IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CRI-2019-442-11
[2019] NZHC 1747

	BETWEEN	ROBERT KAVANAGH Appellant
	AND	THE QUEEN Respondent

Hearing: 23 July 2019

Appearances: S J Zindel and W K Jones for Appellant
J W Cameron for Respondent

Judgment: 23 July 2019

JUDGMENT OF COOKE J

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[1] The appellant, Robert Kavanagh, faced three charges of breaching a protection order before Judge Zohrab in the District Court at Nelson:[1]

(a) Encouraging a person to engage in psychological abuse of the protected person, Mr Kavanaghs ex-partner. This charge was dismissed.

(b) Sending correspondence to the protected person, Mr Kavanagh's son. He was convicted of this charge.

(c) Engaging in behaviour that amounted to psychological abuse of the protected person, Mr Kavanagh's son. He was also convicted of this charge.

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1 *New Zealand Police v Kavanagh* [2019] NZDC 11727; Domestic Violence Act 1995, s 19 and 49(1)(b), maximum penalty three years' imprisonment.

[2] Mr Kavanagh appeals his conviction in relation to the third charge on the grounds the Judge erred in making speculative findings and failing to take into account the appellant's evidence on the topic. The second charge is not challenged on appeal. Mr Kavanagh was convicted and discharged, but appeals the third charge as a matter of principle as he does not feel it is justified.

Factual background

[3] Mr Kavanagh was in a relationship with M for approximately 11 years. They have three sons together; C, T and R. The boys are now aged 15, 13 and 11 respectively. Mr Kavanagh and M separated at the start of 2012. The two reconciled briefly in 2013 but then separated again at the end of 2013.

[4] Mr Kavanagh is the subject of a protection order. The protected persons are M, C, T and R.

[5] The third charge, and subsequent conviction, concerned Mr Kavanagh engaging in behaviour amounting to psychological abuse of his son C. The Crown's case is that the defendant drove to his sons' school during the lunch break. He parked his van in the school carpark, and went inside to speak to staff. C left the classroom for lunch and saw Mr Kavanagh's van parked outside. C suspected his father was at the school, and attempted to find his younger brother, T. Meanwhile school staff had alerted T's teacher and they had held him in the school counsellor's office. The counsellor told C that T was in their office and asked if he wanted to wait there also. C then found some friends and went to an area of the school where he did not think the appellant would be able to find him. C then sent his father a message saying "I suggest you leave before you get in even more trouble". The appellant replied "Thanks, but I would suggest you run along and play lol let the grown-ups do the worrying and talking, there's a good lad".

[6] As a result of this interaction C felt concerned and uneasy. He said he felt uncomfortable and unsafe knowing that his father was at the school, and was concerned for his younger brother.

District Court decision

[7] The District Court Judge began by summarising the elements of the offence. First, the prosecution had to prove that:[2]

(a) At the material time the defendant was subject to a protection order,

(b) The defendant was aware of the order, and

(c) The defendant breached the order.

[8] He noted that if the prosecution proved the above elements of the offence, the burden then switched to the defendant to prove on the balance of probabilities that he had a reasonable excuse to breach the order.

[9] The Judge then observed that the first two elements of the offence were satisfied, as it was not in dispute that a protection order was in place at all relevant times in respect of the victims, and the defendant was aware of the order.[3]

[10] It was also not in dispute that the appellant went to his sons' school. The issue was whether or not the prosecution could prove beyond reasonable doubt that the defendant breached the order as alleged in the charge — namely whether the defendant had psychologically abused his son.

