IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CRI-2021-443-000016
[2021] NZHC 1217

BETWEEN	MARIE KING Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 6 May 2021

Appearances: N P Bourke for the Appellant
L A Blencowe for the Respondent

Judgment: 27 May 2021

JUDGMENT OF NATION J

---

[1] The appellant, Ms King,[1] appeals against the making of a protection order in favour of her 14 year old daughter, imposed when Judge Harrison sentenced Ms King on 22 March 2021 for assault.[2]

[2] In summary, Ms King submits:

(a) section 123B of the Sentencing Act 2008 should be interpreted to preclude jurisdiction to impose a protection order solely in favour of a child; and

(b) alternatively, if there was jurisdiction to impose such an order, this was not necessary in the circumstances of this case.

---

1 To avoid identification of the appellant's daughter, the appellant's name has been anonymised.
2 *Police v King* […].

Background

[3] On 15 December 2020, Ms King pleaded guilty to two charges of assault.[3]

[4] Ms King had been in a relationship with one victim, her partner, for the past 18 years although for the past five years the relationship had been on and off. The other victim was their only child who was aged 14.

[5] On the evening of 5 September 2020, the parents and their daughter were at an address where a heated argument developed. Ms King walked in and out of the house collecting property and putting it in the car she was intent on taking. While her partner was sitting on the couch, Ms King approached him, grabbed his genitals and spoke contemptuously to him. This was in the presence of their daughter. When her partner asked for the car keys which Ms King had taken, she pushed past him and entered the car. When the partner reached into the vehicle to grab the keys, she lashed out at him and scratched his face, causing him to bleed. While the partner was in the house phoning the Police, Ms King approached her daughter who was sitting on the couch, spoke to her angrily and punched her right arm four or five times.

[6] When Ms King first appeared in court on these charges on 11 September 2020, she was bailed on conditions that she reside at a different address to the victims, that she have no contact with the victims and that she not be within close proximity of the victims' address or her daughter's school.

[7] Afterwards, there were resolution discussions with the Police. The prosecutor advised that, provided Ms King complied with ongoing counselling, the Police would seek a deferred sentencing.

[8] On 15 December 2020, Ms King pleaded guilty to two charges of common assault. On being told of the understanding reached with the Police, the Judge did not consider it necessary to order a pre-sentence report. Ms King was remanded to 22 March 2021 for the counselling to continue. The Judge also removed the "not to

---

[3] Crimes Act 1961, s 196 – potential sentence one years' imprisonment.

contact" bail conditions and replaced them with "not to offer violence" conditions. This enabled Ms King to resume living with her family.

[9] A report from a facilitator from the Taranaki Restorative Justice Trust was filed with the Court on 26 February 2021. The report writer advised that both the partner and Ms King said Ms King did not assault the partner, and they did not want to participate in restorative justice when there was nothing to apologise for. She advised they had moved away from their earlier home area. Ms King was engaged in alcohol and drug counselling and personal counselling for grief and anger management.

[10] There was a victim impact statement from the daughter. She said she had been scared at the time because Ms King was so angry with her. She said it was the first time her mother had been physical with her, "usually it's all verbal abuse and yelling only". She wanted her mother to get help.

The District Court decision

[11] The Judge said she had been persuaded to deal with Ms King through a deferred sentence. She explained this was because Ms King was engaging with a sentence of intensive supervision which had been imposed in July 2020 and was engaging with the required counselling to address her issues.

[12] As to the daughter, the Judge noted she was vulnerable. The Judge said the daughter had an ongoing relationship with Ms King but emphasised that this was family violence, so a protection order was necessary. This would cover any kind of violent behaviour, verbal abuse, name calling and physical assaults.

[13] On each charge, Ms King was convicted and ordered to appear for sentence if called upon within the next 12 months. She was ordered to pay Court costs and a protection order was made in favour of the daughter.

Principles on appeal

[14] An appeal against a decision to make a protection order under s 123B of the Sentencing Act is treated as an appeal against sentence, pursuant to s 123H of the Act.

