

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-19-01348

DIRECTOR OF PUBLIC PROSECUTIONS

v

SITI NURHIDAYAH KAMAL

JUDGE: HER HONOUR JUDGE GAYNOR
WHERE HELD: Melbourne
DATE OF HEARING: 31 October 2019 and 24 February 2020
DATE OF SENTENCE: 17 March 2020
CASE MAY BE CITED AS: DPP v Kamal
MEDIUM NEUTRAL CITATION: [2020] VCC 254

REASONS FOR SENTENCE

Subject:
Catchwords:
Legislation Cited:
Cases Cited:
Sentence:

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the DPP	Ms Lauren Gurry	Office of Public Prosecutions
For the Accused	Mr Rahmin J de Krester	Stary Norton Halphen

HER HONOUR:

1 Siti Nurhidayah Kamal, you have pleaded guilty before me to one charge of blackmail. The maximum penalty for this offence is 15 years' imprisonment.

OFFENDING

2 The facts underlying your offending are as follows.

3 Your victims, Jay and Deanne Windross, were attending on their 11 month old daughter, Amiyah, who had suffered an undiagnosed neurological disease since birth and was gravely ill and hospitalised at the Monash Children's hospital.

4 On 20 April 2019, the Windross' having spent some days at the Hospital with their daughter went to the nearby Chadstone Shopping centre to do some shopping. At about 5.00pm, Mrs Windross went to the bathroom there, taking her black Samsung S8 mobile telephone. While using the bathroom she placed the phone on the toilet roll holder in the toilet cubicle. She left the bathroom, saw her husband on his own mobile telephone and realised that she had left her phone behind.

5 The potential loss of her phone caused enormous distress to Mrs Windross who had hundreds of images of her daughter on it, which were not backed up. It became clear during the plea hearing that these pictures comprised the main photographic record of Amiyah's life. Mrs Windross ran back into the cubicle but the phone was gone. Devastated she and her husband called out to passers by in the hope whoever picked it up would hear them. There was no response so they went to the Telstra and Samsung stores to see if the phone could be accessed or tracked, and then to Chadstone Centre Management and surrounding stores to check if it had been handed in.

6 They had no success in either locating the phone or finding ways to access its contents.

7 Throughout all this Mr Windross kept dialling the mobile phone in the hope it would be answered and located. Finally as he and his wife got into their car, the phone was answered

but only background noise could be heard, and the phone was hung up after about 20 seconds.

8 Mr Windross called back again, the call was rejected, and on his third call it seemed the phone was switched off. In the 45 minutes since the phone was mislaid Mr Windross called it about 105 times.

9 That evening via a post on his personal Facebook page, Mr Windross made a public appeal for help in locating the phone. He posted information about how the phone had been lost and that it contained images of his very ill daughter. He listed his personal mobile phone number and indicated he would give a cash reward for the phone's return but did not designate an amount. That post was then picked up by a number of media outlets who more widely publicised the appeal to locate the phone.

10 Late afternoon on 23 April 2019, Mr Windross began receiving messages from you through WhatsApp, using your personal mobile number, indicating you had the phone. You wrote you were remorseful for not returning it earlier.

11 .Mr Windross replied "*please put it in my letterbox. I'll get my neighbour to check that it's there and I'll transfer you the money to wherever you want it*".

12 As the Whatsapp conversation continued Mr Windross saw you had begun deleting his messages so took screenshots of some of them. In those messages, you asked for \$1,000 for the phone and suggested that if the money was not provided it would not be returned. At around 6pm Mr Windross wrote "*my baby is in her last minutes*", and "*can we discuss this tomorrow, she's about to leave us*".

13 Nearly four hours later, you replied "*how?*". Mr Windross then wrote: "*I don't know yet. I can't think at the moment. My baby isn't going to last out the night. What do you suggest*". A little over an hour later, between 11.14pm and 11.23pm, you wrote "*please transfer me money I will return you the phone or maybe I just sell it*", then "*I hope you can help me*" and then "*you maybe help me today god may help you*".

14 At 2.05am on the morning of 24 April, Amiyah passed away at Monash Children's Hospital while being held in her parents' arms. It is therefore clear that you delivered your request for money and intimated the threat to dispose of the telephone if you were not paid, while the Windross' were at the bedside of and attending to their dying baby daughter.