[11] The Judge addressed the meaning of psychological abuse in the following way:

> [9] Psychological abuse does not necessarily involve actual or threatened physical or sexual abuse. Psychological abuse does not necessarily have to have a physical element to it, it can involve behaviour which chips at a person's confidence, behaviour which is designed to put them down or humiliate them. It can involve an abuse of power which, by degrees, makes another person apprehensive and unsettled. It can exploit an emotional or psychological vulnerability, or it can involve indulging in behaviour designed to unsettle, antagonise, offend in any way, provoke or worry another party, and it can involve implicit or explicit threats, and I got that summary from the decision of Judge Walsh in *G v C*.[4]

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2 At [6].
3 At [7].
4 *G v C* (1997) 16 FRNZ 201.

[12] The Judge noted that in evidence C said he was uneasy seeing his father's van at the school and he felt uncomfortable and unsafe, and he had wanted his father trespassed from the school.[5] He was satisfied this amounted to psychological abuse.[6] The Judge concluded:

> [43] So if one considers the definition of psychological abuse, as I dealt with it earlier on, he was engaging in behaviour which was designed to unsettle, offend, provoke, worry his son. So, I am content to conclude that that charge is proven beyond a reasonable doubt as well.

[13] Mr Kavanagh argued that he had a reasonable excuse for breaching the protection order.[7] Mr Kavanagh said that it was not his intention to breach the order, and he did not anticipate there would be any contact.[8] He went to the school to find out information about his children and had not intended to go at the lunch hour but was kept waiting until the lunch hour arrived. He said he did not anticipate that his conduct would amount to psychological abuse.

[14] The Judge accepted that he was there to get information but noted Mr Kavanagh's indifference to his son's message warning him to stay away from the school. He found that Mr Kavanagh must have known that his son did not want to the contact, and he remained on the school property: "against the background where he must have known that C did not want that contact, he has remained, and there is clear evidence that C was uneasy about that, felt uncomfortable, unsafe, and there is clear evidence he had concerns for his brother".

Relevant law

Approach to appeal

[15] An appeal against conviction in a Judge-alone trial is governed by s 232 of the Criminal Procedure Act 2011. This appeal is brought under s 232(2)(b) which requires the Court to allow an appeal if the Judge erred in the assessment of the evidence to such an extent that a miscarriage of justice has occurred.

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5 At [34].
6 At [43].
7 Domestic Violence Act 1995, s 49(2).
8 Decision at [14] and [32] and [35].

[16] The Supreme Court recently re-examined the approach to assessment of evidence for conviction appeals in *Sena v New Zealand Police*.[9] The Court held that appeals in such cases should proceed by way of rehearing in accordance with the well-established principles canvassed in *Austin, Nichols & Co Ltd v Stitchting Lodestar*.[10]

New evidence on appeal

[17] In support of the appeal the appellant made an application to file further affidavit evidence under s 334 of the Criminal Procedure Act 2011. In his evidence Mr Kavanagh draws attention to the finding of the Judge that, as a consequence of the text that C had sent him and Mr Kavanagh's reply, he must have known that C did not want contact but remained. Mr Kavanagh explains in his affidavit:

> In response to this I say I did not read the 1.07 p.m. text message from my son ("*I suggest you leave before you get in even more trouble*") until approximately 2.30p.m. that afternoon. I had spent the previous hour, or thereabouts, speaking with the principal of the school about a raft of issues involving my sons. It was not until the conclusion of that interview that I checked my phone as I was leaving the school. I then discovered the text message and responded to it soon after at 2:37 p.m. I attach to this affidavit as exhibit "A" a copy of the text communications between myself and my son as confirmation of this.

[18] That affidavit also annexes the terms of the interim parenting order.

[19] I accept that this evidence should be admitted on appeal. Whilst Mr Cameron opposed this, and challenged the credibility of the affidavit in particular, given that Mr Kavanagh was not questioned as to the timing of the text messages, it would be unjust for the evidence as to the timing of Mr Kavanagh's text reply at trial to be taken into account.

Breach of protection orders

[20] It is a standard condition of every protection order that the respondent must not engage, or threaten to engage, in other behaviour, including intimidation or harassment, which amounts to psychological abuse of the protected person.

