

**IN THE DISTRICT COURT
AT DARGAVILLE**

**CRI-2017-011-000157
[2018] NZDC 2910**

NEW ZEALAND POLICE
Prosecutor

v

SARAH LOUISE ROGERS
Defendant

Date of Ruling: 15 February 2018
Appearances: Sergeant B Iggo for the Prosecutor
T Shepherd for the Defendant
Judgment: 21 February 2018

**RESERVED JUDGMENT OF JUDGE D J ORCHARD
[Application pursuant to s 115 Criminal Procedure Act 2011
to withdraw a plea of guilty]**

[1] This is an application by Sarah Louise Rogers to withdraw her plea of guilty to a charge laid under Harmful Digital Communications Act 2015, s 22.

[2] The offence carries a maximum term of imprisonment of two years and/or a fine of \$50,000.

[3] The relevant parts of the charging document are set out below:

Date of offence: On the [date deleted]

Offence location: at [location deleted]

Offence description: Posted a digital communication, namely pictures of a penis with intent that it cause harm to [the victim] where posting that communication would cause harm to an ordinary reasonable person in the position of [the victim] and by posting that communication caused serious emotional distress to her.

[4] The circumstances which gave rise to the charge are set out in the police summary of facts:

Introduction

At approximately [time and date deleted] the defendant ROGERS was at her home address in [location deleted].

The victim in this matter is the defendant's daughter, [the victim].

Circumstances

At the time of the incident, the defendant had recently trespassed her partner from her home address following an argument.

While at her home address, the defendant accessed her partners Facebook account and sent a series of Facebook messages to the victim from his account.

The defendant composed the messages in a way that led the victim to believe that they were coming from the defendant's partner.

The defendant sent messages to the victim stating "Hey [name deleted]" and "You're next lol".

The victim replied to the messages stating "Go away".

The defendant sent "Your mum caught me cheating again poor old woman she had it coming to her."

The victim replied "Do u seriously want to make things worse for us crappy life" and "I don't give a fuck piss off."

The defendant sent "My life's good now your mom is gone" and "lol".

The victim replied "Just go away".

The defendant sent "ok cya soon In person (red heart symbol)" and "Real soon".

The victim replied "Called the police now so have fun trying" and "And like you know where I am loser".

The defendant then sent the victim two separate images of an erect penis being held over a wooden table.

The defendant sent another message to the victim stating "I wanna fuk u like [name deleted]".

The victim exchanged several more messages with the defendant and advised that she was taking the messages to the Police.

The victim reported the matter to Police later that day.

The defendant's partner was contacted by the police, he reported to the [location deleted] police Station to make a statement. The defendant accompanied him to the police station.

Upon arrival, the defendant immediately confessed to police that she reset her partner's password, accessed his Facebook account and sent the Facebook messages to the victim from his account.

Comments

The defendant spontaneously admitted that she sent the messages and the pictures of the erect penis to the victim.

In explanation she stated that she wanted to get her partner in trouble.

The defendant has previously appeared before the court.

Orders

There are no orders sought.

[5] It is common ground that on [date deleted] at the [location deleted] Police Station the defendant confessed to sending the messages after accessing her partner's Facebook page. The defendant was bailed from that date to appear in the Dargaville District Court on 1 June 2017. While the charging document was not filed in the District Court until that date, it is common ground that the defendant had it from the time she was bailed by the police. On 1 June 2017 the defendant entered a plea of guilty and was remanded for sentence on 22 June 2017. On that date the Court record shows that the Judge signalled that a term of imprisonment was the likely starting point and may well be the end point because the pre-sentence report was not impressive. He required that counsel be assigned and further remanded the defendant to 15 August 2017 for sentence.

[6] On 15 August 2017 Mr Shepherd advised the Court that the defendant intended to apply to vacate her plea of guilty. On 13 November 2017 an application for leave of the Court to withdraw the guilty plea was filed in the Dargaville District Court.

[7] The grounds on which the defendant relies are:

- a. The applicant did not appreciate the nature of the charge; *R v Taylor*¹ and
- b. The applicant's ability to determine whether or not to plead was affected by ill health and/or other circumstances at the time; *Leeder v Christchurch District Court*² and
- c. If there is a possible defence to a charge of which the applicant was unaware when she pleaded guilty, whether because of incompetent legal advice or otherwise.

[8] At the hearing, which took place in the Dargaville District Court on Wednesday 14 February 2018 Mr Shepherd, counsel for the defendant, further refined the grounds relied upon:

- (a) That when she entered her plea of guilty the defendant failed to appreciate the nature of the charge in that while she understood what the charge was she did not know the factual basis for it was that she had sent a picture of a penis to her daughter.
- (b) That at the time she entered the plea she was under pressure from her husband.
- (c) That she entered the guilty plea on the basis that she thought the penalty would be "a slap on the wrist".
- (d) She had an arguable defence (ie, the complete defence that she did not send the pictures and therefore did not commit the offence).

