCA 462 and *R v Lemmens* [2010] QSC 271. Although in the normal course a sentence by way of punishment for contempt of court would be cumulative on the existing sentence, I have a concern as to ensuring that the benefit that Mr Serna got for his plea of guilty is not diminished by the punishment for contempt in comparison to the sentences that were imposed on the co-defendants for the same offence who were sentenced after trial. In particular, Mr Sander was sentenced to imprisonment of 30 years with a non-parole period of 16 years. It is that non-parole period of 16 years that causes me concern in relation to Mr Serna's existing non-parole period of 15 years.

For that reason, I have decided to make the sentence of six months' imprisonment for the contempt which I had imposed on Mr Serna concurrent with his existing term of imprisonment and I am not in any way going to alter his current non-parole period that is fixed under his Commonwealth sentence.