15 At 2.26am, you messaged "*please I'm begging you I don't want to sell and erase all of your memory I promise you I'm an honest person*".

16 The next morning, at 9.41am, you messaged "*any update?*". At 9.44am, Mr Windross replied "*please don't erase anything our baby passed away in our arms early this morning you have our memories of her please let us have some rest and then we will organise something I promise*". You replied that you were "*really sorry to hear that*" and promised to keep the mobile phone and return it once the Windross' had made a cash deposit.

17 At 12.04pm on 24 April, Mr Windross messaged you asking to make arrangements, saying he had \$1,000 cash, and finishing "*please don't sell my phone I need to have the memories*".

18 At 12.39pm, you sent Mr Windross a screenshot of your Commonwealth Bank account and requested the money be transferred there. At 12.48pm, Mr Windross messaged you "*I am going to do it but I need to know that you have the phone and you are not just trying to get money out of me*". He sent a number of similar messages pleading for confirmation that you had the mobile telephone before he gave you any money. You then identified the name of the bank account as being "Siti Kamal".

19 You continued regularly requesting payment until 5.05pm, when the messaging ended. During that time, Mr Windross suggested a number of ways to exchange the phone, indicating he was at the hospital with his daughter or that he wanted to get back to his daughter for the last time. You sent a message at 4.04pm stating "*are you going to deposit or not*".

20 On April 25 at 11.55am Victoria Police investigations led them to your address in Springvale. There they seized your mobile telephone, identified it had the number from

which the messages were sent, and confirmed from images on it that it was your current mobile telephone.

21 Early morning the next day 26 April police attended your home and arrested you. You were taken to the Ringwood Police Station where a record of interview was begun but not concluded as you are a Malaysian national and police could not obtain a satisfactory interpreter. You were then charged. Mrs Windross' phone has never been found.

22 In all, 160 messages were exchanged between you and Mr Windross in a 24 hour period, 92 of them being from you to Mr Windross.

VICTIM IMPACT STATEMENTS

23 During the plea hearing, Mr and Mrs Windross each read out their Victim Impact Statements. Mrs Windross stated:

“While myself and my husband laid in a hospital room with our 11 month old daughter slowly dying in our arms we had a woman who had absolutely no care for the turmoil we were facing. Demanding money from us. Taking our time, attention and focus away from the last moments of our daughter’s life ...”

24 Later in her statement, Mrs Windross wrote:

“... she continued to berate my husband with messages demanding money for a phone that she in fact didn't even have. A phone that held such incredibly precious memories of our daughter that I will never get back.”

25 Finally, Mrs Windross wrote:

“Not only had I had my daughter cruelly ripped from me by death but now all the hope that I've felt that I would get thousands of photos and memories back was also ripped from me when we were told that she had been lying all along.”

26 In his Victim Impact Statement, Mr Windross described the tortuous course of his daughter's illness which began as a diagnosed failure to thrive in the early weeks of her life because of an ineffective swallow reflex. A condition which ultimately required surgery inserting a stomach tube so she could receive nutrients. Amiyah had virtually no body tone, could not raise her head, suffered great physical discomfort, thrashing about constantly,

and could sleep for only 15 minutes maximum at a time and only while being held by one of her parents. In October 2018 Amiyah went into respiratory arrest and was rushed to the Emergency Department at Monash Hospital.

27 This led to longer periods of hospitalisation, and the introduction of high levels of medication but Amiyah continued to be agitated if one or other parent was not present, and presented with daily health issues requiring constant 24 hour attendance by her parents, more usually Mrs Windross.

28 Mr Windross wrote that Amiyah spent 200 days of her 338 days of life in hospital. He described the exhaustion and the immense physical and emotional toll that Amiyah's condition took on he and his wife.

29 Mr Windross also described how you made your first contact with him right at the time he and his wife were meeting with Amiyah's medical team who were breaking the news to them that their daughter's recent medical episode would be her last, that it was not reparable, and that she would not survive. He then described the hope you gave them that the photographs could be recovered, and then of the devastation of learning that you in fact did not have the phone. He wrote, "Our hopes of seeing our daughter in happier and more positive times was ripped from us."

