DISTRICT COURT OF QUEENSLAND

CITATION:	*RC v MM* [2018] QDC 276
PARTIES:	**RC** (Appellant) v **MM** (Respondent)
FILE NO/S:	D286/17
DIVISION:	Appellate
PROCEEDING:	Appeal pursuant to Section 164 of the *Domestic and Family Violence Protection Act* 2012
ORIGINATING COURT:	Magistrates Court at Southport
DELIVERED ON:	12 December 2018
DELIVERED AT:	Southport
HEARING DATE:	26 November 2018
JUDGE:	Kent QC DCJ
ORDER:	**1. Appeal allowed;** **2. The orders made in the Magistrates Court at Southport on 3 October 2017 are set aside;** **3. The application for a domestic violence order is dismissed.**
CATCHWORDS:	MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – WHEN APPEAL LIES – where the appellant challenges the granting of a two year Protection Order – where it is uncontentious that an intimate relationship existed between the parties – where there was an act of domestic violence – where there was no ongoing relationship between the parties – where neither party sought to continue the relationship – whether the imposition of a Protection Order was necessary or desirable. MAGISTRATES – APPEAL AND REVIEW – QUEENSLAND – APPEAL – GROUNDS – where the appellant challenges the granting of a two year Protection Order on the grounds that the Magistrate erred in finding that the making of the order was necessary or desirable – where there was no ongoing relationship between the parties – where the aggrieved conceded that significant aspects of her evidence were inconsistent and untruthful – whether the Magistrate made an error of law in imposing a Protection Order.

COUNSEL:	M McMillan (Solicitor) for the appellant
	Mr M C O'Brien (Senior Legal Officer) for the respondent
SOLICITORS:	McMillan Criminal Law for the appellant
	Queensland Police Service Legal Division for the respondent

Introduction

[2] The appellant challenges a decision on 3 October 2017 pursuant to s 37 of the *Domestic and Family Violence Protection Act* 2012 (the "DV Act"), granting the aggrieved a Protection Order for two years. The orders were made after a contested hearing where evidence had been given by the aggrieved, the appellant and two other witnesses. Prerequisites for making such an 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.

[3] In the evidence there was no contest that a relevant relationship had existed between the parties. They had an intimate relationship, for a disputed duration.

[4] Central to this appeal, however, is the contention by the appellant both that there was an error in concluding that an act of domestic violence had occurred and, in particular, that there was a further error in the conclusion, required by the legislation, that it was necessary or desirable to make a protection order.

[5] The grounds of appeal are as follows:

(i) the Magistrate erred in finding the making of the order was necessary or desirable;
(ii) the Magistrate was predisposed to making the order even before any evidence had been adduced and so was neither impartial or to be seen to be impartial;
(iii) the Magistrate erred in finding the applicant had discharged the onus of proof when the respondent's evidence was not challenged by the applicant; and
(iv) the Magistrate decision was unsafe or unsatisfactory.

Nature of the appeal

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

> "**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 the person sought a temporary protection order in a proceeding under this Act—a decision to refuse to make the order."

[7] 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.[1]

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

[9] In such a case the appellate powers of the court as provided by s 169 are to be exercised for the correction of error. In *Coal and Allied Operations Pty Ltd v AIRC*[2] Gleeson CJ, Gaudron and Hayne JJ said:

> "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 re-hearing 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 way of re-hearing, are construed on the basis that, unless there is something to indicate otherwise, the powers are to be exercised for the correction of error."[3]

[10] Further, as submitted by the respondent, where the decision under appeal involves the exercise of a discretion, error of the kind explained in *House v R*[4] will need to be shown.

[11] The respondent also refers to the requirements and limitations of such an appeal as referred to by the High Court in *Fox v Percy*[5] 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 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 and 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."[6]

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1 Section 168.
2 [2000] 203 CLR 194 at 203-204, [14].
3 See generally *ACP v McAulliffe* [2017] QDC 294, Horneman-Wren SC DCJ at [9]-[11].
4 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ; see *Cole and Allied Operations Pty Ltd v AIRC*, supra at [21].
5 [2003] 214 CLR 118 at 125-126.
6 *Commissioner of Police v Toomer* [2011] QCA 233 at [21].

Legislative framework

[12] Section 4(1) of the DV Act sets out the principles for administering the Act. One of the guiding principles is that 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 ss (2).

[13] 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.

[14] 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
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> (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 sections 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 section 4; and …"

The hearing

[15] On 22 April 2017, the respondent filed an application for a protection order in the Magistrates Court at Gladstone. On 28 April 2017, the appellant was served with the Temporary Protection Order made on 24 April. The hearing was subsequently held on 3 October 2017 at Southport. The appellant was legally represented at the hearing of the application.

