IN THE DISTRICT COURT
AT PALMERSTON NORTH

CRI-2015-054-002246
[2016] NZDC 3791

NEW ZEALAND POLICE
Prosecutor

v

FARANIKO PEI
Defendant(s)

Hearing:	29 February 2016
Appearances:	Ms M Wilkinson-Smith for the Police Mr P Murray for the Defendant
Judgment:	14 March 2016

DECISION OF JUDGE J D LARGE
ON s 147 APPLICATION

Background

[1] On 10 August 2015 the defendant went into the Palmerston North Police Station carrying a sawn-off shotgun and fired two rounds into a glass partition behind which was Constable Ross, albeit 2-3 metres away from where the impact occurred.

[2] Initially the defendant was not charged with the current charge (CRN 3824), but when the matter was referred to the Crown the charge was laid on 6 November 2015.

[3] The charge currently reads:

> Used a firearm against a member of police by firing two shot-gun rounds within close vicinity of Raewyn Ross acting in the course of her duty and was reckless whether or not that person was a member of the police.

[4] The charge currently before the Court is not correct and will need to be amended as it currently refers to the use of a firearm "against a member of police" when in fact the words "member of police" were deleted and substituted by the word "constable" from 1 October 2008 pursuant to s 116A(2) of the Policing Act 2008.

[5] The defendant faces five other charges which are not part of the application and on those matters the defendant has been remanded in custody to 28 April 2016 for a judge alone trial, he having pleaded not guilty on 17 December 2015 to all matters.

[6] This is an application by Faraniko Pei for a discharge under s 147 of the Criminal Procedure Act 2011 on the charge contained in charging document 3824 under s 198A(1) of the Crimes Act.

> **147 Dismissal of charge**
>
> (1) The court may dismiss a charge at any time before or during the trial, but before the defendant is found guilty or not guilty, or enters a plea of guilty.
>
> (2) The court may dismiss the charge on its own motion or on the application of the prosecutor or the defendant.
>
> (3) A decision to dismiss a charge may be made on the basis of any formal statements, any oral evidence taken in accordance with an order made under section 92, and any other evidence and information that is provided by the prosecutor or the defendant.
>
> (4) Without limiting subsection (1), the court may dismiss a charge if—
>
> (a) the prosecutor has not offered evidence at trial; or
>
> (b) in relation to a charge for which the trial procedure is the Judge-alone procedure, the court is satisfied that there is no case to answer; or
>
> (c) in relation to a charge to be tried, or being tried, by a jury, the Judge is satisfied that, as a matter of law, a properly directed jury could not reasonably convict the defendant.

(5) A decision to dismiss a charge must be given in open court.

(6) If a charge is dismissed under this section the defendant is deemed to be acquitted on that charge.

(7) Nothing in this section affects the power of the court to convict and discharge any person.

[7] Section 198A(1) of the Crimes Act 1961 provides:

> **198A Using any firearm against law enforcement officer, etc**
>
> (1) Every one is liable to imprisonment for a term not exceeding 14 years who uses any firearm in any manner whatever against any constable, or any traffic officer, or any prison officer, acting in the course of his or her duty knowing that, or being reckless whether or not, that person is a constable or a traffic officer or a prison officer so acting.

[8] The essential ingredients under s 198A(1) are therefore:

(a) Using any firearm in any manner whatever against a constable;

(b) That that constable was acting in the course of her duty; and

(c) Was reckless, whether or not the person is a constable so acting.

The defence case

[9] It was properly acknowledged by Mr Murray that discharging a firearm or actually presenting a firearm at a law enforcement officer is not required for the offence to be made out, he submitting that it can be used in any way but it must be against that particular officer.

[10] He refers to the definition of the word against from the Oxford English Dictionary as well as Black's Law Dictionary and cites cases of *R v Swain* [1992] 8 CRNZ 657 (HC) and *Hutton v R* [2010] NZCA 160 at [20]:

> The word "against" is to be given its ordinary meaning, which is the pistol was used in the manner that was adverse in some way to the interests of one or more members of the police who were present at the property.

[11] The circumstances of *Hutton* as set out in Mr Murray's submissions gave a background of the police arriving at Mr Hutton's property, advising him that they were looking for him and a 9mm pistol. Mr Hutton did not respond to that but went to a vehicle and without saying anything removed a firearm.

[12] In evidence he was described as holding it with his thumb on the trigger. He was followed by police officers who attempted to restrain him and Mr Hutton put up some resistance but eventually let the officer take the pistol from him. The trial judge directed the jury that Mr Hutton must have manipulated the firearm so as to deliberately and intentionally convey a threat of its use. The Court of Appeal accepted this is a correct explanation.

