EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-044-001349
[2017] NZDC 24650

NEW ZEALAND POLICE
Prosecutor

v

[CHARLIE WILLS]
Defendant

Hearing:	30 October 2017
Appearances:	Sergeant M Hagen for the Prosecutor L Herbke for the Defendant
Judgment:	30 October 2017

ORAL JUDGMENT OF JUDGE C M RYAN

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[1] On 3 October 2017, I heard submissions by Mr Herbke that there was no case to answer following the police use in relation to a breach of a protection order by engaging in psychological abuse of the protected person, [name deleted]. After hearing from Mr Herbke and from Sergeant Hagen, I found that there was no case to answer. I dismissed the charge and gave reasons.

[2] Costs were sought. I directed that submissions be filed in accordance with a timetable. Mr Herbke was to file and serve the application and submission in support by 4.00 pm on 6 October 2017 and police were to file and serve a response by 4.00 pm on 13 October 2017. The costs application was to be heard before me on 17 October 2017 at 10.00 am.

[3] The reason for the rather short turnaround, particularly where Mr Herbke's submissions were concerned, was because I was only sitting in the North Shore District Court for a limited time and knew that I would be sitting in the week of 17 October but thereafter not until 2018. At the time, I was not aware that I would be returning in January 2018. I was anxious to resolve the matter without any lengthy delay.

[4] Mr Herbke filed and served his submissions by 6 October 2017. The police did not file and serve their response because they were seeking advice from the Crown solicitor as to whether to appeal my decision and wanted some time to consider the matter.

[5] On 17 October, therefore, police sought an adjournment. I noted that they had, in fact, requested the adjournment by email on 11 October 2017 but the Registry had not brought that email to my attention. Had it been so, then I may have granted the adjournment without the need for an appearance or indicated that I still wished to receive submissions. I did make the point that wishing to appeal did not exempt them from filing something within the time frame.

[6] I allowed the police further time to file submissions and adjourned the costs application to 30 October, that is today, at 10.00 am. I directed that the police file and serve their submissions by 4.00 pm on 26 October. I have received their submissions.

[7] By way of background, I found that there was no case to answer because on the police case I could not be sure that either Mr [Wills] tagged a photograph of a male anus with the complainant's name or permitted it to be published or knew or could be deemed to know the tag was there and allowed it to remain. I record Mr Herbke's arguments in support as follows. First, there was no evidence that the offending picture on the Facebook page of a person called [name deleted] was that of the defendant. I found that Mr [Wills] was [that person – nickname deleted] because the complainant gave evidence to that effect. She was not challenged on that point and it was open to me to find that her evidence on that point was credible and reliable which I did.

[8] Secondly, the tag name [complainant's nickname deleted] was not the complainant, [name deleted]. However, she gave evidence that she was known as [complainant's name deleted] and [complainant's nickname deleted]. While Mr Herbke made some submissions about Mr [Wills] dating some [other] person called [the same name as the complainant's nickname], there was no evidence about that apart from evidence from the bar which does not count. It was not put to [the complainant].

[9] Given the acrimonious break up between the parties, sufficient to lead to the granting of a protection order, which was made final, there was an obvious offence that [the defendant's nickname] and [the complainant's nickname] were the same parties.

[10] However, there were difficulties in the prosecution case. First, there was no evidence from the person who first saw the tagged photo, stating at what time he or she saw the picture, in what circumstances and, in particular, whether there were any postings by Mr [Wills] at the time which would indicate that he at least knew of the existence of the tagged photo and chose to leave it there and, therefore, publishing it even though he may not have been its author.

[11] Secondly, there was no evidence from [the complainant] as to the passage of time between when she was told about the tag, then created a false profile to gain access to the page, before accessing the page and the tagged photo.

[12] Thirdly, there was no evidence as to the passage of time between her seeing the offending picture then taking a screenshot and giving it to the police.

[13] Fourthly, there was no evidence from her as to whether there were any postings on the site at the same time or beneath the photo by [the defendant's nickname] which would indicate that he knew of the photo and chose to leave it there.

[14] Next, in cross-examination, she admitted that others can post to a person's Facebook page depending on the settings on the page. She accepted Mr Herbke's

proposition that somebody else could tag a picture depending on the settings that the Facebook profile user had set.

[15] There was no evidence as to what Mr [Wills'] settings were. The police did not investigate that. If Mr [Wills'] settings had been shown to be restricted and tags could only be made by him or only after he had approved them, this would point to his being the author to the tag or the publisher of it.

