IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2018-463-000098
[2019] NZHC 313

BETWEEN	CHRISTA MARECE SHORT (aka) KRYSTA DE KHAN Appellant
AND	THE QUEEN Respondent

Hearing:	20 February 2019
Appearances:	P N Ross for Appellant A Gordon for Respondent
Judgment:	1 March 2019

JUDGMENT OF HINTON J

This judgment was delivered by me on 1 March 2019 at 2.30 pm
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Cathedral Lane Law, Napier
Gordon Pilditch, Rotorua

[1] This is an appeal against conviction on one charge of contravening a protection order. Judge Hollister-Jones convicted the appellant on 4 September 2018 and sentenced her to $1,000 emotional harm reparation.

[2] The present appeal is brought pursuant to ss 229 to 232 of the Criminal Procedure Act 2011.

[3] The High Court, as the first appeal Court, must allow the appeal if it is satisfied that:

(a) the trial Judge erred in their assessment of the evidence to such an extent that a miscarriage of justice has occurred; or

(b) in any case, a miscarriage of justice has occurred for any reason.[1]

[4] A miscarriage of justice means any error, irregularity, or occurrence in, or in relation to, or affecting the trial that:

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.[2]

Background

[5] The background is unusual and very sad. The appellant alleges that her father sexually abused her when she was young. It seems her two sons have also tragically died. The appellant gave evidence in the District Court that she is an ACC beneficiary as a result of a post-traumatic stress disorder. Her father, who died after the District Court hearing, re-married some years ago and the obviously difficult situation between the appellant and her father extended to the step-mother, whom the appellant considered was protecting her father.

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1 Criminal Procedure Act 2011, s 232(2)(b) and (c).
2 Criminal Procedure Act 2011, s 232(4).

[6] About five years ago, the step-mother obtained a trespass order and then subsequently a protection order against the appellant.

[7] There is no dispute that the protection order was correctly served and that after service, the appellant posted material on Facebook which was psychologically abusive of the protected person. This included statements such as, "[the protected person] is dangerous, sleep tight" and materially more. A number of the recipients passed these communications on to the protected person.

[8] The District Court Judge found the defendant guilty, after finding the statements were psychologically abusive of the protected person and there was no reasonable excuse for the breach.

Appellant's case

[9] The main focus of Mr Ross' submission was on an analogy with the defence of qualified privilege under defamation law. The communications that were found to have breached the protection order were not made directly to the protected person, or to the public in general. They were made to a restricted group of about 40 people, via a posting on Facebook. The argument is that these people all had a proper interest in receiving communications and this constitutes a defence to the crime of breaching a protection order, akin to qualified privilege in the civil law of defamation.

Analysis

[10] Clearly such a defence does not apply per se. Qualified privilege is a statutory defence provided by s 16 of the Defamation Act 1992. While Mr Ross did the best job he could of expanding on the potential parallel or analogy, in my view, the appellant's case can only be advanced, given the making, service and breach of the order are all accepted, in terms of the defence of "reasonable excuse".

[11] The Court in *Porter v Police* affirmed the test in *A v Police*:[3]

> Any assessment of whether reasonable excuse exists will be fact specific. It will be made in the context of the relationship between the parties and whether

[3] *Porter v Police* [2006] NZFLR 725 (HC) at [41]; citing *A v Police* [1999] 2 NZLR 501 (HC).

> the incident in question is a single incident or a repeat. On the test enunciated by Baragwanath J, the ultimate issue is whether an ordinary New Zealander would regard the communication as reasonable in the circumstances; those circumstances including the existence of the order and the inherent vulnerability of the protected person to psychological abuse.

[12] Judge Hollister-Jones considered at length whether there was a reasonable excuse, focusing on whether the appellant would have reasonably contemplated that her communications to third parties would be passed on to the protected person.

[13] I have no reason to disagree with the conclusion he reached in that regard. The appellant's communications were made to approximately 40 people and quite a number of them did pass them on to the protected person. As the Judge said, the very nature of the communications suggested that the defendant was not so aligned with the parties to whom she was messaging that she could expect their loyalty or their silence.

[14] Turning back to Mr Ross' argument about qualified privilege, I do accept of course that the defence of reasonable excuse for breach is not limited to any particular excuse. So, for example, it might be argued, somewhat akin with qualified privilege, that a defendant has a legitimate interest or duty to communicate certain facts about a protected person to other people and the recipients have a legitimate interest in receiving that information. While that is theoretically available as a reasonable excuse, I see no such interest or duty on the part of the appellant here in making the communications she did about the protected person to third parties, or on their part in receiving them. The situation might arguably have been different if, for example, the communications were primarily about her father's alleged wrong-doing to a smaller group of potential witnesses, but that is not the case.

[15] I also considered whether there might be some reasonable excuse in not being aware of the extent of the protection order. The general understanding of a protection order and, for that matter, the wording of the order itself, is focused on the defendant not being allowed to communicate with the protected person in any way. I reviewed the wording of the order in Court. A defendant would have to extrapolate significantly to understand that, as a matter of law, they also could not communicate to third parties who might then pass that on. However, whether such an argument is available or not,

which is doubtful, I do not think it would succeed here. First, the burden is on the appellant to satisfy the Court she has a reasonable excuse. It is apparent from the notes of evidence that the appellant was confused as to why she had been charged when she had not been in contact with the protected person for some time. However, there is insufficient evidence, and, given what seems to have been a fairly torrid history between the parties, including a previous trespass order, the appellant either would or should have known that she was not allowed to communicate with third parties in terms that are likely to be passed on.

[16] It might also be a reasonable excuse if the person breaching was under a very high level of stress, and consequently lashed out, briefly and unthinkingly at the time. In this case, it does seem that the appellant was under a high level of stress at the relevant time. It seems that at the same time as she received the protection order, she received a Coroner's report arising out of the death of one of her sons. But the extent of the communications she made could not be excused by the stress and anxiety under which she was operating. The content was egregious.

[17] I therefore conclude that the District Court Judge was correct to find that there was no reasonable excuse for breaching the protection order and I uphold the conviction.

Hinton J