30 Mr Windross wrote:

"While you were trying to negotiate money from me for the return of a phone which you never had in your possession my wife and I were cradling our only child as her heartbeat began to beat slower and slower. The fact that I told you that our baby was dying in our arms and that I wanted to discuss the return of the phone at a later time wasn't a deterrent for you."

31 He wrote further: "You took moments away from the last opportunity I could have with my breathing daughter to negotiate and threaten me with a phone you never had" and at one stage "you even baited me to respond to you with the threat that you'd wipe the phone if I didn't respond".

32 Both Mr and Mrs Windross wrote of their immense grief and disappointment in the aftermath of their daughter's death on learning that you did not have the phone and of then

having to make numerous attendances upon police stations to make statements. It was clear that you added immeasurably to the terrible anguish they were already undergoing as their daughter died. It was also clear from their Victim Impact Statements that their anger and anguish at being treated this way at such a time of their lives remains with them.

PERSONAL CIRCUMSTANCES

33 I now turn to your personal circumstances.

34 You are 25 years of old and were born in Malaysia. You have no previous criminal history. You were adopted aged two weeks old. Your father is apparently a police inspector and your mother has the occupation of home duties.

35 You told neuropsychologist, Mr Warwick Brewer, whose report dated 13 December 2019 was tendered on the plea that you did well at primary school but from age 12 your grades began to deteriorate and that your parents thought you were too social.

36 You reported being sexually abused at age 14 by a cousin two years older than you, telling your parents about this after a few weeks. Your aunt, presumably the cousin's mother, was then confronted and contact with her ceased. You told him you bullied your peers from about age 13. You began truanting from school and were expelled from one school at about age 16 then attended a second school in Sabah until you were 17. At that age police found you in possession of methylamphetamine but you were not charged. You told Mr Brewer you ran away from home and school and missed your final exams.

37 You said you began using alcohol regularly and heavily from age 14 then cannabis and methamphetamine from age 17 but stopped using these when you married at age 21. You have two children aged three and four who have been cared for by your mother in Malaysia since you came to Australia.

38 Between ages 18 and 24, you were a singer in a band. You described your marriage as tumultuous, and your husband as a heavy drinker who regularly assaulted you. You said you ran away from him and migrated to Australia, but that he followed you soon after. You

also said he stopped drinking when you first became pregnant and that the violence had then stopped.

39 At first, you lived in Coffs Harbour and worked on a farm. When your husband arrived, you both travelled to Mildura before renting a house in Springvale in January 2019.

40 Your counsel told me that it was the aim of you and your husband to make money to send back to your family, and the two of you undertook bicycle delivery work, but the pay was far lower than you had expected and you ran into financial difficulties.

41 The offending, your counsel told the court, was spontaneous and impulsive. He said it occurred because you were financially desperate. For reasons which I will elaborate upon later in these sentencing remarks I have difficulty accepting that explanation.

42 This matter resolved into a plea before Committal mention, so witnesses were spared the ordeal of giving testimony and the community spared the time and expense of a trial. You have been in custody since your arrest spending all but a few days in the protection unit because of the nature of your offending and the likely reaction of other prisoners to it.

43 Your counsel told me you have weekly telephone contact with your parents in Malaysia and speak to your children every two or three months. Your marriage is strained but your husband is still in Australia and has continued to visit you in gaol.

PSYCHOLOGICAL EVIDENCE

44 At the first hearing plea hearing reliance was placed on the report of psychologist Gina Cidoni who assessed you as having an intellectual disability. I expressed some concern at the testing and further and more detailed neuropsychological testing by Mr Brewer found no evidence of this and placed you at low average to average intelligence. At the second plea hearing your counsel formally abandoned reliance on the Cidoni report.

45 Mr Brewer described your mood when he interviewed you in custody on December 13 2019 as “cheerful” and reported that while you continued to experience “quite a bit” of anxiety and felt depressed at times you were less depressed than seven months before.