[16] Because of the lack of evidence, first, I could not rule out the possibility that some misguided and puerile friend thinking it was all a big, clever joke, had posted the picture then tagged the picture and, secondly, I did not have any evidence to show that the picture had been there for sufficient time for Mr [Wills] to know about it, which could have been shown by, for example, his postings on the site at the same time the photo was there or postings under the photo or postings in response to someone else's comment about the photo.. That left me uncertain.

[17] The fact that the police themselves had not checked the page themselves or created a false identity to check or used that of [the complainant] to check on postings and tagging or questioned Mr [Wills] about his Facebook profile or obtained a production order were also issues which meant that the prosecution fell short of showing a case to answer.

[18] As a result of my finding no case to answer and dismissing the charge, Mr Herbke asks for costs in the vicinity of $7544 for preparing for the Judge alone trial, for the Judge trial itself, for making a cost application, then for having to come over to Auckland today after the application was adjourned.

[19] He submits that prior to the case review hearing, he conducted case management discussions with North Shore Police Prosecutions by email. He has annexed the email trail to his submissions in support of the costs application as exhibit B. In those emails, as I can see, he raised the lack of evidence about the actus reus and of course that was the main reason for my dismissal of the charge.

[20] Mr Herbke also submits that at the case review hearing, Mr [Wills] accepted the protection order was in force at the time of the alleged incident but no other facts were accepted, nor any admissions made by the defence. This he argues put the police on notice that all aspects of the police case were contested including the identity of the person who tagged the photograph.

[21] On 27 September 2017, as the date for the Judge alone trial approached, Mr Herbke again wrote to the police, this time in more detail as to the reasons why he considered that the policer could not succeed in proving the charge. First, he noted that there was no evidence the photograph was posted on the defendant's Facebook account. The Facebook account in which the photo was posted was [the defendant's nickname]. I have already dealt with that argument and dismissed it.

[22] Secondly, the person tagged was [nickname deleted], the name of which was not hyperlinked to the complainant. Mr Herbke alleged that the tag on the photo was not referring to the complainant and the similarity in name between [nickname deleted] and [the complainant's name] was immaterial. I have already dealt with that and dismissed it.

[23] Thirdly, and more importantly, there was no evidence that the defendant himself actually tagged the name [nickname deleted] on the photo. The photo, Mr Herbke told the police in writing, was a featured photo meaning anyone of the Facebook user's friends could have created a tag on that photo. There was no evidence whatsoever that the defendant was the person who created the tag on that photo. Ultimately, I found that was so.

[24] Mr Herbke argues that the police, therefore, had notice six days prior to the Judge alone trial that this was a lacuna in the evidence which they could have filled. They elected not to do so.

[25] The letter went on to assert that the seriousness of the offending was low and there was no evidence for believing it might be repeated. There was only one previous breach, the Court was likely to impose a small nominal penalty and there was the

Family Court agreement. None of those issues, in my view, raised any doubts about the police case.

[26] The police responded to Mr Herbke by providing him with a copy of *Senior v Police*[1]. In doing so, they failed to grasp the difference between the two cases.

[27] In *Senior* there was no dispute as to the acts reus; the appellant had clearly published the abusive post. However, he argued that he never intended the complainant to see it or for her to be caused any psychological harm. The complainant was with a family member who had permission to view the defendant's site, saw the post and pointed it out to the complainant. The Court held that such publication was foreseeable to a Facebook user and found him guilty of breaching the protection order.

[28] In the present case, there was a dispute about the actus reus as clearly signalled by Mr Herbke in his letter of 27 September. *Senior* could therefore not assist the police and was irrelevant to the issues in this case.

[29] Today, Sergeant Hagen argues that a logical inference can be drawn, that given the acrimony between Mr [Wills] and [the complainant], Mr [Wills] put the picture on his page and tagged it. Not necessarily so. As I said at the Judge alone trial, I could not rule the possibility that one or more of Mr [Wills'] friends in a juvenile and misguided way, thinking it was really funny or supportive or both, posted and tagged the photo. There was no evidence as to Mr [Wills'] settings and [the complainant] was specifically cross-examined by Mr Herbke on the point, conceding that it was possible for someone else to upload the photo to Mr [Wills'] page and tag it, depending on Mr [Wills'] settings.