[15] Appeals against sentence are allowed as of right by s 244 of the Criminal Procedure Act 2011 and must be determined in accordance with s 250 of that Act. An appeal against sentence may only be allowed by this Court if it is satisfied there has been an error in the imposition of the sentence and a different sentence should be imposed.[4]

Submissions

Appellant's submissions

[16] Ms King's counsel, Mr Bourke, said that during the sentencing the in-court probation officer confirmed Ms King was fully compliant with her existing sentence of supervision and was successfully engaged with both anger management and alcohol and drug counselling. Mr Bourke said, during the sentencing, the Judge indicated to the prosecutor an intention to impose a protection order in favour of Ms King's partner and enquired of the prosecutor whether the partner held any views as to that. The partner was seated in the public gallery. He told the Judge he objected to the making of a protection order. Mr Bourke said the Judge then continued with the sentencing and imposed a protection order in favour of the daughter without seeking submissions from counsel as to this.

[17] Mr Bourke accepted that, at face value, s 123B of the Sentencing Act could enable the making of a protection order in favour of a child victim but argued that a purposive interpretation of the legislation would indicate that Parliament did not intend for courts to impose protection orders in favour of children on sentencing.

[18] Mr Bourke submitted that, before amendment on 1 July 2019, the relevant legislation demonstrated Parliament had intended to exclude the making of protection orders in favour of children as part of the sentencing process. That was because a prerequisite for the making of a protection order under the Sentencing Act had been that there be an offence involving the use of violence against a person *other than a child* with whom the offender is, or had been, in a domestic relationship.

---

4 Criminal Procedure Act 2011, ss 250(2) and 250(3).

[19] As Mr Bourke explained, s 123B(1)(a) was amended as from I July 2019 by s 64(1) of the Family Violence (Amendments) Act 2018 by substituting "family violence offence" for "domestic violence offence". Section 123A was amended on the same date.

[20] These amendments resulted in there no longer being an explicit prerequisite that the offence involved the use of violence against a person other than a child.

[21] Mr Bourke argued, despite this change, there was nothing in the legislative process to indicate that in 2018 Parliament had intended to alter the previous legislative position so as to permit the court, on sentencing an offender for a family violence offence, to make a protection order for a child. Mr Bourke argued that, had Parliament intended to make such a substantial change, there would have been express reference to this within the legislative process. He said there was none.

[22] Mr Bourke asks the Court to interpret ss 123A and 123B of the Sentencing Act, as they now are, as if they are still subject to the pre-amendment qualification that the offence involved the use of violence against a person other than a child.

[23] Mr Bourke argued the restricted interpretation of the relevant provisions of the Sentencing Act would be consistent with provisions in the Family Violence Act 2018 which require courts to recognise the particular interests of children in prescribing the circumstances as to when and how a child might make an application for a protection order.[5]

[24] He also submitted, with the enactment of the Family Violence Act, there was a legislative intent that, if protection orders for a child were to be made, the expressed views of the child or of an approved organisation, such as Oranga Tamariki or a social worker in that department, would be taken into account.[6]

---

5 See Family Violence Act 2018, s 62(2).
6 Section 65.

[25] Mr Bourke argued the prohibition in s 123C of the Sentencing Act against a sentencing court imposing a condition with respect to arrangements for access to a child was consistent with Parliament's intention that matters involving children should be left to the Family Court rather than dealt with by a sentencing court.[7]

[26] Alternatively, Mr Bourke argued, if there was jurisdiction under the Sentencing Act to make a protection order for the benefit of the child, such an order should be made with adequate information as to whether the making of the order would be in the best interests of the child and preferably with appropriate consideration of the views of the child. This aligns with the way the Family Court is required to consider those matters when dealing with issues over children.[8]

[27] Mr Bourke submitted the Judge here did not have information that would have justified the making of the protection order, particularly when she did not know the child's view as to the making of an order. He submitted there was a need for caution particularly when the child's parent and guardian had indicated he was opposed to the making of a protection order for his own benefit. He argued that, in this case, the order was not necessary for the child's protection. He submitted the circumstances of the case were similar to others where the High Court had held the making of a protection order was not necessary.[9]

Respondent's submissions

[28] Ms Blencowe, for the Crown, submitted there is nothing in s 123B or in the Sentencing Act as a whole which prohibits the Court from making a protection order in favour of a child at sentencing. She submitted there is nothing which limited the meaning of "victim of the offence" so as to exclude a child.