46 You reported self-harming behaviour by cutting from age 15 to last year. Personality screening revealed what Mr Brewer termed “high loading” on chaotic and personality traits. This included high levels of impulsivity, mood changes, temper outburst, and suspicion of others. There was some evidence of Post Traumatic Stress Disorder traits possibly arising from your adolescence but not enough to warrant a full PTSD diagnosis. You also reported a tendency to instant gratification which interfered with your ability to make or carry out long term plans. He found you did not suffer from any intellectual disability, acquired brain injury or mental illness.

47 Mr Brewer stated:

“From Ms Kamal’s report she indicates her offending was impulsive and occurring in the context of significant financial stress and the imperative to be re-united with her children: it is possible in my opinion that her chaotic and disorganised personality features which are by definition characteristically associated with excess emotional expression, leave Ms Kamal with reduced ability to exercise sound judgement and reasoning. Evidence to support this opinion is reflected in her somewhat naïve approach to offending that allowed easy identification of...her mobile phone number, her name and her bank account.

48 In terms of your experience in prison, where I accept you have undertaken a number of programs, Mr Brewer stated that “paradoxically” people like you who have a disorganised and chaotic personality structure find the high level of structure within a prison is therapeutic.

49 He believed that post sentence you may pose a mild suicide risk.

50 I received two letters of apology written by you to the Windross’ and a reference from your husband.

SUBMISSIONS

51 I now turn to counsel’s submissions.

52 Defence counsel submitted that I should sentence you to the time you have already served. He pointed to your lack of prior criminal history and submitted that your offending was impulsive, unsophisticated and carried out in a way that meant you were easily identified by police.

53 Mr DeKrester submitted correctly that you were entitled to a discount for your early plea of guilty, involving as this did sparing the Windross' from the ordeal of giving evidence and saving the community the time and expense of a trial. He further submitted I should find this also reflected remorse on your part. In fact, he submitted your letters of apology demonstrated a high degree of remorse. He submitted your offending involved none of the traditional threats of violence often found in blackmail cases, lasted for a short time and was voluntarily ended by you before police became involved.

54 He submitted I should take into account that on your release from prison you will be deported back to Malaysia - knowledge of this therefore imposing an additional emotional burden on your imprisonment.

55 Mr DeKrester submitted that your lack of criminal history meant I should find that you have good future prospects of rehabilitation.

56 He also submitted that the delay of four months in this case while further reports were obtained, added to his client's anxiety. Finally, he submitted I should find that gaol was particularly difficult for you because you were incarcerated in a foreign country and held in the more restrictive conditions of the protection unit.

57 Prosecuting counsel submitted blackmail was an inherently serious offence which must be denounced, and involved a wide range of scenarios so that each case must be decided on its own facts. She submitted the focus in this case should be on the actual harm inflicted.

58 Ms Gurry submitted the objective gravity and seriousness of your offending was high. She said that despite being told by Mr Windross exactly what the situation was with his daughter you continued on with persistent and repetitive messaging in pursuit of your blackmailing efforts.

59 She described your offending as opportunistic, premeditated and a blatant attempt to extort money.

60 Ms Gurry submitted there was no real evidence of your alleged financial desperation or need and pointed out that you had been in Australia for only a few months before committing this offending.

61 Ms Gurry submitted that although the offending occurred over a short time it was very intense as evidenced by the number of messages. She submitted that the timing and continuation of that offending when you had been told of Amiyah's fragile and deteriorating condition was an aggravating feature. That is, she submitted, you knew the Windross' were very vulnerable and desperate. The offending also involved trickery as you never had the phone to return to the Windross'.

62 Ms Gurry submitted the impact of the offending was extremely traumatising for the Windross'.

63 She conceded the offending was not protracted, that you did not steal the phone and was unsophisticated in that you gave your personal details to Mr Windross. Nor was there threatened violence. The offending did not occur in breach of bail, parole or a Community Corrections Order that otherwise aggravated the offending.

64 However, Ms Gurry submitted this was offending carried out for personal profit in very distressing circumstances, involving a high degree of responsibility and culpability. The impact also involved creating a false hope which then exacerbated the Windross'' grief in already tragic circumstances.

65 She submitted that although your plea of guilty was an early one it was made in the face of a very strong prosecution case. She conceded I could find there was some remorse by you based on your letters.

