IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

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

CRI 2019-463-0027
[2019] NZHC 849

BETWEEN	SOLICITOR-GENERAL Appellant
AND	ISAAC MANUEL KAREKARE Respondent

Hearing: 16 April 2019

Appearances: K S Grau for the appellant
B J Hesketh and D J Sheely for the respondent

Judgment: 16 April 2019

ORAL JUDGMENT OF JAGOSE J

Solicitors:
Crown Law, Wellington
Adams Hesketh, Tauranga

[1] Isaac Karekare was sentenced to ten and a half months' imprisonment by Judge P G Mabey QC in the District Court at Tauranga on 4 February 2019.[1] He also was ordered to pay $280 in reparation.

[2] Mr Karekare had pleaded guilty to charges of wilful damage,[2] male assaults female,[3] and theft.[4] The victim of these charges is Mr Karekare's ex-partner, against whom Mr Karekare previously had offended. They have a child together.

[3] The Crown now appeals that sentence, on the sole basis the Judge erred in failing to make a protection order against Mr Karekare pursuant to s 123B of the Sentencing Act 2002.

Approach to appeals against sentence

[4] This is a prosecutor's appeal against sentence.[5] I must allow the appeal only if I am satisfied both there is an error in the sentence, and a different sentence should be imposed.[6] By analogy, the measure of error should be 'manifest'[7] – a principle "well-engrained" in this Court's approach to sentence appeals.[8] In any other case, I must dismiss the appeal.[9]

Jurisdiction

[5] Mr Karekare had been in custody for 14 months for the current offending prior to being sentenced. He was released immediately once sentenced on 4 February 2019.

[6] As an appeal against sentence (and not against a sentence of imprisonment), although "not heard before the date on which the person convicted has completed serving that sentence", the appeal is not to be treated as abandoned as not heard before

---

1 *R v Karekare* [2019] NZDC 1815.
2 Summary Offences Act 1981, s 11. Maximum penalty is 3 months' imprisonment or a fine not exceeding $2000.
3 Crimes Act 1961, s 194(b). Maximum penalty is two years' imprisonment.
4 Crimes Act 1961, ss 219(1)(a) and 223(d). Maximum penalty is 3 months' imprisonment.
5 Criminal Procedure Act 2011, s 246.
6 Section 250(2).
7 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [26]-[27].
8 At [33] and [35].
9 Section 250(3).

the sentence was completed.[10] The purpose of that rule is to prevent a person being recalled to detention after being released.[11] But imposition of a protection order nonetheless may be the subject of appeal.[12] The unpalatable alternative is there is no right of appeal, if a protection order is not to be regarded included within "sentence".

Offending

[7] Early in the evening of Friday, 3 November 2017, Mr Karekare went to his ex-partner's address. He forced his way into the house by breaking the jamb on the locked back door. This gave rise to the charge of wilful damage. She attempted to flee through the front door. Mr Karekare stopped her by pushing the door shut. He swore at her and threatened to "smash her". Mr Karekare grabbed her, throwing her up against the wall, before raising his fists and threatening to punch her. This, obviously enough, sustained the male assaults female charge. She pleaded with Mr Karekare not to hurt her. When he walked into the bedroom, she escaped. He chased her down the driveway but returned to the house when she began screaming. She called the police from a neighbouring property. Mr Karekare took the victim's mobile phone when he left the property. This gave rise to the theft charge.

District Court decision

[8] The Judge recognised the charges Mr Karekare faced represented a "very significant reduction from the original allegations".[13] These were of aggravated burglary, and attempted wounding with intent to cause grievous bodily harm.

[9] On appeal, the sole issue is the Judge's failure to impose a protection order.[14] In considering if a protection order was necessary for the victim's protection, he acknowledged the gravity of Mr Karekare's current offending – he assaulted his ex-partner in her own home after forcing his way inside – as well as his previous offending against her.

---

10 Section 249.
11 *R v Vercoe* (1996) 14 CRNZ 383 (CA) at 387, commenting on s 249's predecessor.
12 See *Holloway v Police* [2014] NZHC 1626.
13 *R v Karekare,* above n 1, at [2].
14 Sentencing Act 2002, s 123B.

[10] The Judge reviewed transcripts of telephone conversations the victim had with Mr Karekare when he was in prison. She told Mr Karekare she made a false complaint to the police, and she would not sustain the complaint by evidence in Court. She said she was sick of Mr Karekare's treatment of her – there appears to have been an issue around stealing money – and believed a complaint to the police would convey that message. As she did not pursue that complaint, the charges were reduced to their current form.

[11] The Judge correctly recognised granting a protection order does not depend on the victim's fear; the test is if she is in need of protection from Mr Karekare. But he did not see any such evidence in the "colourful" telephone conversations of threats made by Mr Karekare to the victim. While acknowledging he may take issue with the victim now having another partner, the Judge considered it would be speculative to conclude how Mr Karekare would act (or react) upon release. He noted the victim's own expressions of fear and concern.

[12] Ultimately – given the time since Mr Karekare's previous offending against the victim, while acknowledging Mr Karekare had been in prison for a significant part of that duration – the Judge was not satisfied there was a need for a protection order and declined the application. This finding was supported by his observation the victim had not applied for a protection order in the Family Court while Mr Karekare was in prison. Further, the Judge considered Mr Karekare had a right to see his son; any ongoing contact could adequately be controlled by a Family Court order or by agreement.

Discussion

[13] Section 123B of the Sentencing Act 2002 provides as follows:

> **S123B Protection order**
>
> (1) This section applies if—
>
> (a) an offender is convicted of a domestic violence offence; and
>
> (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.

