DISTRICT COURT OF QUEENSLAND

CITATION:	*AMB v TMP* & Anor [2019] QDC 100
PARTIES:	**AMB** (appellant) **v** **TMP** (first respondent) **and** **QUEENSLAND POLICE SERVICE** (second respondent)
FILE NO/S:	D230/18
DIVISION:	District Court
PROCEEDING:	Appeal against making of order pursuant to the *Domestic and Family Violence Protection Act* 2012 (Qld)
ORIGINATING COURT:	Magistrates Court at Southport
DELIVERED ON:	21 June 2019
DELIVERED AT:	Southport
HEARING DATE:	13 June 2019
JUDGE:	Kent QC, DCJ
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – INTERFERENCE WITH DISCRETION OR FINDING OF THE JUDGE – GENERAL PRINCIPLES – where a domestic violence protection order was made against the appellant following a contested hearing – whether the learned magistrate erred in finding that the appellant committed domestic violence against the aggrieved – whether the learned magistrate erred in finding the protection order was necessary or desirable.
LEGISLATION:	*Domestic and Family Violence Protection Act* 2012 (Qld) s 4, s 8, 37, s 15(2)(B), s 15(3), s 164, s 168, s 169
CASES:	*Coal and Allied Operations Pty Ltd v AIRC* (2000) 203 CLR 194, followed *Commissioner of Police v Toomer* [2011] QCA 233, cited *Fox v Percy* (2003) 214 CLR 118, applied *GKE v EUT* [2014] QDC 248, considered

House v R (1936) 55 CLR 499, considered

MDE v MLG & Queensland Police Service [2015] QDC 151, applied

RC v MM [2018] QDC 276, cited

COUNSEL:	S Kissick for the appellant The first respondent appeared on her own behalf M O'Brien for the second respondent
SOLICITORS:	ABF Legal for the appellant The first respondent appeared on her own behalf Queensland Police Service Legal Unit for the second respondent

Introduction

[1] The appellant challenges a decision made on 26 July 2018 pursuant to s 37 of the *Domestic and Family Violence Protection Act* 2012 (Qld) (the "*DV Act*"), granting the aggrieved a protection order for five years. The order was made after a contested hearing where evidence had been given by the aggrieved and the appellant. Pre-requisites for making the order included findings that there had been a relevant relationship between the parties; that there had been domestic violence, and that an order was necessary or desirable.

[2] It is common ground that a relevant relationship had existed between the parties. Although they, according to the evidence, had been no more than friends, nevertheless the appellant is the father of the child of the first respondent, thus coming within the meaning of "spousal relationship" as defined in s 15 of the *DV Act*, specifically, s 15(2)(b). It is noteworthy that subsection 3 provides that it is irrelevant whether there is or was any relationship between the parents of the child.

[3] The appeal centres on contentions that there was an error by the magistrate both in concluding that an act of domestic violence had occurred and, secondly, a further error in the conclusion, required by the legislation, that it was necessary or desirable to make a protection order.

[4] The grounds of appeal are as follows:

(a) the learned magistrate erred in finding that the appellant committed domestic violence against the aggrieved within the meaning of Part 2, Division 2 of the *DV Act*;

(b) the learned magistrate erred in finding the protection order was necessary or desirable to protect the aggrieved from domestic violence in accordance with s 37 of the *DV Act.*

Nature of the Appeal[1]

[5] The appeal lies pursuant to s 164 of the *DV Act* which is in the following terms:

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[1] Much of the analysis of the procedural and legal aspects of an appeal of this kind can be found in my previous judgment in *RC v MM* [2018] QDC 276.

> "164 **Who may appeal**
> A person who is aggrieved by any of the following decisions of a court may appeal against the decision –
> (a) a decision to make a domestic violence order;
> (b) a decision to vary, or refuse to vary a domestic violence order;
> (c) a decision to refuse to make a protection order;
> (d) if a person sought a temporary protection order in a proceeding under this Act – a decision to refuse to make the order."