[29] Ms Blencowe argued the recent amendments to the Sentencing Act demonstrate Parliament's intention to allow courts to make a protection order for the

---

7 The Court recognises and appreciates the effort and diligence Mr Bourke demonstrated in obtaining and providing to the Court aspects of the legislative background to the relevant amendments.

8 For example, Family Violence Act, s 63; Care of Children Act 2006, s 6; and Oranga Tamariki Act 1989, s 11; and consistent with the United Nations Convention on the Rights of the Child 1577 UNTS 4 (signed 20 November 1989, entered into force 2 September 1990), art 12.

9 *Whaanga v Police* [2018] NZHC 734.

benefit of a child on sentencing because they deleted the express exclusion that had been in the earlier version of the Act.

[30] It was submitted that interpreting s 123B so as to allow the court to make a protection order for a child as a victim of the offence would be consistent with the purposes and principles of the Sentencing Act as set out in ss 3, 7 and 8. These purposes and principles include providing for the interests of victims and deterring the offender from committing the same or a similar offence.

[31] Ms Blencowe said, with the enactment of the Family Violence Act, Parliament had broadened the ways in which the Family Court could make orders to deal with all types of family violence so as to reduce the risk of further family violence. She submitted that allowing the court to make a protection order for the benefit of a child under the Sentencing Act was consistent with that intent. Ms Blencowe accepted that a protection order could impact on the relationship between a parent and a child. Despite that, she noted it was not mandatory for the Family Court to obtain the views of a child before making either a temporary or final protection order under the Family Violence Act. Ms Blencowe informed the Court that, when the Family Court did make a final protection order (either on the basis of proven allegations of violence or where the making of such an order was not opposed), it was common for the orders to be made without the children who could be affected being represented or their views having been obtained.[10]

[32] Ms Blencowe stressed the ability of a Judge to make a protection order on sentencing only arose when the commission of a family violence offence had either been admitted through a guilty plea or proven at trial.

[33] Ms Blencowe submitted it was relevant that s 123G of the Sentencing Act states that a protection order made under that Act is to be entered into the records of the Family Court and is to be treated as if it were a final protection order made by that court under the Family Violence Act (except if an appeal against the protection order is made, in which case it is an appeal against a sentence).

---

[10] I infer she was speaking about a situation where an adult partner in a domestic relation, not a child, had sought a protection order against the other partner.

[34] Ms Blencowe argued that, in this case, the Court did have information as to how the child felt about what had happened to her. She referred to *Broderick v Police* where the High Court on appeal had said it was not expected that sentencing Judges would have to discuss extensively why they considered the making of a protection order was necessary.[11] She referred to *Bowman v Police* where the making of a protection order had been upheld on appeal when the offender had not previously acted in a violent way towards the victim of that offending.[12]

Analysis

Jurisdiction issue

[35] I accept that, before 2018, Parliament had not intended, and the legislation did not provide, for a court to make a protection order for a child under the Sentencing Act.

[36] Before 2019, s 123A of the Sentencing Act defined domestic violence offence as follows:

> **Domestic violence offence** means an offence against any enactment (other than the Domestic Violence Act 1995) involving the use of violence against a person, *other than a child*, with whom the offender is, or has been, in a domestic relationship.
>
> (emphasis added)

[37] Before 2019, s 123B of the Sentencing Act stated:

> **Protection order**
>
> (1) This section applies if–
>
> (a) an offender is convicted of a *domestic violence offence*; and

---

11 *Broderick v Police* [2014] NZHC 133, [2014] NZFLR 406 at [21].
12 *Bowman v Police* [2015] NZHC 2556.

