IN THE DISTRICT COURT
AT AUCKLAND

CRI-2013-004-003095

NEW ZEALAND POLICE

v

DAVINA VALERIE MURRAY

Hearing:	15, 16, 17, 18, 19, 22 and 23 July 2013
Appearances:	A Longdill and J Harley for the Informant Defendant in person with McKenzie Friend B J Hart Amicus Curiae C Hirschfeld
Judgment:	01 August 2013

JUDGMENT OF JUDGE R COLLINS

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[1] Distilled to its essence this is a simple case.

[2] On 7 October 2011 at Mt Eden Correctional Facility ("MECF") the Legal Visits Supervising Officer Ngaire Cooper took possession of an Apple iPhone, a packet of Marlboro cigarettes and a cigarette lighter. Those items comprise Exhibit 14.

[3] On the evidence there are two possibilities, and two only, as to how Ngaire Cooper came into possession of those items.

[4] The first possibility is that asserted by the prosecution, i.e. they were introduced into MECF by the defendant Davina Murray and given to inmate Liam Reid.

[5] The second possibility is that asserted by the defence, i.e. Corrections Officer Noel Purcell conspired with Corrections Officer Maurice Stanley to falsely accuse Liam Reid of possession of the items and that he Mr Purcell, or someone known to him introduced those items into the Corrections Facility.

[6] It is not a case of choosing between the two possibilities. The prosecution must prove the proposition it asserts beyond reasonable doubt. If the defence's assertion is a reasonable possibility on the evidence in this case the defendant is entitled to the charge being dismissed.

[7] In this prosecution Ms Murray represented herself. At various times from being charged until hearing of the charge she has been represented by Mr B J Hart, Mr H Lawry and Mr C Hirschfeld. At the hearing of the charge she was assisted by Mr Hart as a McKenzie Friend and she was also a beneficiary of the services Mr Hirschfield provided as amicus curiae.

The charge

[8] Ms Murray is charged that on 7 October 2011, contrary to s 141(1)(c) Corrections Act 2004 she-

> Delivered things namely an Apple iPhone 4 serial number 81129QYBA4S IMEI number 012839002353032, a pack of Marlborough cigarettes, and a BIC lighter to Liam Reid, a prisoner inside the Mt Eden Corrections Facility (MECF).

[9] The Corrections Act 2004 provides:

> **S 141 Unauthorised deliveries, communications, [recordings, and possession of unauthorised items]**
>
> (1) [Subject to subsection (1A), every person] commits an offence who, except under the authority of this Act or of any regulations made under this Act or the express authority of the prison manager or the chief executive,—
>
> ...
>
> (c) delivers any thing, or causes it to be delivered, to any prisoner inside a prison:
>
> ...

(1B) A person is liable on conviction to imprisonment for a term not exceeding 3 months, to a fine not exceeding $5,000, or to both, who—

(a) commits an offence against subsection (1)(a), (b), (c), or (g); or

[10] The prosecution therefore need to prove:

10.1 The defendant delivered a thing or things.

10.2 The things delivered were to a prisoner.

10.3 The prisoner was inside a prison.

[11] There is no dispute in this case that on 7 October 2011 Liam Reid was a prisoner and that he was inside a prison.

Finding

[12] Other than the evidence of Liam Reid there is no evidence to support the proposition that the presence of the iPhone, packet of cigarettes and cigarette lighter in MECF on 7 October 2011 was the result of a conspiracy between Corrections Officers Purcell and Stanley.

[13] In light of all the evidence in this case I have no difficulty in rejecting Mr Reid's evidence. It was completely implausible. Supported by a number of pieces of compelling circumstantial evidence I accept the evidence of Corrections Officers Purcell and Stanley. I accept they found the cellphone, cigarettes and cigarette lighter in Mr Reid's possession in the way they described in the second holding cell which is adjacent to the legal visits area at MECF.