[30] Mr Herbke submits that, as a result, given the outcome and his prior warnings to the police, the Costs in Criminal Cases Act 1967 is invoked. He argues, in particular, that ss 2 and 5 of that Act apply. He raises issues as to whether the police acted in good faith in bringing and continuing the proceedings, whether at the commencement of the proceedings the police had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence, whether the police

[1] *Senior v Police* [2013] NZHC 357.

took proper steps to investigate any matter coming into their hands or which suggested the defendant might not be guilty, whether generally the investigation into the offence was conducted in a reasonable and proper manner and whether the charge was dismissed because the defendant established, in this case by cross-examination of witnesses for the prosecution, that he was not guilty and whether the behaviour of the defendant in relation to the acts or admissions on which the charges were based and to the investigation in proceedings were such that a sum should be paid towards the cost of his defence.

[31] Mr Herbke strongly relies on *Morris v Police.*[2] Counsel for Mr Morris, Mr Harold, raised from the first appearance the issue of paucity of evidence. He specifically put the police on notice when making an application for bail that he would be making an application for costs. The Judge observed that the evidence against the defendant was "very slim" and, therefore, lifted some of the restricted bail conditions, although some were re-imposed on appeal.

[32] His Honour Lang J on appeal observed that the District Court Judge's assessment of the weakness of the police case was correct. The police had received "a shot across their bows" not just by Mr Harold but also by a District and a High Court Judge both of whom opined that the case against Mr Morris was weak. Once the Crown received and perused the file, it accepted Mr Harold's submissions and advised that it was not going to proceed against Mr Morris. The charge was withdrawn. Full indemnity costs were sought for the various attendances over 14 months from the first appearance and, in addition, the costs for the costs hearing.

[33] Mr Herbke refers me to [16] of the decision in which His Honour Asher J held:

> As was pointed out in *Shirley v Wairarapa District Health Board,*[3] in a civil proceeding, while the cost jurisdiction is discretionary, it is not unprincipled otherwise it would be unacceptably arbitrary.

[34] The Court held that it has a general discretion pursuant to s 5(1) to order a payment of such sum as it thinks just and reasonable towards the cost of a defence.

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[2] *Morris v Police* [2013] NZHC 1336
[3] *Shirley v Wairarapa District Health Board* [2006] NZSC 63

That sets the general test. The considerations set out in s 5(2) apply specifically to the amount of any costs granted as well as to whether to grant costs.

[35] As Tipping J observed in *T v Collector of Customs*:[4]

> The amount to be ordered may be influenced by the grounds which existed for making an order in the first place. For example, if, under s 5(2)(a) the Court is of the view that the prosecution had not acted in good faith, that might be a strong point to awarding costs at/or towards an indemnity level.

[36] Mr Harold did not suggest that the prosecution failed to act in good faith for continuing the proceedings. However, he submitted that from the outset, the police had insufficient evidence to support a conviction yet chose to proceed "on a wing and a prayer."

[37] In response, Mr Burns for the Crown submitted that it was reasonable for the police to bring the charge. They were hoping that by establishing that Mr Morris was part of an organised criminal group and proving that organised criminal group was involved in the supply of methamphetamine, a sufficient link could be shown to establish Mr Morris' guilt.

[38] Asher J held that the police had to show that the gang of which Mr Morris was a part was involved in the supply of methamphetamine in this case. There was no such evidence. The Judge was somewhat sympathetic towards the police position because there was evidence that Mr Morris was involved in the Head Hunters, a gang which conducts serious criminal activity and the circumstances in which the methamphetamine was found was suspicious.

[39] However, the plain fact was there was nothing, apart from proximity and involvement in the gang, that linked Mr Morris to the methamphetamine. That evidence could never sustain a conviction beyond reasonable doubt. Asher J noted that such difficulties had been recognised and recorded by two previous Judges but the police did not heed those warnings and withdraw the charges.

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[4] *T v Collector of Customs* HC Christchurch, AP 167-94, 28 February 1995

[40] Although His Honour was not prepared to make a finding of bad faith, "vigorous efforts," by Mr Harold to bring home the weakness of the case to the police and the Courts together with the observations of the two Judges were relevant to the exercise of the discretion as to whether there should be a cost award.[5] The police had the clearest possible notice of the weakness of their position but they chose to continue.

[41] His Honour found that this fell squarely within s 5(2)(b) because "there was not sufficient evidence to support the conviction at the commencement of the proceedings and that remained the position until the discharges 14 months later."

[42] Mr Herbke submits that the present case is similar and relies on s 5 (2)(b) to (g). The police had been alerted to the concerns prior to the case review hearing and prior to the Judge alone trial. He argues that they had ample time and opportunity to either seek a production order to retrieve evidence of the defendant's activities on the Facebook platform or a search warrant on the defendant's home to gather the electronic devices that would show his browser history and his usage of the Facebook platform.