[6] The appeal is to be decided on the evidence and proceedings before the court that made the original decision; however the appellate court can order that the appeal be heard afresh.[2]

[7] In the absence of such an order, which has not been pursued in this case, the nature of the appeal under s 168(1) is of a rehearing. This is so even though the nature of the appeal is not expressed in these terms in the section.

[8] In such a case the appellate powers of the court are as provided by s 169 are to be exercised for the correction of error. This was described in *Coal and Allied Operations Pty Ltd v AIRC*[3] by Gleeson CJ, Gaudron and Hayne JJ in the following terms:

> "Ordinarily, if there has been no further evidence submitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions confirm appellate powers, even in the case of an appeal by rehearing, statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the powers are to be exercised for the correction of error.[4]

[9] Further, as submitted by the second respondent, where the decision under appeal involves the exercise of a discretion, error of the kind explained in *House v R*[5] will need to be shown.

[10] The respondent also refers to the requirements and limitations of such an appeal, referring to *Fox v Percy*[6] in the following terms:

> "The foregoing procedure shapes the requirements, and limitations of such an appeal. On the one hand, the appellate court is obliged to 'give the judgment which in its opinion ought to have been given in the first instance'. On the other, it must, of necessity, observe the 'natural limitations' that exist in a case of any appellate court proceeding wholly or substantially on the record. These limitations include the

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2 *Domestic and Family Violence Protection Act* 2012 (Qld) s 168.
3 (2000) 203 CLR 194.
4 *Ibid* at pp 203-204, para [14].
5 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.
6 (2003) 214 CLR 118 at 125-126.

> disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses credibility and of the 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole."[7]

Legislative framework

[11] Section 4(1) of the *DV Act* sets out the principles for administering the Act. One of the guiding principles is the safety, protection and wellbeing of people who feel or experience domestic violence, including children, are paramount. There are a number of subsidiary principles in subsection 2.

[12] Further, s 8 defines domestic violence for the purposes of the Act. It includes behaviour by a person towards another person which is emotionally or psychologically abusive.

[13] Section 37 of the Act provides relevantly as follows:

> "37. **When court may make protection order**
> (1) A court may make a protection order against a person (the respondent) for the benefit of another person (the aggrieved) if the court is satisfied that –
> (a) a relevant relationship exists between the aggrieved and the respondent; and
> (b) the respondent has committed domestic violence against the aggrieved; and
> *Note* - see the examples of the type of behaviour that constitutes domestic violence in ss 8, 11 and 12, which define the terms *domestic violence, emotional or psychological abuse* and *economic abuse*.
> (c) the protection order is necessary or desirable to protect the aggrieved from domestic violence.
> (2) In deciding whether a protection order is necessary or desirable to protect the aggrieved from domestic violence –
> (a) the court must consider –
> (i) the principles mentioned in s 4; and …"

[14] Clearly enough, s 37, in using the word "may" confers a discretion on the court as to whether or not to make a protection order. In this case the grounds of appeal relate to the findings of a trial magistrate that the two incidents found to have occurred were incidents of domestic violence pursuant to s 8 of the *DV Act*, as well as the exercise of the discretion pursuant to s 37 as to whether it was necessary or desirable to make a protection order.

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7 See also *Commissioner of Police v Toomer* [2011] QCA 233 at [21].

The hearing

[15] On 26 February 2018, the first respondent filed an application for a protection order in the Magistrates Court at Southport. Accordingly a temporary protection order was made on 7 March 2018. The hearing as to a final protection order took place on 5 July 2018. Thereafter the magistrate's judgment was reserved until being delivered on 26 July 2018.

[16] The aggrieved had sworn an affidavit in support of her application which was filed on 11 May 2018. I shall refer to her as Ms P. The affidavit set out the background that she and the appellant were never in a relationship, just friends, but they had a daughter together. Her affidavit then sets out a number of matters in relation to her contact with the appellant including insults by him and various unpleasant interactions particularly in relation to arrangements for the appellant to have contact with the daughter, who is now five years of age. There is a narrative of various alleged misbehaviour in support of the contention that an order should be made.