[14] Secondly, I am satisfied beyond reasonable doubt that those three items were introduced into MECF on that day by the defendant Davina Valerie Murray.

Reasons

[15] My reasons for so finding are as follows.

[16] Ms Murray commenced a professional relationship with Mr Reid as client/counsel in 2009 when Mr Reid was an inmate at Auckland Prison. At that time his appeal against his convictions had been dismissed by the Court of Appeal. He wished to seek leave to appeal to the Supreme Court. Throughout 2011, particularly in June, July and August Ms Murray's visits to him became frequent, in fact very frequent. The level of attendance of counsel and client became quite extraordinary. There were 16 visits in June, 16 in July and 17 in August 2011. In the course of this contact Ms Murray became infatuated with Mr Reid to the point where in text messages in July and August of 2011 she expressed her love for him and her desire to marry him[1].

[17] I very seriously doubt that Ms Murray's number of visits to Mr Reid in the 12 months before 7 October 2011 was in any way necessary to prepare for his application for leave to appeal to the Supreme Court. The traditional approach is for counsel to assess the prosecution case and take the client's instructions and thereafter analyse the prosecution case against the client's instructions[2]. Undoubtedly issues or topics will arise that require discussion with or explanation from the client.

[18] Mr Reid gave evidence[3] that in seeking leave to appeal to the Supreme Court Mr Mansfield was lead counsel and Ms Murray was acting as junior counsel. Mr Reid's evidence[4] was that he and Ms Murray would go through the evidence at his trial "a box or two at a time".

[19] It is not necessary for the purpose of this proceeding to come to any conclusion regarding the motivation for Ms Murray's numerous visits to Mr Reid. Whatever the motivation may have been the salient fact is she visited him so often that she became emotionally involved with him. That emotional involvement is in

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[1] Exhibit 13.
[2] *R v Ulcay* [2008] 1 Cr. App. R. 27 at paras [27] and [28].
[3] NOE page 284.
[4] NOE at 285.

direct contradiction to the detached objective reasoning with which the criminal justice system exhorts counsel to invest their advocacy. The first factual finding therefore I make is the context of this allegation. The context is that the relationship between Ms Murray and Mr Reid was not one of an orthodox lawyer/client. It was one that had become very close at a personal level.

The finding of the iPhone, cigarette packet and cigarette lighter

[20] On 7 October 2011 Corrections Officer Noel Purcell said that in the time broadly between 1.30pm and approximately 3.20pm the defendant visited Liam Reid at MECF. The meeting took place in a booth in what has been described as the legal visits area. A diagram depicting the layout, drawn by Mr Purcell was produced by him as Exhibit 1.

[21] There is no dispute that that meeting took place. The defence witness Mr Reid confirmed the fact of the meeting[5].

[22] At the conclusion of his visit with Ms Murray, Mr Reid was taken to holding cell two, prior to being escorted back to his unit. The system that operated was that he would be taken from the visiting booth to the holding cell by the officer working on the prisoners' side of the visiting booth. In this case that was Mr Purcell. From the holding cell the prisoner would be escorted by another officer, described by Mr Reid as a "runner" back to his unit.

[23] There is no dispute that on 7 October 2011 Mr Reid was escorted from the legal visits booth, where he had been with Ms Murray, to the holding cell.

[24] The only difference between the prosecution and defence case on this part of the narrative is the time Mr Reid waited in the holding cell. That difference, if it exists, is immaterial.

[25] The Corrections Officer who arrived to escort Mr Reid back to his unit from holding cell two was Corrections Officer Maurice Stanley. His evidence[6] was that

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[5] NOE at 290.

with Corrections Officer Purcell present he commenced a routine "wand" search of Mr Reid. Such a search involves moving a metal detector around the body of the person subject to the search. Mr Stanley said the wand "went off" indicating metal in the area of Mr Reid's abdomen. Mr Reid was wearing overalls which should have been sealed. However Mr Purcell had in his evidence demonstrated how items could be moved into the overalls.