[9] The evidence on which the defendant relies to support her application is largely contained in her affidavit sworn 21 September 2017. In that affidavit she claims:

- (a) She first became aware of "this charge" (meaning the complaint against [her partner, name deleted], made by her daughter [the victim]) when the police served a protection order obtained against her partner at the defendant's home address. [3]

¹ [1967] NZLR 577

² [2005] NZAR 18 (HC)

- (b) She accompanied her husband into the [location deleted] Police Station about a week later when he went to the [location deleted] Police Station at the request of [the Constable]) to discuss the messages. [4] and [5]
- (c) At the police station she acknowledged to [the Constable] that she had checked her partner's Facebook account because she thought her partner had "been unfaithful (to her) again" and he had left his phone behind. She did not explain how she was able to access his account. She also acknowledged to [the Constable] that, "It could have been (her) that sent inappropriate messages from Mr [her husband]'s Facebook account but there was no mention of penises." [5] and [6]
- (d) She says that later in the day, "While driving home I said to [my husband] that *I was worried that he may be blamed for something that he did not do.*" (emphasis added)

[10] About a week later the defendant was arrested and taken to the [location deleted] Police Station for questioning. She claims that she was never told what the contents of the messages were and did not give a statement. She says that at this time she, "Was very stressed and missing my husband as he had been trespassed from my property by the police when these allegations first came to light." [10]

[11] She acknowledged that she went to see Mr Darryl Hart, a Whangarei solicitor prior to her first appearance but that Mr Hart had no disclosure with him at the time. The implication is that our she was still unaware of the specifics of the allegation. She says, "...I thought about putting my hand up to this as I did not want to see my husband in trouble." She claims not to remember much about our first conversation.

[12] The defendant goes on to say that she saw Mr Hart again as duty solicitor the next day and she acknowledges that she was given the summary of facts with some of the Facebook messages attached but still no pictures. She says she entered a guilty plea as she was expecting a "slap on the wrist".

[13] She says that when she was at Court she was feeling alone, stressed and anxious and suffering from unspecified medical conditions that were placing stress on her.

[14] Significantly she says, “Because I said I had hacked into [my husband’s] Facebook account I entered a guilty plea...”

[15] Finally, the defendant acknowledged that her relationship with her daughter [the victim] was strained [details deleted]. She also said that her daughter had animosity towards [her husband]. She concluded by saying she wanted, “[the victim] questioned about who sent these pictures to her Facebook account.”

[16] The defendant’s position therefore is that she did not send the pictures, nor did her partner and she has no idea who did send them.

[17] As it happened Mr Hart was in Court when the defendant signalled her intention to apply to withdraw her guilty plea. He prepared an affidavit setting out his account of relevant events. He did this of his own volition and without seeing the affidavit of the defendant. This affidavit was filed after Ms Rogers waived solicitor/client privilege. At the hearing the defendant accepted his account as accurate, notwithstanding that it contradicted her own on matters of real significance.

[18] Mr Hart said that his initial contact with Ms Rogers had been a 15-minute phone call on [date deleted] 2017. In that phone call she was able to give him details of the charge including that it was alleged that she had caused harm by posting a digital image and the relevant section and category of offence. This supports the inference that at that time Ms Rogers had a copy of the charging document. My understanding is that by the conclusion of the hearing that was accepted by her.

[19] Mr Hart said that Ms Rogers was also able to explain to him the basis for the charge in general terms including that it related to what she had done while pretending to be [her husband]. He raised the possibility of investigating whether she had any possible defence but she was clear from the outset that she wanted to plead guilty.

[20] Either during that conversation or during a meeting of at least an hour's duration at his office on [date deleted] 2017 Ms Rogers explained how she had obtained the photograph of the naked penis which she had sent her daughter [the victim]. She also gave details of the image, specifically that a table was part of the picture. I note that Ms Rogers has never sought to explain how she could have had such information, let alone such detailed knowledge, if her assertion that neither she nor her husband sent the picture and she does not know who did were truthful.

[21] During the meeting on [date deleted] Ms Rogers expanded on the background to the offending and the motive for it. She told Mr Hart that prior to sending the messages she had been fighting with her husband who had been cheating on her. She used his cell phone SIM card to access social media sites through Facebook. She then sent electronic messages to [the victim] (including the image) whilst she was intoxicated.

[22] Moreover, she told Mr Hart that she had sent a message to her daughter saying, "You will be next," and another to the effect of, "Are you up for some fun with a nine-inch hard cock," and a third, "I will hurt you the way I hurt [name deleted], the way I hurt your mama."

[23] She told Mr Hart that when she had initially been charged by the police she had made an informal statement admitting that she had sent the messages.

[24] When questioned by Mr Hart as to her motives she described an abusive relationship with [her husband] and said that she had not been able to remove him from her home. She described a number of serious assaults by him on her and said that she did not want him bailed to her address. In her evidence she contradicted this by saying that the motive for her allegedly false confession and admission of the charge was that she wanted [her husband] back home because she did not want to be alone.

