IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 46/2022
[2022] NZSC 89

BETWEEN	KERRYN MITCHELL Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Kós JJ

Counsel: Applicant in person
F E Cleary and K L Kensington for Respondent

Judgment: 21 July 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted following a jury trial before Judge Mill in the District Court at Wellington on two charges of breaching a protection order and three charges of attempting to breach a protection order. She was sentenced to two years and three months' imprisonment.[1] We understand that she has served that sentence in full and been released from custody on release conditions. Her appeal against conviction and sentence to the Court of Appeal was dismissed.[2] She now seeks leave to appeal her conviction and sentence to this Court.

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1 *R v Mitchell* [2021] NZDC 5941 [DC sentencing notes].
2 *Mitchell v R* [2022] NZCA 159 (Gilbert, Woolford and Dunningham JJ).

[2] The proposed conviction appeal seeks to:

(a) challenge decisions of the Family Court making the protection order in favour of Mr L (who had briefly been the applicant's lover) and extending that order to include Mrs L (whom Mr L subsequently married);

(b) challenge the admissibility of evidence relating to the transmission of the relevant letter correspondence to Mr and Mrs L (which is the substance of the first two charges), the production of the protection order in evidence, and the admission of propensity evidence; and

(c) challenge the verdicts on the basis of consent to contact by Mr L.

[3] These grounds are intensely fact-specific. No matter of general or public importance is raised by the proposed conviction appeal.[3] As we apprehend the evidence, there is no risk that a substantial miscarriage of justice has occurred, or will occur, if leave is not granted:[4]

(a) The protection order was challenged in 2016; the High Court dismissed the challenge.[5] The Court of Appeal had previously declined leave to appeal further against a decision barring the applicant from bringing a further application to seek a discharge of the order.[6] Collateral challenge here and now is not appropriate.

(b) The indicated challenges to admissibility have insufficient prospects of success. The exact mechanism of transmission is not material to the offence of breach of a protection order, which on these facts is simply concerned with whether the applicant caused the letters to be delivered to Mr and Mrs L's mailbox. The order itself appears to have been duly produced in terms of s 139 of the Evidence Act 2006. The applicant's

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3 Senior Courts Act 2016, s 74(2)(a).
4 Section 74(2)(b).
5 *KM v TL* [2016] NZHC 1327.
6 *KM v TL* [2014] NZCA 218, [2014] NZFLR 635.

knowledge of the order was plainly established by her own challenges to its making, and prosecutions for prior breaches. The latter gave rise to the propensity evidence, and we see no error in the Judge summarising for the jury the basic facts of each prior conviction relevant on a propensity basis.

(c) The challenge based on consent to contact lacks evidential foundation.

[4] In sentencing, the Judge applied a starting point that reflected the overall offending, including the applicant's more than 60 prior convictions for persistent breaches of the protection order.[7] He considered that, along with the applicant's lack of remorse, the lack of any indication that the behaviour would cease and the serious adverse effect on the victims meant a sentence close to the maximum was required by s 8(d) of the Sentencing Act 2002.[8] The only mitigating consideration, somewhat unusually (as the Judge acknowledged), was the applicant's exemplary courtesy in court, for which three months' credit was given.[9]

[5] The proposed sentence appeal seeks to challenge the sentence on the bases that the Judge failed to take into account ss 8(g), 10A and 83–85 of the Sentencing Act, warnings should have been given to her that s 8(d) of the Sentencing Act was being considered and that "Minimum Period of Imprisonment and/or Cumulative Sentencing options were being sought by the Crown". The latter two points appear not to have been advanced before the Court of Appeal.

[6] The matters the applicant wishes to raise are particular to her case and do not give rise to any matter of general or public importance. We do not consider there is any indication of an adverse error, let alone a substantial miscarriage of justice, in the sentencing (which was largely orthodox in content) or in the way the Court of Appeal assessed (and dismissed) the first appeal against sentence.

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7 DC sentencing notes, above n 1, at [24]. This was in accordance with the approach taken in *Mitchell v R* [2013] NZCA 583 at [14].

8 DC sentencing notes, above n 1, at [25]–[26].

9 At [28]–[29].

Result

[7] The application for leave to appeal is dismissed.

Solicitors:
Luke Cunningham & Clere, Wellington for Respondent