[26] On the metal detector activating Mr Reid indicated that his cigarettes or his cigarette lighter had caused that activation. He then produced for Corrections Officer Stanley the cigarette package which contained the BIC cigarette lighter within it.

[27] Mr Stanley then said a strip search was required of Mr Reid and took place. In the course of his clothing being removed Corrections Officer Purcell took Mr Reid's shoes and found the iPhone in one of those shoes. He described the phone as being towards the front or toe end of the shoe.

[28] Mr Reid gave no evidence of the origins of the cigarette packet and lighter but it can be assumed that his position is that those items were not in his possession and are part of the fabricated evidence against him.

[29] Mr Purcell[7] said he gave the three items to his supervisor the witness Ngaire Cooper. She, Ms Cooper, said she placed the iPhone, cigarette packet and cigarette lighter in an evidence bag and that her supervisors Mr Martin Clark and Mr Paul Monzari wanted to sight the items.

[30] In cross-examination Ms Cooper said she gave the exhibit pack containing the three items to Mr Monzari. Mr Monzari's evidence was that he did not take possession of the exhibit bag and that it was placed in the prison exhibit safe. From there the witness Shayne Clayden, as the Site Prosecutor at Auckland Prison, received Exhibit 14 from Megan Lamont on 13 October 2011. The transfer of the exhibit from MECF to Auckland Prison was explained on the basis that an exhibit

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[6] NOE at 220.
[7] Page 192 NOE.

follows the prisoner to whom it relates. The evidence was that shortly after 7 October 2011 Mr Reid was transferred from MECF to Auckland Prison.

[31] On 19 October 2011 the witness Shayne Clayden transferred Exhibit 14 to Robert Downs. On 1 November 2011 Mr Downs gave Exhibit 14 to Detective Tolmie.

[32] In summary the evidence that Exhibit 14 contains the iPhone, cigarette packet and cigarette lighter handed to Ngaire Cooper is as follows. Corrections Officers Purcell and Stanley respectively say they found those items of that description. They say that the items were given to Ngaire Cooper. She confirms that and says that she secured them in an exhibit bag. Exhibit 14 is noted on the outside as containing the three items and that they were seized on 7 October 2011 by officers Purcell and Stanley. The location that they were seized is described as the holding cell in the legal visits area of MECF. Ms Cooper recognised Exhibit 14 as the items she dealt with on 7 October 2011. From there Mr Clayden gives evidence of receiving the exhibit from Megan Lamont and giving it to Mr Downs who gave it to Detective Tolmie who produced it as an exhibit.

[33] The chain of custody may not be perfect. I note Mr Monzari and Ms Cooper differ as to who placed the items in the exhibit safe at MECF. However I am satisfied on the evidence summarised above that Exhibit 14 contains the iPhone, cigarette packet and cigarette lighter that Ngaire Cooper received from Corrections Officers Purcell and Stanley respectively. In any event that has not been the real issue in the case. Mr Reid does not challenge that Correction Officer Noel Purcell was in possession of a cellphone in the proximity of holding cell two in the legal visits area on 7 October 2011. What Mr Reid disputes is that that cellphone came to Mr Purcell's possession via himself, Mr Reid. To an extent, and save for matters I am about to discuss, the issue is who brought the items into MECF - Mr Purcell or Ms Murray.

[34] Subsequent evidence though does in fact further link the cellphone to both Mr Reid and to Ms Murray. Following his receipt of the cellphone Detective Tolmie did a number of things. Some of those actions were adduced in evidence on the

prosecution case of the substantive charge. Others came into evidence on the voir dires held to determine admissibility of various evidence. For the purpose of making a finding on guilt or otherwise I have only taken into account the evidence adduced for the purposes of proving of the substantive charge.