(b) there is not currently in force a protection order against the offender made under the Domestic Violence Act 1995 for the protection of the victim of the offence.

(2) The court may make a protection order against the offender if–

(a) it is satisfied that the making of the order is necessary for the protection of the victim of the offence; and

(b) the victim of the offence does not object to the making of the order.

(3) A protection order may be made under this section in addition to imposing a sentence or making any other order.

(4) An order may be made under subsection (2) even though domestic violence proceedings have been filed by the victim of the offence against the offender, and those proceedings have not yet been determined.

(5) If an order is made under subsection (2) in the circumstances described in subsection (4), the domestic violence proceedings, in so far as they relate to an application for a protection order against the offender, end.

(emphasis added)

[38] During this time, the definition of "domestic violence" as contained in the Domestic Violence Act did not exclude violence against a child from the definition.[13] In the Sentencing Act, Parliament had expressly excluded violence against a child from the definition of a domestic violence offence as a prerequisite for the making of a protection order under the Sentencing Act. I accept Mr Bourke's submission that this demonstrated an intention to avoid the making of protection orders in favour of children as part of the sentencing process.

[39] Additional evidence of Parliament's intention, that the victim for whom the protection order could be made under the Sentencing Act would be an adult, is found in s 123B of the Act.

[40] Under s 123B(2)(b), a prerequisite for the making of a protection order was that "the victim of the offence does not object to the making of the order". I do not consider Parliament would have intended that, if the making of a protection order was otherwise necessary for the protection of a child, the power of the court to make the order could be ousted by a child's objection.

---

[13] Domestic Violence Act 1995, s 3.

[41] At the time, under the Domestic Violence Act 1995, an application for a protection order by a minor under 16 years had to be made by a representative pursuant to rules of court.[14]

[42] Also consistent with the limitation on a sentencing court's power to make a protection order for the benefit of a child was s 123C(1)(b) of the Sentencing Act and its reference to s 27 of the Domestic Violence Act. Through those sections, s 123C of the Sentencing Act enabled the Court to impose special conditions to protect the victim from domestic violence but that did not include a condition with respect to access arrangements for a child.

[43] Sections 123A and 123B(1)(a) were amended as from 1 July 2019 by the Family Violence (Amendments) Act. Notably, the amended version no longer contains an exclusion for an offence against a child.

[44] Under s 123A of the Sentencing Act:

> **123A Interpretation of terms used in this section and sections 123B to 123H**
>
> In this section and sections 123B to 123H, unless the context otherwise requires,—
>
> **child** has the meaning given to it by section 8 of the Family Violence Act 2018
>
> **family relationship** has the meaning given to it by section 12 of the Family Violence Act 2018
>
> **family violence offence** means an offence—
>
> (a) against any enactment (including the Family Violence Act 2018); and
>
> (b) involving family violence (as defined in section 9 of that Act)
>
> **family violence proceedings** means proceedings in the Family Court under the Family Violence Act 2018 that relate wholly or partly to an application for a protection order
>
> **victim of the offence** means the person against whom the offence was committed by the offender.

---

[14] Domestic Violence Act, s 9(2)

[45] Section 123B is now:

> **123B Protection order**
>
> (1) This section applies if—
>
> (a) an offender is convicted of a family violence offence; and
>
> (b) there is not currently in force a protection order against the offender made under the Family Violence Act 2018 for the protection of the victim of the offence.
>
> (2) The court may make a protection order against the offender if—
>
> (a) it is satisfied that the making of the order is necessary for the protection of the victim of the offence; and
>
> (b) the victim of the offence does not object to the making of the order.
>
> (3) A protection order may be made under this section in addition to imposing a sentence or making any other order.
>
> (4) An order may be made under subsection (2) even though family violence proceedings have been filed by the victim of the offence against the offender, and those proceedings have not yet been determined.
>
> (5) If an order is made under subsection (2) in the circumstances described in subsection (4), the family violence proceedings, in so far as they relate to an application for a protection order against the offender, end.