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9 *Sena v New Zealand Police* [2019] NZSC 55.

10 At [32]; and *Austin, Nichols & Co Ltd v Stitchting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

Psychological abuse is further defined in the definition of domestic violence under the Domestic Violence Act 1995:

> **3 Meaning of domestic violence**
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> (1) In this Act, *domestic violence*, in relation to any person, means violence against that person by any other person with whom that person is, or has been, in a domestic relationship.
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> (2) In this section, *violence* means—
>
> (a) physical abuse:
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> (b) sexual abuse:
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> (c) psychological abuse, including, but not limited to,—
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> (i) intimidation:
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> (ii) harassment:
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> (iii) damage to property:
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> (iv) threats of physical abuse, sexual abuse, or psychological abuse:
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> (iva) financial or economic abuse (for example, denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education):
>
> (v) in relation to a child, abuse of the kind set out in subsection (3).
>
> (3) Without limiting subsection (2)(c), a person psychologically abuses a child if that person—
>
> (a) causes or allows the child to see or hear the physical, sexual, or psychological abuse of a person with whom the child has a domestic relationship; or
>
> (b) puts the child, or allows the child to be put, at real risk of seeing or hearing that abuse occurring;—
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> but the person who suffers that abuse is not regarded, for the purposes of this subsection, as having caused or allowed the child to see or hear the abuse, or, as the case may be, as having put the child, or allowed the child to be put, at risk of seeing or hearing the abuse.
>
> (4) Without limiting subsection (2),—
>
> (a) a single act may amount to abuse for the purposes of that subsection:
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> (b) a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.

> (5) Behaviour may be psychological abuse for the purposes of subsection (2)(c) which does not involve actual or threatened physical or sexual abuse.

[21] In terms of the defence, the prosecution needs to prove a contravention of the order and knowledge of the order by the defendant. The onus then switches to the defendant to prove the existence of a reasonable excuse on the balance of probabilities.[11] A reasonable excuse is that which the ordinary New Zealander would regard as reasonable in the circumstances — the circumstances including the inherent vulnerability of the protected person to psychological abuse.[12]

[22] Mr Zindel's written submissions on appeal were primarily directed at the defence of reasonable excuse. Mr Zindel argues the Judge was incorrect to assume the appellant had ignored his son's text message. He refers to [41] of the Judge's decision:

> [41] What we have got here is the defendant on 8 October going to the school. We know the protection order is in place. We know that the defendant knows about it. We know about his intention, and I accept that he was there to get some information, I understand that, but things changed when he gets the text from [C] because [C] knows he is there, and he sends the defendant a message saying, "I suggest you leave before you get in even more trouble." Aware that his son knows that he is present, rather than deciding, "Well, perhaps the best thing to do is leave and we will sort it out on another occasion," also against the background we know of the previous social media contact when he was not required to do, he has then replied, "Thanks, but I would suggest you run along and play lol let the grown-ups do the worrying and talking, there's a good lad."

[23] Mr Zindel says that this finding was irrelevant to the appellant's intention or his actions, and "the Judge's conclusion that the appellant disregarded his son's text and feelings was, at best, speculative and did not take into account the appellant's evidence".

[24] Whether the excuse is reasonable will depend on whether an ordinary New Zealander would consider it to be reasonable in all the circumstances.[13] The circumstances will include the need for protection, the order and its terms, and the fact

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11 *Hargrave v Police* (1998) 17 FRNZ 124 (HC); and *A v Police* [1999] 2 NZLR 501 (HC), confirmed in *R v Easton* [2007] NZFLR 70 (CA).

12 *A v Police* [1999] 2 NZLR 501 at 506; confirmed in *R v Easton* [2007] NZFLR 70 (CA).