[35] Mr Robert Kainuku, an agency liaison analyst with Vodafone gave evidence that all mobile phone handsets have an IMEI number[8]. The prosecution allege in this case that the iPhone which is part of Exhibit 14 has the serial number 81129QYBA4S and the IMEI number 012839002353032. A simple examination of the iPhone which is part of Exhibit 14 confirms the prosecution case. The sim card tray for the iPhone does indeed have that serial number and IMEI number imprinted.

[36] Mr Kainuku has also produced Exhibits 8 and 9 in the hearing. They are business records held by Vodafone. Exhibit 8 is a re-sign agreement and Exhibit 9 is a tax invoice. Exhibit 9 discloses that on 27 September 2009 (10 days before the alleged offending) a Davina Murray purchased an Apple iPhone with the same IMEI number as appears on the iPhone produced (part of Exhibit 14). No purchase funds were needed for the phone as it was linked to a 24 month plan which committed the purchaser to paying $173.91 per month. Exhibit 9, which is a Vodafone re-sign agreement, is linked by customer reference number to Exhibit 8. It is also in the name of a Davina Murray. The identity of the customer was confirmed to the attending sales assistant by the production of a driver's licence. In this case the driver's licence number was BP714932-625. Detective Tolmie has confirmed that by reference to the driver licence database that driver licence number BP714932-625 is that of the defendant Davina Valerie Murray.

[37] The phone number linked to both Exhibits 8 and 9 is 02102559968. Exhibit 8 has been signed with a signature which can be read as Davina Murray. The phone number (which is derived from the mobile device's sim card and which can be exchanged between handsets) 02102559968 was at the material time the phone number of the defendant Davina Murray. That has not been challenged in the case. Exhibit 13 is a series of text messages sent to and from 02102559968. The context and content of those text messages make it clear the defendant is the author of at

[8] Page 157 NOE.

least a significant number. Those text messages discuss someone by the name of "Reid" and also "Liam" as well as disclosing that the sender of some of the text was working on his appeal.

[38] Therefore I summarise the compounding and accumulating circumstantial evidence to this point.

38.1 On 7 October 2011 Ngaire Cooper receives the iPhone (Exhibit 14) from Corrections Officer Purcell.

38.2 I am satisfied that Exhibit 14 is the iPhone received on 7 October by Ngaire Cooper.

38.3 That the iPhone in Exhibit 14 has the IMEI number 012839002353032.

38.4 That the iPhone in Exhibit 14 was purchased by a Davina Murray on 27 September 2011 from Vodafone by re-signing a Vodafone plan for 24 months for cellphone number 0212559968.

38.5 I accept that cellphone number 0212559968 was at the material time the defendant's cellphone number.

38.6 The defendant's driver's licence was used as identification in the iPhone when Exhibit 14 was purchased.

38.7 Ten days after the purchase of the iPhone it is located at MECF. Therefore I am satisfied that the defendant purchased the Apple iPhone with the IMEI number 0128309002353032. Ten days after the purchase of the iPhone it is handed by Corrections Officer Purcell to Ngaire Cooper at MECF immediately after the defendant has visited Liam Reid.

38.8 The defendant when given the opportunity by both Mr Paul Monzari and Detective Tolmie to say that she had lost the phone or that Mr Reid had taken it from her gave neither that explanation.

[39] The cumulative effect of the eight pieces of circumstantial evidence above provides overwhelming proof that Ms Murray provided the phone to Mr Reid. It does not take into account acceptance of the evidence of Corrections Officer Purcell and Stanley. However it is a short step in logic to conclude their evidence must be correct. More is not needed to find the charge proved beyond reasonable doubt but more is available. I detail that now.

[40] The first of the additional matters is this. Ms Murray was confronted with a prima facie case that showed that she was the purchaser of the iPhone some 10 days before it is found at MECF. She knew well in advance of the hearing that was the evidence she faced. In fact at the end of the prosecution case she did in fact face that evidence. The defence case advanced through the evidence of Mr Reid was that Corrections Officer Purcell had possession of that same iPhone and had fabricated his account that it was in Mr Reid's shoe. For the defence scenario to have any plausibility there has to be an evidential foundation of how the iPhone got from Ms Murray, after she purchased it, to Corrections Officer Purcell or an explanation that she had never purchased it.