[17] At the end of the hearing, the magistrate was satisfied on the balance of probabilities that the following acts of domestic violence occurred:

(a) on 29 October 2017, the appellant sent a message to Ms P which was derogatory and abusive in nature;[8]

(b) between October and December 2017, Mr B emotionally abused Ms P over multiple Facebook messages that contained derogatory name calling.[9]

[18] As set out below, the appellant is very critical of the quality of the first respondent's evidence, as was the magistrate. Indeed, in relation to the respondent's evidence concerning an interaction between the parties on 10 December 2017, she was found to have been lying, in that, without her knowledge, the appellant was recording the interaction and the recording simply did not support the use of insults which she had attributed to him.

The decision

[19] As set out above, it was non-contentious that there was the requisite relationship between the parties which is the first element of a procedure in s 37. Secondly, her Honour found that there was an act of domestic violence which occurred on 29 October 2017 in the form of a text message by the appellant to Ms P, the terms of the message being derogatory and offensive in their nature (Annexure 7 to her affidavit); thirdly, the tone and content of the messages comprised in Annexure 2 to Ms P's affidavit, having occurred across October to December 2017. Her Honour found that these incidents were acts of domestic violence being emotionally abusive in nature.

[20] The details of the first message are set out in Annexure 7, which is a printout of a text message sent at 14.28 on 29 October 2017 in the following terms: (bearing in mind that, at this stage, the child was approaching four years of age):

> "And stop putting nappies on her, I creates an issue when you don't clean her after. And not like she hasn't been able to for a couple of years. It's you … you have even told her to just let it go when she

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8 Decision 26 July 2018, p 4, l 35.

9 Decision 26 July 2018, p 4, l 40.

> needs to .. don't get how you as a woman don't know how to clean private parts. But then again it might explain something."

[21] So far as Annexure 2 is concerned, it includes a number of printouts of text messages between October and December 2017. It includes a number of insults including "you're fucking retarded"; "you are probably the most fucked up bitch I've ever met"; "fucking dumbass". The magistrate described these terms as derogatory and offensive in their nature.

[22] As to whether or not it was necessary or desirable that a protection order be made, the magistrate found that an order was necessary or desirable to protect Ms P from domestic violence. She said that she had regard to the principles mentioned in s 4 of the Act and had considered the paramount need for the protection of Ms P from domestic violence, and it is necessary or desirable to impose the protection order to meet that need. She considered that the evidence indicated there is a prospect of domestic violence in the future, which she described as a significant risk, considering the evidence as to the acts which had taken place.

Appellant's submissions

[23] The appellant submits that the respondents' evidence did not support a finding of domestic violence. It is submitted that the evidence earlier demonstrated that the respondent was lying. In relation to the interaction on 10 December 2017, it was alleged by the aggrieved that the appellant attended her house and used words such as "dumbass" and "you are a cunt" towards the aggrieved. However the entire events, including all conversations, were recorded by the appellant, and the recording was played at the hearing. It demonstrates no evidence of the appellant using any such words or indeed any indecent or abusive language or any other evidence of any domestic violence. It was conceded during cross-examination of the aggrieved that the appellant did not use the words as per her allegation.

[24] Thus it is submitted that the magistrate erred in relying in any way on the evidence of the respondent.

[25] The magistrate did acknowledge these difficulties. At page 4 of the judgment her Honour said:

> "There were some aspects of Ms P's evidence which were shown to be not credible, and I am referring to the recording of the conversation on 10 December 2017, which did not reveal Mr B in that recording stating the derogatory names cited by Ms P. This disparity in the evidence made it difficult to accept Ms P's evidence in its entirety."[10]

[26] The appellant further submits that there was not a proper basis for the finding of the magistrate that a protection order was necessary or desirable in order to protect the respondent from domestic violence.