[46] Mr Bourke accepts, with the deletion of the qualification in the definition of family violence offence, on the face of it, s 123B would now allow a sentencing court to make a protection order for the benefit of a child who was the victim of an offence involving family violence, as defined in s 9 of the Family Violence Act. That definition includes a physical assault. Here, the daughter was the victim of such an offence.

[47] Applying ss 123A and 123B according to the "natural and ordinary" meaning of the words would accordingly permit the making of a protection order in these circumstances.

[48] Before the 2018 amendment, the Sentencing Act required the protection order made on sentencing to be sent immediately to the Family Court and entered into the records of that Court.[15] The order was then to be treated as if it were a final protection

---

[15] Sentencing Act 2002, s 123F.

order made by that Court under the Domestic Violence Act.[16] Various provisions of that Act were to apply to the order accordingly. The sections referred to included s 48 which allowed the Family Court to appoint someone to represent a child in any application for the variation or discharge of a protection order made by or on behalf of that child.[17]

[49] After the 2018 amendment, s 123G required the protection order to be registered in the Family Court. Once a protection order had been made on sentencing and entered into the records of the Family Court, the order was to be subject to various specified provisions of the Family Violence Act. The sections referred to included s 111. This section applies to applications on behalf of a protected person for the variation or discharge of a protection order, or the defending on behalf of a protected person of any such application made by the person against whom the protection order was made. Section 111 states that other sections in the Family Violence Act, including sections which provide for the representation of children affected by such applications, are to apply.[18]

[50] It could thus be suggested, with the 2018 amendments, Parliament had contemplated that a protection order under the Sentencing Act could be for the benefit of a child as a protected person and had specifically provided for the interests of a child to be recognised once a protection order, made under the Sentencing Act, had been entered into the records of the Family Court.

[51] I would not interpret s 123G of the Sentencing Act and s 111 of the Family Violence Act in that way. Section 111 simply recognises that a protected person might apply for the variation or discharge of a protection order or may wish to oppose such an application. Section 111 does not refer specifically to orders made under the Sentencing Act. Under the Family Violence Act, protection orders can be made for the benefit of children. Section 111 recognises that children might be affected by the making of a protection order and provides for them to be represented in variation or discharge proceedings, and for their views to be taken into account. Similar provisions

---

16 Section 123G.
17 Domestic Violence Act, s 81(b).
18 Family Violence Act, ss 62 and 63.

had been included in the Sentencing Act and the Domestic Violence Act before the 2018 amendments when it was clear Parliament had not allowed a protection order to be made for a child under the Sentencing Act.

[52] Section 123B(2)(b) continues to provide for the sentencing court's ability to make a protection order to be conditional on the victim of the offence not objecting to the making of such an order.

[53] The retention of that limitation is consistent with Parliament intending that, in s 123B, the court would have the power to make protection orders only for adults.

[54] Also in the Sentencing Act is the limitation on a sentencing court's power to impose, as a condition of a protection order, a condition as to matters set out in s 103(2) of the Family Violence Act which concerns access with a child.[19]

[55] Sections 123A and 123B of the Sentencing Act came into force at the same time as the Family Violence Act. With that latter Act, Parliament had provided that the views of the child might be heard in protection order proceedings under that Act and, if the child expresses views on any matter relating to the proceedings, the court has to take those views into account.[20] Parliament did not give the child the power to effectively veto the making of a protection order, as s 123B(2)(b) would do if it was held to apply to a child. With the Family Violence Act, the legislation also ensured there would be oversight independent of the court on any application for a protection order made by a child. Under s 62 of the Family Violence Act, a child can make an application for a protection order but only by a representative.[21] Sections 65 and 66 permit and empower the Family Court to require a report from Oranga Tamariki on an application by a child.