[41] This is a *Trompert v Police*[9] situation. The failure of the defendant to give an explanation when she might naturally be expected to do so may be taken into account in determining the weight to be given to the evidence. Her failure to provide an explanation of how a phone she purchased came into Corrections Officer Purcell's possession significantly lessens whatever weight could be given to Mr Reid's evidence. Ms Murray gave no explanation when invited to do so by Mr Monzari, or by Detective Tolmie and she did not do so in the hearing.

[42] The second additional matter is the duties Ms Murray had pursuant to s 92 of the Evidence Act 2006. It provides:

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[9] [1985] 1 NZLR 357.

92 Cross-examination duties

(1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.

(2) If a party fails to comply with this section, the Judge may—

(a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or

(b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or

(c) exclude the contradictory evidence; or

(d) make any other order that the Judge considers just.

[43] Ms Murray did not challenge either Mr Purcell or Mr Stanley on the critical issue in dispute. The duty under s 92 was to squarely put to them that they had fabricated the evidence against Mr Reid and also herself. Mr Purcell was called first. His evidence commenced late on the fourth day of the hearing, 19 July 2013. He was partway through evidence in chief when the Court adjourned on the Thursday evening. His cross-examination commenced on Friday morning at page 192 of the notes of evidence and continued for 25 pages. During that cross-examination I asked four questions to simply clarify the witness's answer. I intervened twice to correct factually incorrect propositions Ms Murray had put to the witness. The prosecutor objected to one question but I did not allow the objection. As recorded at page 206 I directed the witness not to answer an irrelevant question. Finally as recorded at page 208 line 23 Ms Murray asked this question.

> Imagine if you were watching CDs of a police interview on your laptop and somebody is walking past and can't quite hear the content of the CD –
>
> **The Court: Ms Murray, just pause for a minute.**
>
> Questions which start with things like "just imagine" I suspect aren't particularly focused to the issues in this hearing. You've been given very wide latitude this morning, so there is clearly some very direct cross-examination that you're going to have to come to.

Ms Murray

I am getting there Sir.

[44] At the end of the cross-examination the prosecutor raised the issue of s 92 and I responded as follows:

Ms Longdill

I am just conscious of s 92 of the...

The Court: Yes, Ms Murray's had s 92 drawn to her attention on more than one occasion in this hearing and I am not going to keep repeating it.

[45] That exchange between the prosecutor and myself happened immediately prior to Mr Stanley who was the next witness being called. His cross-examination commenced at page 223 of the notes of evidence. It proceeded for only five pages. I intervened only once to advise that the answer to a question would be speculation. At that point Ms Murray did not continue to cross-examine.

[46] Subsequently when her failure to comply with s 92 was raised with her Ms Murray, (during the course of Mr Reid's evidence) expressed the view that my actions as the Judge may have distracted her from her obligations pursuant to s 92. That submission boarded on the disingenuous.

[47] In preparing for this hearing no point in cross-examination could have loomed larger for Ms Murray than the challenge that she was obliged to make to Messrs Purcell and Stanley that they had conspired to fabricate evidence against Mr Reid and thereby herself. In the context of her allegations of judicial bias it is pertinent at this point to record some observations regarding Ms Murray's conduct during the hearing. I preface those observations with these comments from the Supreme Court.

> Presiding Judges of all Courts have a responsibility to ensure that litigants, represented or not, do not spend time on irrelevant matters in Court hearings or otherwise conduct their litigation in a way that is wasteful of the resources of the Court or the time of other participants.[10]

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[10] *Siemer v Heron & Ors* [2011] NZSC 116 at para [7].