[27] In essence, it was submitted that a number of factors ran counter to such a finding:

(a) The finding with respect to 29 October 2017 was a one-off incident;

(b) The respondent is not fearful of the appellant as evidenced by:

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[10] Lines 30-35.

(i) Her failure to apply for a domestic violence order prior to being served with Federal Circuit Court proceedings in relation to the child;
(ii) Her authoritative and derogatory manner of speaking to the appellant as evidenced by the recording on 10 December 2017;

(c) The dispute is ultimately in relation to ongoing parenting matters, for which the appropriate jurisdiction is the Federal Circuit Court.

[28] In essence, it is submitted that when these factors are correctly analysed, the finding that an order was necessary or desirable cannot be sustained.

[29] In relation to whether or not domestic violence is likely in the future, the appellant submits that:

(a) The allegations do not constitute domestic violence; and
(b) In the alternative, the messages were a one off incident in a confined period in close proximity to the breakdown of the relationship, during which tensions were high between the parties.

[30] Thus there was no real risk of future domestic violence and no proper basis for a finding that a protection order was necessary or desirable.

[31] In this context there was some reference to decided authorities. It was held by McGill SC DCJ in *GKE v EUT*[11] at [33]:

> "…there must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future."

[32] In *MDE v MLG & Queensland Police Service*[12] Judge Morzone QC set out the following test for the element of where the "the protection order is necessary or desirable to protect the aggrieved from domestic violence":

> "In my view, the third element of whether '*the protection order is necessary or desirable to protect the aggrieved from domestic violence'* requires a three stage process supported by a proper evidentiary basis (adduced pursuant to s 145 of the Act):
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> 1. Firstly, the court must assess the risk of future domestic violence between the parties in the absence of any order.
>
> There must evidence to make factual findings or draw inferences of the nature of, and prospect that domestic violence may occur in the future. This will depend upon the particular circumstances of the case. Relevant considerations may include evidence of past domestic violence and conduct, genuine remorse, rehabilitation, medical treatment, physiological counselling, compliance with any voluntary temporary orders (s 37(2)(b)), and changes of circumstances.

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11 [2014] QDC 248.
12 [2015] QDC 151.

Unlike, its predecessor provision under the now superseded legislation, the court does not need to be satisfied that future domestic violence is 'likely'. However, there must be more than a mere possibility or speculation of the prospect of domestic violence.

2. Secondly, the court must assess the need to protect the aggrieved from that domestic violence in the absence of any order.

   Relevant considerations may include evidence of the parties' future personal and familial relationships, their places or residence and work, the size of the community in which they reside and the opportunities for direct and indirect contact and future communication, for example, in relation to children.

3. Thirdly, the court must then consider whether imposing a protection order is '*necessary or desirable'* to protect the aggrieved from the domestic violence.

   In this regard, pursuant to s 37(2)(a), the court must consider the principles in s 4(1) that:
   (a) the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount;
   (b) people who fear or experience domestic violence, including children, should be treated with respect, and disruption to their lives minimised;
   (c) perpetrators of domestic violence should be held accountable for their use of violence and its impact on other people and, if possible, provided with an opportunity to change;
   (d) if people have characteristics that may make them particularly vulnerable to domestic violence, any response to the domestic violence should take account of those characteristics;
   (e) in circumstances in which there are conflicting allegations of domestic violence or indications that both persons in a relationship are committing acts of violence, including for their self-protection, the person who is most in need of protection should be identified;
   (f) a civil response under this Act should operate in conjunction with, not instead of, the criminal law.

4. Finally, if the court is satisfied of the other pre-conditions of a relevant relationship and domestic violence are established, the court may exercise its discretion to make a protection order imposing appropriate prohibitions or restrictions on the behaviour of a respondent necessary or desirable to protect the aggrieved from the domestic violence."[13]

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13 At [55].