[43] In a less intrusive manner, the officer in charge could have been tasked with making a request for the information from Facebook. Mr Herbke is unaware of what information Facebook might have provided but argues that the fact that no request was made at all supports the inference that the police had no taken proper steps to investigate.

[44] In fact, an even less intrusive method may have been, with the consent of the complainant, to have used her false Facebook profile to investigate the page, its posts and tags, or to have asked her to take screenshots over a number of days of the photo if it remained on site and postings by the defendant which showed he knew about and was referring to the tagged photo which would have made it impossible for him to claim he did not know it was there or that someone else had done it without his knowledge.

[45] Mr Herbke submits that the decision not to investigate further, once put on notice, was negligent and that proper steps were not taken when faced with a clear

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[5] *Morris* supra n2 at [22]

challenge as to the evidential basis of the charge. The police, he submits, did nothing to rebut the submission he made to them or even try to fill the lacuna in the evidence. Sufficient evidence was not present.

[46] He further argues that they did not take proper steps to investigate any matter coming into their hands which suggested the defendant might not be guilty, namely counsel's letters and emails. The police did not conduct the investigation in a proper and reasonable manner, even if bad faith is not found. The evidence as a whole could not support a finding of guilt. The charge was not dismissed on technicality.

[47] The defendant always behaved well and was always present for his Court appearances. The case progressed in a timely manner and there was no behaviour by him that would reduce or extinguish any cost award.

[48] This was not a case of special difficulty, complexity or importance. Mr Herbke refers to *Sanders v Police*[6] in which it was held the costs of $222 for a half day would be derisory given the actual costs were about $20,000. He argues that because the police have been negligent, have been put on notice on two separate occasions, that there was no case to answer on the same basis he raised, have failed to respond to the evidential issues raised, if they even considered the issues raised at all and have breached a clear duty to exercise their discretion to prosecute based on a range of factors, costs should be paid in full.

[49] The police understandably disagree strongly. They submit that the post was made public on the defendant's page and was discovered by a third party who had alerted the complainant. They go through her evidence about creating a different name to access the page and being horrified, disgusted and motivated enough to report it to the police. I accept that.

[50] Sergeant Hagan argues that the screenshot was taken of the photo on the defendant's page. However, the police did not check that but accepted her word for it. In fairness, so did I. Sergeant Hagan submits that the photo was uploaded to the

[6] *Sanders v Police* [2011] NZHC 1838

defendant's page and tagged by himself. However, the point is that there was no evidence that it was by himself which is why I dismissed the charge.

[51] Nonetheless, the Sergeant continues to say this and argues that the defendant made the tagged image public, meaning that the complainant and anyone that she knew or knew of it could see it, although, of course, the two of them had blocked each other from their accounts. It was the view of the prosecutor there was a strong inference that the image was tagged either by the defendant or that he must have known about it and permitted it to remain on his page.

[52] Such an inference I found had no evidential foundation, so the prosecutor was mistaken. The alternative possibility that someone who knew both parties, or was at least supportive of and sympathetic to the defendant appears not to have been contemplated by the police, notwithstanding Mr Herbke's letter.

[53] While the prosecutor relied, in part, on *Senior,*[7] and the police submissions today traverse that case again, the reality is that case was different for the reasons I have discussed. The defence in that case was "I never thought it was possible that the person I was abusing could possibly have known about this," and the Court rejected that. The defence in this case is "you can't prove that I did it or that I knew about it and acquiesced in its publication."

[54] Today Sergeant Hagan says that the Facebook page and photo were self-authenticating so there was no need for any investigation involving Facebook. After all, there is a Facebook address and URL and a phrase "[name deleted – defendant's nickname] with [nickname deleted], yesterday at 6.53, public and featured photos." I accept that, now it has been pointed out to me which it was not at the Judge-alone trial but again, there is no evidence as to what that means, no evidence as to whether, once a photo of someone on a Facebook page is tagged, the name of the Facebook profile user on whose page the photo is tagged appears alongside the tag, whether the user has tagged the person or not, when "yesterday" was and so on.

[7] *Senior v Police* [2013] NZHC 357, supra n1.

[55] The police contest suggestions that the complaint lied at the Judge alone trial. I had no issue with the complainant's credibility and reliability. Mr Herbke's submissions as to costs no longer contest those aspects of the complainant's evidence or suggest that they are relevant in terms of costs. The issue is whether there was a case to answer on the evidence. The lacuna in the evidence was raised by Mr Herbke prior to trial. The police do not appear to dispute that the issue was raised in writing prior to trial.