[48] There were many features of the defendant's approach to this litigation. They include but are not limited to the following and are in no particular order:

48.1 Emailing demands to the registry, including demands of the Judge to do certain things. The concept of appropriate applications with supporting memoranda is loosely observed by Ms Murray.

48.2 Repeatedly talking over witnesses and the Judge.

48.3 Repeatedly asking questions of witnesses when looking at the media benches.

48.4 Repeatedly pursuing lines of cross-examination after such lines of cross-examination had already been ruled irrelevant, e.g. the Serco emails.

48.5 Conferring with her McKenzie while I was actually addressing her.

48.6 On occasions, when propositions were directed to her by me for comment, turning to the media benches, laughing or grinning before responding.

48.7 Until directed not to do so, walking in wide circles, including turning her back to the Court while cross-examining.

48.8 Using derogatory language about a witness (e.g. describing the witness Rachael Williams as saying she could give "them a ringy ring" during submissions on the admissibility of the recorded telephone conversations between Ms Murray and Mr Reid).

48.9 Lateness to Court.

48.10 Making gratuitous comments after rulings adverse to her were given.

[49] On one occasion I reminded Ms Murray she was not addressing a jury (that was at the point when she was referring to Ms Williams' evidence mentioned in the above paragraph).

[50] On one other occasion I reminded Ms Murray this proceeding was not American television. It was Ms Murray who chose to repeat those reminders.

[51] I reject my attempts to adhere to the Supreme Court's direction as to how proceedings should be controlled was in any way the result of any bias. I can ascertain no basis to grant Ms Murray's application for a stay based on judicial bias.

[52] The third additional matter is the communications prior to the offending between Mr Reid and Ms Murray. They are contained in Exhibit 11 (a CD) and the transcripts of those conversations are set out in Exhibit 12.

[53] In the first of those recorded telephone discussions dated 29 September 2011 Mr Reid tells Ms Murray to write down an IMEI number. Eight days before 7 October Mr Reid and Ms Murray are discussing something as detailed and linked to a cellphone as an IMEI number. As matters transpire it is then a cellphone that is one of the introduced items on 7 October.

[54] Later that same day, 29 September, Mr Reid and Ms Murray talk about the topic discussed earlier in the day. In fact Ms Murray becomes frustrated with Mr Reid when he does not realise what she is talking about. She does not use any plain straightforward language to make it obvious what she is talking about.

[55] The next conversation, also recorded on 29 September, is a discussion about the use of cellphones and Ms Murray's phone. In the context of the evidence of the purchase of the iPhone on 27 September there is then this evidence.

> LR I reckon I know what's wrong with your phone.
>
> DM Oh do you?
>
> LR Yeah I um I reckon that when you were resetting all your settings you accidentally pushed um the delete all settings you went into the general into the general settings...

DM Yeah.

LR ...yeah and then you've gone down and you've scrolled down and um you have gone into the delete all settings and that's why it's locked you out and that's why when you turn it on its only it only allows you to ring emergency numbers.

DM Right so how would I fix that?

[56] In a conversation on 4 October 2011 Mr Reid says:

> I need it in writing I need it sent to me so yeah when you get off your lazy arse and send that stuff in for AJ to look at a paralegal thing you could like slip it into that and send it into into one of your diplomatic pouches yeah can you staple it altogether you know so you know like staple his stuff together and then staple that stuff together in put it in all at the same time.

[57] The fourth additional matter is communication involving Ms Murray post the afternoon of 7 October 2011. On that date at 17.08.04 hours the following text was sent from the defendant's cellphone:

> Hi. I just got phoned from jail and they told me Liam in confinement because after our meeting today he was found with contraband items. I don't know what and they won't tell me. Davina.

[58] The addressee replied:

> What!

In a further text the addressee enquires:

> How will that affect tonight?

At 17.15.31 the defendant replied:

> Yeah I don't know what they are talking about...tonight will be fine.

That text was followed shortly after by another text.

> Tonight is about vision not clients.