[25] Mr Hart recorded his advice on the issue of the likely sentencing outcome as follows:

I advised Ms Rogers in my view, a potential end sentence for the offending might be one of community work, but only if there was a full pre-sentence report and if all of the information had been passed by Ms Rogers to me, was made available to the Judge at sentencing.

[26] It was agreed that Mr Hart would represent her as duty solicitor the next day when she would enter a plea of guilty and a fee was discussed for his services thereafter.

[27] The next day, after Mr Hart intimated that a plea of guilty was likely to be entered, the matter was stood down so that Ms Rogers could read the summary of facts which she did. It was only after she had signed the summary of facts to confirm that she accepted it and would plead guilty that the plea was actually entered.

[28] The presiding Judge, His Honour Judge Harvey, indicated that he took a dim view of the offending and that the defendant's liberty was at risk. Understandably these comments caused her some anxiety.

[29] On 7 June Mr Hart received a series of text messages from the defendant. The first three are set out below:

13:16 Hi its sarah here. Is it possible to change my plea? The charge was against [my husband]. Had [the victim] known it was me sending the messages, she may not have gone to police and laid a complaint.

14:03 Hi the charge was initially against [your husband]. However you then went to the police and effectively confessed to the offending.

14:05 Not officially. And, I admitted to sending the messages, but, for example, had [the victim] been aware – on any other day – I had sent the messages, she wouldn't have reacted in the same way! Basically, I pled guilty to a charge initially intended for [my husband] to answer, not her mother.

[30] It can be seen that the defendant effectively admits guilt again.

The law

[31] As counsel for the defendant, Mr Shepherd, says in his helpful submissions this application falls to be determined under s 115 Criminal Procedure Act 2011:

115 Plea of guilty may be withdrawn by leave of court

- (1) A plea of guilty may, by leave of the court, be withdrawn at any time before the defendant has been sentenced or otherwise dealt with.

...

[32] I accept Mr Shepherd's submission that the pre-Criminal Procedure Act 2011 authorities setting out the principles relevant to the exercise of the discretion and which give guidance as to the circumstances when it will be appropriate to exercise the discretion are equally relevant under the new provision.

[33] The principle which underlies the exercise of the discretion is still that it should be exercised in favour of an applicant when the interests of justice demand it.

Findings of fact

[34] The defendant has, in her evidence, conceded that the account of events given by Mr Hart in his affidavit are accurate. Mr Hart was an impressive witness and I have no hesitation in accepting his account of events. Where his evidence is at odds with that of Ms Rogers, either in her affidavit or in her evidence, I unhesitatingly prefer his. Ms Rogers has shown herself to be untruthful. She has also admitted responsibility for sending the indecent picture the subject of this charge not just by her plea of guilty but also to [the Constable] and to Mr Hart, both before and after she entered that plea. She was also able to give details of both the picture and the emails sent to her daughter and did not attempt to explain how she could have known those details at the time she did, given that her stated position is that neither she nor her husband was responsible for sending them and she does not know who did. I am satisfied that the reason for her failure to give such an explanation is that no explanation consistent with her innocence is available to her.

Decision

- (a) I am satisfied that the defendant was fully aware of the nature of the charge and in particular that it was alleged that she had sent her daughter [the victim] a picture of a penis from [date deleted] when she was arrested and subsequently bailed by the police.

- (b) There is no sufficient evidence on which the Court might conclude that she entered this plea under pressure from her husband. She does not say so. What she has said is that she did not want to be alone and also did not want to see her husband convicted of something he did not do.
- (c) While Ms Rogers no doubt hoped for a non-custodial sentence when she entered her plea I accept Mr Hart's evidence that he had made her aware that this was not a foregone conclusion and depended on a favourable pre-sentence report. In any event, disappointed hopes as to a sentencing outcome are not, of themselves, a ground for granting leave to withdraw a guilty plea.
- (d) Finally, and most importantly, I come to the real issue in this case: has the defendant satisfied me that there is a reasonable possibility that she did not send the subject image and is therefore innocent of the offence? There is no doubt that, if the Court is faced with a situation where there is a realistic possibility that a defendant, no matter how foolishly, has admitted a charge of which he or she is innocent the discretion should be exercised in his/her favour. As Hardie Boys J said in *R v Turrall*³ (cited with approval in *R v Repia*⁴):

This Court should be the fountain of Justice and ensure that no man is wrongly convicted even if it is his own foolish act that has brought the situation about (page 313).

[35] This is not such a case. This is a case where a plea of guilty has properly been entered with full knowledge of the nature of the charge and the facts underlying it and that plea has subsequently been regretted when the defendant has realised that a sentence of imprisonment is a real possibility.

[36] The application is dismissed.

³ *R v Turrall* [1968] NZLR 312

⁴ *R v Repia* [1985] 1 NZLR 122 at page 127

[37] The defendant is remanded on continued bail to the Dargaville District Court on [date deleted] March 2018. An updated PAC report is directed in case there has been any change in Ms Roberts' circumstances since the earlier report was prepared.

D J Orchard
District Court Judge