[56] I accept that the police have to bring prosecutions despite any agreement people might fashion in the Family Court. I accept that in the detection and intervention of crime especially where there is family violence, there is a high public interest. I accept that the police acted in good faith. However, that is not the issue in this case. The issue is whether s 5(2)(b) to (g) are invoked. Mr Herbke has not relied on s 5(2)(a), just as Mr Harold in *Morris* did not rely on it either.

[57] I turn then to s 5(2)(b) and ask whether, upon the commencement of the proceedings the prosecution had sufficient evidence to support the conviction on the defendant in the absence of contrary evidence. The answer must be no. The lacuna as to the identity of the person who tagged the photo with the complainant's name was present from the beginning and was never filled.

[58] Next is s 5(2)(c), whether the prosecution took proper steps to investigate any matter coming into its hands which suggested the defendant might not be guilty. The answer, unfortunately, is also no. Police were put on notice twice about the gap in their evidence and it was made abundantly clear on 27 September 2017. No action was taken.

[59] I find that it was obvious and without complexity that the police had to prove that Mr [Wills] was the person who tagged the photograph or that if someone else did it, he was quite happy to allow it to be published on his page for a period long enough for him to have had the opportunity to remove it. I am still unaware as to whether the defendant was on the site posting at the relevant time and hence showing he must have been aware that the tagged photo was there.

[60] Next, the investigation into the offence was I find conducted in a reasonable and proper manner to a limited degree. The police interviewed [the complainant]. They seized as an exhibit the screenshot she showed them. However, they went no further. They did not go and see the Facebook page for themselves to assure themselves of the authenticity of the screenshot. They did not obtain a production order. They did not monitor or investigate the page to see if the defendant was posting on the page while the tagged photo was there. A non-intrusive and relatively inexpensive investigation could have taken place.

[61] Next is s 5(2)(e) whether the event as a whole would support a finding of guilt but the charge was dismissed on a technical point. That does not arise here.

[62] Next is s 5(2)(f) which does arise here. The charge was dismissed because the defendant established, by cross-examination of witnesses, that he was not guilty and successfully obtained a decision that there was no case to answer.

[63] Finally, I turn to s 5(2) (g), the behaviour of the defendant. His behaviour throughout the proceedings could not be said to be reduce or extinguish any sum paid to his defence.

[64] Accordingly, I find that costs are payable. The issue is how much should be paid. Costs must be reasonable in the circumstances.

[65] I consider that Mr Harold did a great deal more to raise concerns and the Judges did a lot more to raise warnings in the *Morris* case but those warnings were ignored by the police, although the Crown, once it received the case, acted responsibly in saying they were going to withdraw the charge. The trouble was that it took 14 months to come to that point. Those factors make that case worthy of a greater cost award.

[66] Just as Asher J found, I find that while the prosecution in this case acted in good faith, key evidence was missing.

[67] I too have sympathy for the police position. They are required to investigate cases involving family violence and breaches of a protection order if someone

complains. However, the investigation was not up to the normal standard by the police. Costs are required because the police case was weak from the outset and the police declined to accept the clear and, in my view, reasonable requests of Mr Herbke to withdraw the charge unless they had better evidence.

[68] Given the evidence available, the police should not have charged Mr [Wills]. While there were suspicions and the suspicions were reasonable, the investigation should not have proceeded until the police had more than what they thought might be an inference that Mr [Wills] either tagged the photo with the complainant's name or it was there for a sufficiently long time for him to be deemed to have published it, especially when it was very clear that the identity of the tagger was in issue.

[69] Mr Harold's fees were $14,000 over 14 months. There is a much shorter time here, fewer warnings and less egregious behaviour. In *Morris v Police*, costs of $10,000 were awarded out of the $14,500 sought which is close to 70%.

[70] In my view, about 50 percent of the costs for the preparation of this trial and the taking of the matter to trial should be awarded. For the application for costs and supporting submissions, I consider that the sum of $1000 is payable. Accordingly, 50 percent of the costs up to today and $1000 for the application. Costs for today's appearance have been incurred by the defendant because of the need to adjourn and come in to Auckland and I consider that an award of $600 for today is appropriate.

[71] In conclusion, therefore, the orders are as followers:

1. Costs for the preparation for trial and for the trial itself: $2466.75.

2. Costs for the costs application; $1000.

3. Costs for today; $600.

[72] I direct that a copy of this decision be transcribed and given to both parties.

C M Ryan
District Court Judge