At 17.16.46 the addressee replies to the defendant's phone:

> Are they suggesting you gave him something?

The answer from the defendant's phone at 17.17.57 records:

Didn't feel like that – felt more like just informing me. But I am a bit paranoid that they thought that now you bring it up.

[59] Those texts are consistent with the evidence of Paul Monzari and the contact he made with the defendant in the late afternoon of 7 October 2011.

[60] On 8 October the following occurs as part of a discussion between the defendant and Liam Reid.

LR You know I I you know fucken enough you know I've already I've already told you what I've said to them so you know...

DM (Inaudible).

LR That's ah that's the way it's gonna be so you know they have to decide whether they gonna make a big deal about it and cause themselves some med you know cause if they charge me on the outside for this I'm still gonna say the same thing in the dock so if I'm gonna be in the media man they're not gonna want me to get up there and say that sort of shit in the dock so ah yeah they'd want to tread very carefully. I don't care if they charge me in here and put me in the pound or whatever and here for a couple of weeks or whatever. I don't give a fuck but yeah they'll want want to make too much of a big deal. I don't give a fuck but um yeah they'll won't want to make much of a big deal about it cause they worried about their image (inaudible).

DM Well you're on the eve of your Supreme Court appeal you know it's not what we need.

[61] On 11 October 2011 the following conversation occurs:

DM No, no, no, no, no, no there's nothing further to discuss. What I thinks happening is their putting a set of some sort a case against you. We know that because why else would he say ah ah you ok like why wouldn't I be...

LR Yeah.

DM ... ok Reid um so at the end of the day in um the innuendo that we felt present is obviously going to be actioned and I have sit and wait for that to occur but don't worry I'll obviously you know (inaudible) appropriately.

LR Oh well um I'll I'll just gonna name the screw who brought it in for me then fuck them and if they charge me on the other side or whatever I'll scream it from the rooftops in the Court in the courthouse so they fucken ah so everybody knows how corrupt Serco is then that's what I'll do.

DM No we just gonna sit and wait (inaudible).

LR Yeah no but if the worse comes to the worse that's what I'll do ah fuck.

DM Yeah.

[62] Corrections Officer Noel Purcell's evidence was that Mr Reid told him the phone had come from another officer[11].

[63] Corrections Officer Ngaire Cooper's evidence was that Mr Reid told her that the phone had been bought by him down from the unit and that he had got it from an officer.

[64] Neither was challenged that Mr Reid had said those things. Mr Reid's evidence given in the hearing on the critical point of where he said the cellphone came from differed from what he told Ms Murray in the recorded phone calls that he had said, differed from what he told her he would say, and differed from what Corrections Officers Purcell and Cooper recalled him saying.

[65] The inconsistencies in Mr Reid's statements as to the origins of the cellphone add to the gross unreliability of his evidence.

Exhibit 10

[66] This exhibit is the data in printed form said to have been obtained by Detective Tolmie by subjecting the iPhone (Exhibit 14) to a programme known as XRY.

[67] The prosecution seek to produce the exhibit via s 137 Evidence Act 2006. Ms Murray objected to the admissibility of Exhibit 10. In doing so she relied on *Scott v Otago Regional Council*[12].

[68] Three points arise. Firstly Exhibit 10 was produced to prove the link between the iPhone (Exhibit 14) and Ms Murray. Some texts recovered by the XRY programme on their face logically indicated they had been sent by her. I have

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[11] NOE, 191.
[12] Dunedin High Court CRI-2008-414-17 3 November 2008 Heath J.

already found Ms Murray purchased the iPhone. The link between her and the phone is established in any event without resort to Exhibit 10. My finding of guilt does not rely on Exhibit 10.