[14] Once a protection order made under s 123B has been entered in the Family Court's records, the order is to be treated as if it were a final protection order made by that court under the Domestic Violence Act 1995.[15] Determining whether a protection order is necessary is an evaluative exercise, but the inquiry need not be overly refined.[16]

[15] The Judge was satisfied three of the s 123B conditions were met: Mr Karekare was convicted of a domestic violence offence; a protection order was not currently in force; and the victim of the offence did not object to the making of the order. But he was not convinced a protection order was necessary for the protection of the victim.[17]

[16] The Crown submits the Judge acted contrary to the purpose of s 123B and established authority. The Judge is said to have placed the onus on the victim to manage her situation and safety, when he should have used the powers available to him under the Sentencing Act 2002.

[17] The Judge did seem to draw a negative inference from the victim's decision not to seek a protection order herself in the Family Court. There is a request for a protection order on the file, dated 3 November 2017 (when the offending occurred, but well before sentencing). That may explain her decision not to go to the Family

---

15 Sentencing Act 2002, s 123G.
16 *SN v MN* [2017] NZCA 289, [2017] 3 NZLR 448 at [22] and [24(f)].
17 Sentencing Act 2002, s 123B(2)(a).

Court to seek a protection order. But in any event, no application is needed by the victim for the court to impose a protection order – the express consent or agreement of the victim is not required, so long as they do not object to the making of an order.[18] The wording of s 123B(2)(b) makes that clear.

[18] The s 123B(2)(a) requirement that the making of a protection order must be necessary for the protection of the victim of the offence is the same requirement as contained in s 14(1)(a) of the Domestic Violence Act 1995, under which a protection order can also be made. The Court of Appeal in *SN v MN* recently considered the test under that section, and commented:[19]

> 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.

[19] Mr Karekare has offended against the victim before, and in a serious way. In 2013, he was sentenced to four years' imprisonment on charges of aggravated assault, assault with intent to injure, common assault, indecent assault, kidnapping, threatening to kill or cause grievous bodily harm and obstructing the course of justice. These charges all arose out of the same incident and involved the same victim. Mr Karekare had forced his way inside the victim's home before indecently assaulting her, attacking her and threatening to kill her.

[20] In 2011, when the victim was outside her house, Mr Karekare tackled her to the ground twice. A member of the public intervened and the victim tried to run away. But Mr Karekare pulled her to the ground and threatened to kill her. He was convicted of male assaults female and sentenced to two months' imprisonment.

[21] While there was a lapse between his last assault on her and his current offending, that is in part explained by his being in custody. He was released from prison in 2016 and the present offending occurred in 2017. Alongside that, there have been several police callouts recorded as incidents between Mr Karekare and the victim.

---

18 *Te Kani v Police* [2014] NZHC 82, [2014] NZFLR 400 at [18].
19 *SN v MN,* above n 16, at [23].

[22] In her victim impact statement, the victim states she is terrified of Mr Karekare. She wants him to leave her alone and believes he will seriously hurt her one day. It is unclear whether this statement was before the Judge, although he was told by a case officer the victim was fearful of Mr Karekare. These fears are not without foundation, given Mr Karekare's previous conduct. They are not unreasonable or unrealistic.[20] His conduct towards her illustrates some sense he is entitled to assert himself over her. I am extremely conscious domestic violence is to be understood as a pattern of offending, and not as a series of individual incidents.[21]

[23] Once the victim has proved the existence of past violence, and a reasonable subjective fear of future violence, an evidential burden passes to the offender to raise countervailing factors that weigh against the need to grant a protection order.[22] There are no persuasive countervailing factors here.

[24] Comments the victim made in recorded conversations should be viewed in light of the dynamic of her relationship with Mr Karekare. There may well have been inconsistencies in her statements. But focusing on her recantations of evidence and "highly unreliable version of events" disregards the fact Mr Karekare pleaded guilty to these charges. While the victim and Mr Karekare are no longer in a relationship, they were not in a relationship when this offending occurred either. In some cases, separation may increase rather than dissipate that threat of violence.[23] Further, while there may be no direct evidence of a future risk of offending, past behaviour is the most reliable guide as to future conduct.[24] I acknowledge there is no suggestion Mr Karekare has harmed the victim since his release in February.

[25] I acknowledge a protection order can cause inconvenience where there are children involved.[25] But "it cannot be the case that a person with children is less entitled to a protection order than one without".[26] Mr Karekare and the victim have a

---

20 See *A v B* [2008] NZFLR 65 (HC) at [23].
21 Law Commission *Understanding Family Violence* (NZLC R139, 2016) at [18].
22 *Surrey v Surrey* [2008] NZCA 565, [2010] 2 NZLR 581 at [43]. That was in the context of a victim's application for a protection order; in seeking a protection order as part of sentencing, the initial burden falls on the prosecutor.
23 At [122].
24 At [40]-[42].
25 At [47].
26 At [47].

child together; a protection order can account for that circumstance and its requirements.

[26] Especially in light of the purpose behind s 123B,[27] it is plain the Judge erred in failing to make a protection order in favour of the victim against Mr Karekare. I acknowledge that finding comes close to being one that a protection order should follow in all but exceptional circumstances on conviction for domestic violence. But then again, I recognise domestic violence is characterised by its ongoing pattern and that is what we are asked to look at, whether there is past violence and a reasonable foundation for a fear of future violence. I do not consider the transcripts to expunge that fear in these circumstances.

Result

[27] The appeal is allowed. I impose a protection order subject to standard conditions pursuant to s 123B of the Sentencing Act 2002.

—Jagose J

---

[27] (16 December 2008) 651 NZPD 979.