66 Ms Gurry also submitted that in your case deportation was not a matter which would weigh heavily with you given that it would involve you going home to your family and your children

67 Both counsel relied on a number of decisions involving sentences for blackmail all of which I have had regard to in addition to other cases outlined in the JCV Sentencing

Manual. The factual situations varied widely and it is my view the scenario of this case is unique and must be dealt with on its own facts although regard must be had to the general terms of imprisonment imposed for blackmail.

CONCLUSIONS

68 In my view the prosecution submission that in this case the focus should be on the effect of your offending is correct. Additionally, in my view the offending was considerably aggravated by the surrounding circumstances.

69 Short lived though this offending was, it occurred during a period of intense suffering by the Windross', in circumstances where I am satisfied you were entirely aware they were attending to their dying daughter. I am also satisfied you understood from the outset why they were desperate to retrieve Mrs Windross' mobile phone as had been made clear by Mr Windross' Facebook post. Your efforts to obtain this money continued even after you learned of Amiyah's death.

70 That you should be inspired in the first place by such suffering to offend in this way, much less continue it as intensely as you did even after being told Amiyah was dying and then of her death, I find to be so reprehensible as to be amoral. I regard the objective gravity of this offending and your moral culpability to be of the highest order.

71 Given you had been in Australia only seven or eight months before offending in this way, and in Melbourne for about four months I am not satisfied that your financial situation was so dire as to found the remotest explanation for your decision to offend in this way. Nor was there any evidence of this alleged desperate financial need.

72 That you also falsely represented that you had the phone, which had the effect of adding to the Windross' devastation in the immediate aftermath of their daughter's death in my view only compounds the repellent nature of this offending.

73 The unstable impulsive and chaotic features of your personality as discerned by Mr Brewer do not detract from the cruelty of your actions.

74 In sentencing, I do take into account your early plea of guilty for which you will receive some discount, but also note the corresponding very strong prosecution case. Your letters of remorse do reveal considerable contrition, but in the absence of a frank psychological condition undermining your capacity to understand right from wrong I am satisfied the immorality of your actions must have been clear to you from the outset. As you stated in your letters you are a mother yourself and to quote you “know of the heartache associated with my actions.” Those letters were written from custody in the aftermath of your offending and subsequent arrest, and in the face of forthcoming court proceedings and I find it difficult to attach any great weight to them.

75 Ultimately the prospect of deportation in your case does not involve a loss of opportunity or return to a situation of deprivation to a country which has become foreign to you over a period of years. You had been in Australia only seven or eight months before your attempt at extortion, you were on a bridging visa only and you will return to your parents and children. I am unable to conclude that deportation will cause you emotional difficulty that will add to the burden of your service of a term of imprisonment.

76 I do not regard the several months’ delay in this matter caused by concerns over the accuracy of the first psychological report to be of any mitigatory weight. In my view the inadequacies of that report were evident, and the issue of your apparent intellectual disability an important factor in the sentencing exercise before this Court.

77 You must at law be given some credit for your lack of previous convictions. As to your prospects of rehabilitation I am concerned that that so soon after your arrival in Australia you offended as gravely as you did, but cannot conclude in the face of your lack of previous criminal history that you have none. Whilst your youthful age entitles you to the benefit of greater emphasis on rehabilitative factors the authorities make it perfectly clear that in cases of serious offending that factor will have lesser weight.

78 I accept your offending was impulsive and short lived. I also accept that it was unsophisticated in that you provided personal details which made your detection and arrest a relatively easy matter for police.

79 In sentencing you I do take into account the mitigatory features I have outlined.

80 I have also had regard in a general sense to the terms of imprisonment imposed for offending of this kind as I am bound to do.

81 The trauma you deliberately inflicted upon people already experiencing the gravest of distress, your exploitation of their evident desperation and vulnerability mean that denunciation of your conduct and just punishment are the principles which dominate the sentencing exercise before me. Ultimately, I am not satisfied that the term you have already served sufficiently reflects the objective gravity of your offending, or your moral culpability.

82 I therefore sentence you as follows.

83 You are sentenced to a term of imprisonment of three years, I order that you serve two years before becoming eligible for parole.

84 Pursuant to S6AAA of the Sentencing Act I declare that had you not pleaded guilty I would have sentenced you to a term of imprisonment of four and a half years and ordered you serve a minimum term of three years and six months.

...