13 *A v Police* [1999] 2 NZLR 501 at 506; confirmed in *R v Easton* [2007] NZFLR 70 (CA).

that the protected person is inevitably vulnerable to psychological injury.[14] The appellants excuse, as he saw it, was that he went to the school to obtain the ordinary sort of information that would be provided by the school to a guardian and he did not anticipate this conduct would amount to psychological abuse.

[25] Mr Zindel also argues in the written submissions the appellant's conduct in parking his van out the front of the school and going to the office is insufficient in itself to amount to psychological abuse. He says there is no evidence of loitering or attempt to make contact. Whether or not psychological abuse occurred is a finding of fact. It is well-established that psychological abuse includes behaviour that unsettles, antagonises, offends, annoys, provokes or worries that other person.[15]

Analysis

[26] In responding to the arguments on appeal, it is important to be clear as to the distinct issues that applied to the offence as charged. In particular:

(a) First, the prosecution needed to prove that the defendant had engaged in psychological abuse of a protected person as defined by s 19. Importantly there is no mens rea element.[16] The question is confined to identifying whether, objectively, the conduct in question amounted to psychological abuse as defined.

(b) If psychological abuse as defined is established, the defendant has a defence if he proves that he had a reasonable excuse for breaching the protection order under s 49(2).

[27] When Mr Kavanagh went to the school he did not approach his sons, or seek to make contact with them. He remained within the presence or oversight of school staff throughout. For that reason there is a legitimate issue as to whether psychological

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14 *A v Police*, above n 12, at 506.

15 *Nisbet v SDS* [2016] NZHC 2814 at [10]; *M v Police* [2007] NZFLR 160; and *M v M* (2005) 7 HRNZ 971 (HC) at [19]; *G v C* (1997) 16 FRNZ 201 (FC) (overturned, but not on that point).

16 *A v B* [1998] NZFLR 783 at 789. That case concerned whether psychological abuse had occurred in the context of an appeal against refusal to grant a protection order. The definition of psychological abuse is the same, coming from s 3 of the Domestic Violence Act 1995.

abuse as defined was proved. It is apparent that the Judge placed significance on the text exchange between the defendant and his son. He ultimately held that for the defendant to stay at the school when he knew that his son was aware of his presence, amounted to psychological abuse. Given the facts as he understood them that was an understandable conclusion.[17]

[28] I accept that the affidavit evidence now provided by Mr Kavanagh demonstrates that he was not aware that his son knew of his presence until after he had completed his meeting with the school principal. The printout of his text messages indicate he did not reply to the message until 2.37 pm. It is highly likely that he replied shortly after reading his son's text. Given that I accept that the Crown did not prove that the defendant knew that his son was aware of his presence and that he stayed there nevertheless. This was the key basis for the Judge's findings on this charge.

[29] That leaves the establishment of an act amounting to psychological abuse to the parking of his van in the school car park in circumstances where his sons could have seen it, and been aware of his presence. As the Judge acknowledged, however Mr Kavanagh had arrived at school during class time, but had been asked to wait. It was only at lunch time that C saw his van. Mr Kavanagh remained under the supervision of school staff throughout. Whilst such circumstances viewed objectively could still amount to psychological abuse, I accept that this is an insufficient basis to give rise to a conviction for the offence as charged. The key factual basis leading to the Judge's satisfaction of this element of the offence is no longer present.

[30] That is not the end of the analysis, however. The Criminal Procedure Act 2011 relevantly provides:

> **234 Conviction and sentence for different offence may be substituted**
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> (1) Subsection (2) applies if a person was found guilty at trial of an offence (offence A) and the first appeal court allows the convicted person's appeal against conviction for that offence.
>
> (2) The first appeal court may direct that a judgment of conviction for a different offence (offence B), including an offence that the trial court

[17] I note the Judge appears to have taken into account that Mr Kavanagh intended to unsettle/provoke/worry his son (see particularly [43]) which is not strictly an element of the offence.

could, in accordance with section 136(1), have substituted for offence A, be entered if satisfied that—

(a) the person could have been found guilty, at the person's trial for offence A, of offence B; and

(b) the trial judge or the jury, as required, must have been satisfied of facts that prove the person guilty of offence B.