Respondents' submissions

[33] The unrepresented first respondent resists the appeal, submitting that there was no error by the magistrate. The second respondent, who was legally represented on the appeal (but was not part of the original hearing), made similar submissions perhaps in a more cogent way. The second respondent submits that the conclusions of the magistrate were reasonably open on the evidence and ought not to be disturbed. Her Honour was entitled to find that the conduct of the appellant constituted domestic violence. Further, her Honour was entitled to make the finding, informed by the principles in s 4 of the *DV Act* and in the context of the evidence, that the making of an order was necessary or desirable to protect the first respondent. They were within the range of reasonable findings and ought to not likely be disturbed.

Discussion

[34] Although the magistrate did not descend into detail in relation to her reasoning process of assessing the risk of future domestic violence between the parties in the absence of an order, nor whether the protection order was "necessary or desirable" nevertheless it is demonstrated that the magistrate did turn her mind to those issues.

[35] As to the finding of domestic violence, the magistrate's finding is criticised on the basis that the credit of the aggrieved was fatally damaged and thus the magistrate should not have accepted her version of events. However, in my view, the magistrate's analysis relied on uncontentious matters. The appellant did not deny sending the various text messages referred to. They clearly show the insulting language to which the magistrate referred. In this way, the credit of the first respondent was not central to the analysis and result.

[36] The more troubling aspect, in my view, is whether those events did constitute domestic violence in the form of emotional abuse. One aspect which highlights the difficulty of such an assessment is that this relationship – sadly, like many in such cases seen in the courts – did seem to involve to some extent mutual exchange of insults. The appellant's affidavit exhibited the transcript of recording from 14 December. It is clear enough, on the third page of the transcript, that the aggrieved spoke to the appellant in somewhat abusive terms, describing him as a "creep". Moreover, it is clear enough that on that occasion the then husband of the aggrieved was very aggressive towards the appellant.

[37] Where the dialogue between the parties involved the trading of insults, it is obviously more difficult to reach a conclusion that mere insults (which is all that is suggested here – there is no finding of any physical contact) do amount to "emotional abuse". In my view, such insults, like many other aspects of human interaction, fall on a continuum of seriousness, from completely trivial to very serious; and at a certain point on the continuum it becomes clear that emotional abuse is involved. Drawing the line at the point where this is reached may not be a precise science, and in part depends on the impact on the individual recipient, depending on their particular robustness or otherwise.

[38] What is said by the respondents in this case is that the insult on 29 October was particularly concerning to a mother, criticising as it did her ability to properly care for her daughter; and the other continued insults in text messages likewise fulfil the category of emotional abuse. The first respondent made such submissions from the bar table.

[39] As set out in the authorities mentioned earlier, the appellate jurisdiction is to the exercise for the correction of error and appellate courts need to respect the advantages enjoyed by the trial court which heard and saw the witnesses. The question is not, in my view, whether I would have made the same finding as the magistrate on the material before the court. Rather, the question is whether the decision-making process by the magistrate demonstrates appealable error. Another way of saying this is whether it was outside the range of findings reasonably available to the magistrate on the evidence.

[40] I also take into account that the matter was an exercise of a discretion and interference with such a decision is confined by the principles from *House v R*.[14]

[41] On all of the material, I cannot conclude that an appealable error by the magistrate is identified, nor has there been failure to appreciate any salient feature of the case, nor is there otherwise a miscarriage of justice.[15] There is no error demonstrated in any of the steps set out in *MBE v MLG* above, in that

- There is a risk of future domestic violence, where the parties are necessarily in ongoing contact about the child; this is more than a mere possibility or speculation;
- There is a need to protect the aggrieved from that risk;
- An order is necessary or desirable, particularly considering the factors in s 4(1).

[42] It follows that none of the grounds of appeal are made out and the appeal must be dismissed.

Orders

[43] I therefore make the following order:

1. Appeal dismissed.

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14 (*supra* n 5).

15 See *MDE v MLG (supra* n 12*)* at [80].