[13] In the current case Mr Murray argues that Mr Pei's entry into the Palmerston North Police Station and firing two shots away from the position Constable Ross was in, did not amount to a use of the firearm against Constable Ross.

[14] It is acknowledged that Constable Ross was not in uniform but it was properly conceded by Mr Murray that Constable Ross was a constable and that the defendant was reckless, whether or not she was a constable or was so acting.

[15] Mr Murray's argument surrounds the use of the word "against". Simply put, his argument is that the firearm was not used against Constable Ross because it was not pointed at her, rather it was fired into the glass by her.

[16] Both the Crown and defence agreed to the CCTV footage of the incident from the Palmerston North Police Station foyer to be shown to the defendant and to the Court.

[17] The issue then is to determine whether the word "against" should be construed narrowly as Mr Murray has argued, namely that the use of the firearm had to be against Constable Ross as opposed to against the glass partition some one or two or three meters from where Constable Ross was positioned.

[18] The Crown however are of a different view and argue that the wider interpretation of against should be included and thus the weapon need not have been pointed at Constable Ross to have been used against her.

[19] The expression "uses any firearm in any manner whatever against" is according to Adams on Criminal Law at CA198A.02, "not entirely easy to interpret." It is sufficient for the offence that the defendant has in some way handled or manipulated the firearm so as to convey an implied threat or its further use against a police officer. Actually presenting the firearm at the officer let alone discharging it is not needed.

[20] The inclusion of the words "in any manner whatever" certainly would as Adams would suggest, widen the ambit of the section to include the use of the firearm in some way in which firearms are not usually used as where the firearm was used as a club. However, in the context of this event, the use of the firearm by discharging it (even discharging it away from the immediate position of the officer) is sufficient for there to have been a use against a constable.

[21] Mr Murray in his submissions concentrates on the word "against" and in his view that must be against Constable Ross. However, with respect the word "against" cannot be taken out of context and must be read along with the words immediately before it in the section, namely:

> "… who uses any firearm in any manner whatsoever against …"

[22] In *Hutton v Queen* 2010, NZCA 160 at [21] the Court held that it was not necessary for the Crown to prove that Mr Hutton presented and aimed the pistol at the police or that he fired it. The fact that Mr Hutton removed the weapon from the bag would have been sufficient to constitute the actus reus element. It would amount to a "use" of the weapon in terms of the section. The intention nominated by the Crown namely Mr Hutton, "deliberately used the pistol to convey a threat to the police, would also be sufficient to satisfy the mens rea element".

[23] Applying that to the current situation it must surely be correct in law that by walking into the Police Station with the weapon on show and then raising and

turning towards a section of the glass partition and discharging the firearm Mr Pei has completed the actus mens rea elements of the offence, in that he used a weapon in any manner whatsoever against any constable, especially as he must have been aware of the presence of Constable Ross behind the glass partition.

[24] To say the weapon would need to have been pointed at Constable Ross (or in her general direction – the narrow view) must be wrong as that would give the elements of a completely different crime.

[25] Given that the defendant knew Constable Ross was behind the partition and even accepting for a moment (if the fact-finder reaches the point) that the firearm was deliberately pointed away from Constable Ross and never pointed at Constable Ross, the fact that Constable Ross while present and known by the defendant to be present, behind the partition when he discharged the weapon, it must be said that he used the firearm "in any manner whatsoever against" Constable Ross.

Section 147

[26] I remind myself that I am not the fact finder in this matter but solely to consider an application under s 147 of the Criminal Procedure Act.

[27] The test for a s 147 application, the test for dismissing a charge prior to trial is well settled and I refer to *R v Flyger* [2001] 2NZLR 721 and affirmed in *Parris v Attorney General* [2004] NZLR 519 (CA).

[28] Both of those cases related to jury trials where it was for the jury to determine whether the evidence was or was not sufficient to establish guilt and it was not for the judge to predict what the jury would find.

[29] In this particular fact situation, this Court is to consider only a s 147 and not to consider the facts and make a factual determination.

[30] As settled in *Parris* at [13]:

> [13] There should be a s 347 (now 147) discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed

> jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to the same thing.

And further, at [14]:

> [14] It is vital, however, to appreciate the proper compass of the word "reasonably" in this context. The test must be administered pre-trial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal has the reserve power to intervene on evidentiary grounds. The constitutional divide between trial Judge (law) and jury (fact) mandates that trial Judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence.

Conclusion

[31] I am not satisfied that there is no case to answer, given the findings above. The application is accordingly dismissed and the charge is remanded to the same date as the other charges, namely 28 April 2016 for a judge alone trial.

J D Large
District Court Judge