[56] The authors of Westlaw, Adult Relationships, state that "written advice is obtained as a matter of course on a without notice application and the expectation

---

19 Sentencing Act, s 123C.
20 Family Violence Act, s 63.
21 For example, an approved organisation that is authorised by s 74 to take proceedings under the Family Violence Act on behalf of the child.

would be that written advice would be requested on every application involving a child".[22]

[57] The 2018 changes to the Sentencing Act were first put before Parliament in the Family and Whānau Violence Legislation Bill 2017 (247-1). The explanatory note for that Bill referred to the proposed changes to ss 123A and 123B. The explanation said the new proposed s 123A was to contain updated definitions related to the Family and Whānau Violence Act 1995. The amendment to s 123B was to replace references to domestic violence offences, the Domestic Violence Act and domestic violence proceedings. The explanatory note did not highlight or even refer to the proposed clauses as being intended to allow protection orders to be made for a child who was the victim of an offence in a way that had not been permitted under the earlier provisions.

[58] The initiative for reform had cross-party support in Parliament in 2017 and 2018. Ultimately, the legislative reform process led to the passing of two Acts, the Family Violence Act and the Family Violence (Amendments) Act.

[59] I have checked departmental reports as to the proposed legislative changes, the reports of the select committees considering the legislation and what was said in Parliament about the proposed changes. There was nothing to suggest those in Parliament were conscious that, with the definition of a family violence offence in the Sentencing Act not being qualified as it had been earlier, a sentencing court would have the ability to make a protection order for the benefit of a child when previously this had not been possible.

[60] I accordingly conclude, with the amendments to ss 123A and 123B, Parliament's intention was to retain the limitation on a sentencing court's ability to make a protection order where there had been a family violence offence for the benefit of the victim only where that victim was an adult. Parliament must have intended that the making of a protection order solely for the benefit of a child would still be dealt with in the Family Court.

---

[22] Family Law — Adult Relationships (online looseleaf ed, Thomson Reuters).

[61] Mr Bourke is essentially suggesting that Parliament in 2018 had intended to qualify the commission of a family violence offence as a prerequisite for the making of a protection order in the same way as it had done with the commission of a domestic violence offence in 2009. By excluding the commission of such an offence against a child from that qualification, a mistake was made.

[62] As the authors in Burrows and Carter state "[t]here is a question as to how far it is permissible, when interpreting a provision in a consolidation or revision, to refer to the provisions of the earlier Act that it replaced".[23]

[63] The authors say:[24]

> Acts that consolidate or revise the law, particularly large Acts that draw together provisions from several original statutes, can give rise to difficult problems of construction. …
>
> - Sections in a consolidation or revision Act, or even different parts of a single section, may appear to be inconsistent with each other.
>
> …
>
> - Sometimes simple errors creep in on a re-enactment. The transfer of a section from one Act to another may result in inaccurate cross-references; reference to the other provisions may be erroneous, or insufficiently determinate. Such situations may require a court to correct the error.
>
> (footnotes omitted)

[64] The meaning of an enactment must be ascertained from its text and in light of its purpose.[25]

[65] It might be said that "natural and ordinary" meaning of the words in s 123B is that the sentencing court may make a protection order for the benefit of a child where there has been a family violence offence against the child. As Burrows and Carter state, courts do sometimes depart from the natural and ordinary meaning:[26]

---

23 Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 489.
24 At 498 and 499.
25 Interpretation Act 1999, s 5(1).
26 Page 312.

> The established orthodoxy even in these cases is that the "natural and ordinary meaning" must be the starting point, only to be displaced if a less usual meaning is required better to fulfil the purpose of the legislation, or if the wider context of the Act, or other factors require it. In such a case considerations of purpose, context, or values predominant over the usual conventions of language.

[66] As Tipping J said in *McAlister v Air New Zealand Ltd*:[27]

> The Court can correct a drafting error by addition, omission or substitution of words if three conditions are satisfied: (i) the Court must be sure that there is a drafting error; (ii) the Court must also be sure what Parliament was trying to say; and (iii) the necessary correction must not involve too great a re-writing of the defective language.