[69] Secondly, when Detective Tomlie was referring to Exhibit 10 (prior to any s 137 issue being raised by Ms Murray) Ms Murray objected to the admissibility of one text message on the ground she had sent the very text but that the addressee Cody was a client and the text was the subject of professional legal privilege. The text reads:

> Hi Cody. I need to postpone my meeting with you. I will call you to reschedule. May need to see you on Saturday. Sorry for the inconvenience. I will leave it over to your brother to speak with Alistair Haskett. But I will let him know that I cannot attend today at 5pm. Pls confirm that you have read this text. Thanks. Davina.

[70] It cannot be said that confidentiality was intended because Cody's brother was to speak to Alistair Haskett and the sender of the text was going to let either the brother or Alistair Haskett know the content of the message. Furthermore the text was not a communication that contained any legal advice or assistance nor disclosed any confidential information from Cody at all. It was simply a communication cancelling and rescheduling a meeting. On its face Cody is not identified and nor is he identified as a person who has obtained professional legal services from Ms Murray. Other than the text concluding with the words "thanks Davina" the content of the text has no probative value and can be disregarded. However the effect of what I am left with after Ms Murray's objection is an in Court acknowledgment by her of using the actual iPhone the subject of this proceeding, i.e. the phone in Exhibit 14.

[71] Thirdly, *Scott* was concerned only with s 137(1). The part of s 137(1) which was central to Heath J's judgment is the expression "is of a kind that ordinarily does what a party asserts it to have done,...". However that is not repeated in s 137(2). However even if the phrase "is of a kind that ordinarily does what a party asserts it to have done" is imported into s 137(2) by implication, the situation here is different from that in *Scott*.

[72] In this case the effect of what Detective Tolmie said was that he took the iPhone to the Electronic Crime Laboratory to obtain data from the phone. There, under the guidance of an expert, a programme commonly used to obtain such data was used under the supervision of the expert. Another difference was that in *Scott* the software was used to actually calculate a figure or produce a figure which was critical to the prosecution. Here the programme has simply been used to do that which s 137(2) appears intended to admit.

Matters raised in cross-examination

[73] Much of Ms Murray's cross-examination in this hearing was irrelevant. However it is appropriate to address some issues raised.

[74] There was no evidence of any fingerprints being found on the items in Exhibit 14. Detective Tolmie was ultimately unsure whether the advice he received was either that there was little evidential value to be achieved in fingerprinting the items or whether that process produced no evidence. Had the evidence against Ms Murray not otherwise been so overwhelming the absence of fingerprint evidence may have been of some moment in suggesting that the case had not been proved beyond reasonable doubt. However as in a number of cases where there is no fingerprint evidence it is of no moment here.

[75] CCTV footage of some parts of the prison was available after 7 October 2011 for 14 days. That footage was not requested by the MECF authorities. It is, and was in this case, automatically deleted from the prison hardware holding such in the absence of a request that it be saved. It was deleted before the police enquiry began. I accept Mr Monzari's reasons for not saving the footage[13].

[76] As matters transpired the only relevant footage would have been of holding cell two and the finding of the items on Mr Reid. However there was no challenge to Corrections Officers Purcell and Stanley as to the findings of those items. Furthermore Mr Reid had already indicated his narrative before it was ascertained

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[13] NOE page 257 but note in particular the discussion with the defendant from 257 through to 259.

through the non-party disclosure hearing that no CCTV footage existed. A change in his narrative occurred after it was established in the non-party disclosure hearing that the footage had been deleted. The footage did no longer exist to contradict the altered account he gave at the hearing.

[77] Ms Murray concentrated heavily on the fact of the single point of entry into MECF and by inference the unlikelihood of her being able to bring the items into the prison undetected. However her questioning established just how easy it would have been for her, a lawyer and frequent visitor to the facility to conceal the items and introduce them. I need make no finding just how she did achieve what she did. However the evidence of Paul Monzari[14] shows that if all three items were concealed in her bra then their introduction would have been brought about in a low risk and straightforward manner.

Conclusion

[78] For the reasons given above the charge is proved beyond reasonable doubt.

R Collins
District Court Judge

[14] NOE 270-271.