(3) Subsection (4) applies if a person pleaded guilty before or at trial to an offence (offence A) and the first appeal court allows the convicted person's appeal against conviction for that offence.

(4) If the first appeal court is satisfied that facts admitted by the convicted person in relation to the charge for offence A support a conviction for a different offence (offence B), the first appeal court may, if the convicted person agrees, direct that a judgment of conviction for offence B be entered.

(5) On making a direction under subsection (2) or (4), the first appeal court may—

(a) impose a sentence for offence B (whether more or less severe) that is allowed by law; or

(b) remit the proceeding to the court that imposed the sentence for offence A and direct that court to take the action described in paragraph (a).

[31] Section 136 allows the substitution of a different charge to make the charge correspond to the offence that has been proved. It is a standard provision of a protection order that the person not enter, or remain on any land or building occupied by the protected person without their consent (s 19(2)(c)). There is no dispute that Mr Kavanagh went to the school when his boys were present, and that he did not have prior permission to do so. Mr Kavanagh was asked directly about this issue in cross-examination:

Q. He didn't, at that time he didn't want to see you there and the order prohibits you from going anywhere where the protected person will be and C was at school and you went to the school?

A. Yeah to make an appointment but the thing is I went - what is you want to hear from me? What is it you want me, I've admitted yes I went to the school. Yes I could have done it by phone but no it's not my cultural prerogative to do that.

Q. But there are just other ways you can do these things.

A. Yes of course there is. There is many ways you can do things.

> Q. And you haven't done them in those other ways for instance on this occasion you could have made that appointment by phone without having to go to the school?
>
> A. Yes I could have. I could have.

[32] I am satisfied that the relevant elements of this less serious charge under this section are established. I am also satisfied that no prejudice arises to Mr Kavanagh in substituting a conviction for this charge.[18] When I asked him about this, Mr Jones did not identify any such matters.

[33] What then remains is whether there is a defence that Mr Kavanagh had a reasonable excuse for this differently formulated contravention in accordance with s 49(2). I accept that Mr Kavanagh's desire to speak to the school about his boys was genuine. He also gave evidence that the reason why he had gone to the school directly was because in Maori and Samoan culture it is more appropriate to deal with matters kanohi ki te kanohi — that is face to face. But he nevertheless knew of the protection order, and when asked he relied on what he described as a cultural prerogative to proceed as he did. To assert a right to engage in conduct which is known to be in breach of the order is not reasonable. He could have made arrangements to visit the school at an agreed time. He could also have gone to the school after his boys had left for the day. These were reasonable alternatives available to him that would not have involved breaching the order. For those reasons, even with full allowance for cultural factors, I do not accept that the defence is made out.

[34] As I indicated, Mr Kavanagh brought this appeal as he felt aggrieved that he had been convicted for going to see the principal of his boy's school. I am satisfied that it was unfair to Mr Kavanagh to convict him of the offence of engaging in psychological abuse on this basis. That may partly address Mr Kavanagh's concern. But he must also accept, as he appeared to accept in cross-examination, that he nevertheless breached the protection order by going to the school at all when his sons were present.

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[18] *Christian v R* [2017] NZCA 296 at [32].

[35] For these reasons I allow the appeal and quash the conviction for the offence of engaging in behaviour which amounted to psychological abuse against ss 19(1)(d) and 49(1)(b), and substitute it under s 234 of the Criminal Procedure Act 2011 with an offence of doing an act in contravention of a protection order by entering land occupied by a protected person without that person's consent in contravention of ss 19(2)(c) and 49(1)(b). Given that Mr Kavanagh was convicted and discharged there is no further consequential effect of allowing the appeal in this way.

Cooke J

Solicitors:
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Crown Solicitors, Nelson for Respondent