[67] This was more recently applied by Brown J in *Davidson v Auckland Standards Committee No 3*.[28]

[68] I have concluded that, with the 2018 amendments, Parliament's intention was to continue limiting a sentencing court's ability to make a protection order to situations where an adult was the victim of the family violence offence.

[69] Accordingly, I consider the definition of a family violence offence in s 123A must be interpreted as if it reads:

> **family violence offence** means an offence [other than as against a child]–
>
> (a) against any enactment (including the Family Violence Act 2018); and
>
> (b) involving family violence (as defined in section 9 of that Act).

[70] On that interpretation, the District Court Judge did not have the jurisdiction to make a protection order for the benefit of Ms King's daughter, even though the mother had committed a family violence offence against her daughter. On that ground, the appeal must succeed.

Alternative argument

[71] The alternative analysis, which the Police contend for, is that Parliament did not expressly retain that limitation. The current wording in ss 123A and 123B is clear

---

27 *McAlister v Air New Zealand Ltd*, [2009] NZSC 78, [2010] 1 NZLR 153 at [96].
28 *Davidson v Auckland Standards Committee No 3* [2013] NZHC 2315, [2013] NZAR 1519 at [119].

and unambiguous and must be accepted by the courts as being what Parliament intended. The rationale for that interpretation would be that the making of a protection order under the Sentencing Act occurs only where the commission of a family violence offence has been established and where a sentencing Judge considers the making of a protection order is necessary for the benefit of the child. The sentencing Judge is therefore in a position to assess whether the making of the protection order is, in all the circumstances, necessary for the benefit of the child.

[72] I accept that, if such an analysis and interpretation were to be applied, the fact that one or both of the parents or guardians of a child objected to the making of a protection order would not be determinative as to whether a protection order for the benefit of the child should be made. It is well recognised that parties can choose to remain in abusive relationships and not seek the intervention of the courts, Police or other agencies to bring domestic violence to an end. In doing so, children can be damaged through witnessing violence between their parents as well as being the direct victims of it.

[73] It is a standard condition of a protection order that the offender must not:

(a) engage in behaviour that amounts to any form of family violence against the protected person, whether physical abuse, sexual abuse, or psychological abuse; or

(b) make any unauthorised contact with the protected person.

[74] A protected person can suspend or reinstate the no-contact condition by giving or cancelling consent to contact but there are limitations as to how and when that consent can be withdrawn.[29] It has to be in writing or in a digital communication.[30]

[75] With the making of a protection order for the benefit of a child, that child would be legally empowered to decide for themselves what sort of relationship they want to have with a parent, a power which a child would not normally have. It is a power the child would retain indefinitely and into adulthood unless either the child or the

---

29 Family Violence Act, s 91.
30 Section 94.

offender successfully applies to the Family Court for the discharge or variation of the order. In many circumstances however, such parties would not have the resources, knowledge or inclination to make such an application to the Family Court. A parent subject to the protection order could remain subject to the protection order indefinitely.

[76] There may be circumstances where the making of a protection order empowering a child in that way would be reasonable and necessary. The child, or someone on their behalf, would know that, if there is a risk of further abuse, they would be able to ring an agency such as the Police and have them intervene with the family in a way that could ensure the protected person's safety.

[77] However, there are many different and complex aspects of a parent/child relationship. When serious issues arise in that relationship, there is a fundamental need to assess what is in the best interests of a child and to take into account and decide what, if any, weight should be given to any views a child might express.

[78] Section 123C(2)(d) of the Sentencing Act indicates Parliament did not intend that, in making a protection order, a sentencing Judge would be able to make decisions concerning access which a parent would have to a child.

[79] The Police are contending the Sentencing Act should be interpreted and applied so as to allow a sentencing Judge to make a protection order for the benefit of a child. Such a protection order would at least potentially affect the contact the child could have with their parent.

[80] The High Court has held that, in deciding to make a protection order for the victim of an offence, the fourth step in the required process is to establish that the protected person has no objection to the making of the order.[31]

[81] Section 123B(2)(a) requires that the making of a protection order must be necessary for the protection of the victim of the offence. This is the same requirement as contained in s 14(1)(a) of the Domestic Violence Act 1995 under which a protection

---

[31] *Holloway v Police* [2014] NZHC 1626 at [35].

order can also be made. The Court of Appeal, in *SN v MN*, recently considered the test under that section and commented:[32]

> It is unlikely a Court could rationally refuse to grant a protection order where the behaviour is such as to lead to reasonable fears for safety based on being subjected to a pattern of recent serious domestic violence, unless there are very strong indications to the contrary … The [Domestic Violence] Act is designed not only to protect a person against future violence but the reasonably held fear of violence.

[82] The Police contend the legislation does give a sentencing Judge the power to make a protection order for the benefit of a child, without establishing that the child has no objection to the making of the order and without ascertaining the child's views about the making of the order. I consider that power would likely be used only where it is clear the order is necessary and, at the least, the child has been "subjected to a pattern of recent serious domestic violence".

[83] Here, the relevant victim was a teenager, an age where her views would matter. It was not apparent from her victim impact statement that she wanted to be separated from her mother or have no contact with her. She said she had been "very scared at the time" and her arm was still sore the following day. However, the feelings she conveyed in her victim impact statement were of anxiety about her mother's behaviour. She said she "would like her [mother] to get help and go back to what she once was".

[84] The in-court probation officer had confirmed to the Judge that Ms King was fully compliant with her existing sentence of supervision and was successfully engaged with both anger management and alcohol and drug counselling. Ms King was ordered to appear for sentence if called on. With such a sentence, Ms King could be brought back before the court if there was a repetition of her abusive behaviour towards her daughter within a year or if she failed to continue with the appropriate counselling.[33]

[85] There was no information to suggest that anyone had enquired of the daughter as to how she would feel about the making of a protection order against her mother.

---

32 *SN v MN* [2017] NZCA 289, [2017] 3 NZLR 448 at [23].
33 Sentencing Act, ss 111(1)(a) and 10(1)(b) and (d)(iii).

The Judge did not have the benefit of a pre-sentence report that might have provided further information about the whole family and the views of the child.

[86] As in *Whaanga v Police*, the domestic violence as against the daughter was "at the lower end of the spectrum".[34] Although, in her victim impact report the daughter said that previously the mother had, on a number of occasions, verbally abused and yelled at her, it could not be said there had been a history of "serious domestic violence" against the daughter. There was also no information that the daughter continued to be fearful of her mother in the period between the offending on 5 September 2020 and the sentencing on 22 March 2021.

[87] I recognise, when a Judge has to consider the making of a protection order under the Sentencing Act, it is not practical or reasonable to expect the same sort of detailed analysis of the circumstances of the offending and the need for the making of a protection order as would be required when both the grounds for the making of the protection order and the need for it have been the subject of a defended hearing in the Family Court. The High Court has said that a sentencing Judge should not be expected to provide an extensively discursive rationale for the making of a protection order.[35] Determining whether a protection order is necessary is an evaluative exercise, but the enquiry need not be overly refined.[36] Here, the Judge made the protection order only after the offending had been accepted through guilty pleas and the nature of that family violence offence was apparent from the summary of facts. She also had information through the partner's victim impact statement that the mother had methamphetamine addiction issues. The Judge was understandably concerned at the vulnerability of the daughter to potential family violence in its different forms.

[88] Despite those considerations, in all the circumstances of this case, with the limited information available to her and having regard to the views the victim had expressed, I would have found it was wrong for the Judge to have made the protection order, even if I had found there was jurisdiction under the Sentencing Act to make that order.

---

34 *Whaanga v Police*, above n 9.
35 *Broderick v Police*, above n 11.
36 *SN v MN*, above n 32, at [22] and [24](f).

[89] Accordingly, the appeal is allowed. The protection order made in respect of and for the appellant's daughter is quashed. The other orders made on the sentencing remain in effect.

Solicitors:
Nathan Bourke, Barrister, New Plymouth
Crown Solicitor, New Plymouth.