[16] The aggrieved had sworn an affidavit in relation to the matter. I shall refer to her as Ms R. The affidavit set out the background that she was married with two children but in June 2014, separated from her husband for two and a half months and met the appellant, who was an old friend. They had an intimate relationship for a period of time and she also worked in his business for a period of time. The relationship, according to her, terminated after two and a half months as she was reconciling with her husband. Thereafter the affidavit includes a narrative where the appellant was continually attempting to remain in contact with the aggrieved and generally pursuing and annoying her. This conduct was distressing, if not rising to the level of an offence of stalking. As will become evident, an important feature of his behaviour during this period was the sending of an email from the appellant to the aggrieved on 21 April 2017.

[17] However, a feature emphasised by the appellant's solicitor is the poor quality of the aggrieved's evidence at the hearing, as exemplified by the following concession:

> "Q: … Surely you must concede that your conduct throughout this whole proceeding so far has been to give us information that (a) is either inconsistent with what you've put into sworn documents, or (b) doesn't appear in any of the material we have, again, have before the court today, and again, (c) is something which appears to be inconsistent with what you've told us earlier. Very confusing evidence at times. Would you agree with that?
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> A: I do agree, because you have a very very smart, obviously, client that likes to manipulate things."[7]

As set out below, her evidence did not impress the Magistrate.

[18] The appellant also submits that the email sent by the appellant to Ms R on 21 April 2017 (some time after the relationship had ceased), which formed a central part of the Magistrate's conclusions, dealt with mostly unexceptional topics such as an offer to meet and discuss outstanding matters including financial issues. Ms R agreed that the email was really just the appellant seeking answers from her.[8]

The Decision

[19] In the Magistrate's decision, she made a finding that there was an intimate relationship between the parties, which was non-contentious. This was the first element of the procedure in s 37. Secondly, Her Honour found that there was an act of domestic abuse. Her Honour found that it was in the email of 21 April which was sent to the aggrieved and her husband. It attached, among other things, a photograph of the aggrieved and the appellant having sexual intercourse, with some body parts blurred. Her Honour found it was meant to cause offence and emotional and psychological upset between the parties. This seems to have been intended as a finding of the occurrence of domestic violence, although this was not expressly stated. Her Honour used the word "abuse" instead of "violence", no doubt referring to s 8(1)(c) of the Act. Although ultimately not much may turn on this, it does not enhance the clarity of the reasoning.

[20] Her Honour also found that in the email the appellant was making it clear that he wanted there to be "ongoing conversation" about the matter. Further, Her Honour referred to the nude photographs which were attached to the email and, as Her Honour put it, a veiled threat with respect to the potential of a video being in existence.

[21] Her Honour did not explicitly address all of the elements of s 37, in particular, whether the protection order was necessary or desirable to protect the aggrieved from domestic violence in the future. It may be that the reasons could be read as suggesting that it is implicit, particularly in the email and Her Honour's discussion of it, that the protection order was necessary and desirable; however there is no explicit analysis along those lines, making it harder to discern that the jurisdictional prerequisites were found to exist.

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7 T1-49, ll 15-20.

8 T1-49, ll 33-36.

[22] Moreover, the order was made naming as aggrieved parties not only Ms R but also her husband, children and, indeed, her unborn child. No violence had been offered to any of these people.

[23] In the above context it is impossible to see how any act of domestic violence was committed against certainly the children and unborn child, and it is also difficult to see how it occurred in relation to Ms R's husband. Indeed the respondent helpfully concedes that there is no identifiable evidence that the children were subject to associated domestic violence or exposed to domestic violence and, as I understand it, does not resist the appeal being allowed, at least on that basis, i.e. the removal of the children from the order.

[24] In relation to the husband, as submitted by the appellant, he apparently considered the email contents of little concern because he described the pictures as "innocent" and the messages as "fake". This is set out in his communication, exhibit G to Ms R's affidavit.

Appellant's submissions

[25] In my view the heart of the appellant's submissions is the contention that the Magistrate erred in finding that an order was necessary and desirable. What is submitted is that, in the context of the concessions outlined above, there was no evidential basis for concluding that there was any risk of the appellant committing domestic violence against Ms R in the future. It is pointed out that they have no children together, no shared bank accounts, both parties gave evidence that they had no desire to have any contact with each other in the future and there was no basis to doubt such evidence on either side.

Necessary or desirable?

[26] It was held by McGill SC DCJ in *GKE v EUT*[9] 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."

[27] In *MDE v MLG & Queensland Police Service*[10] His Honour Judge Morzone QC set out the following test for the element of whether "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):
>
> 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

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9 [2014] QDC 248.
10 [2015] QDC 151.

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.

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."[11]

Discussion

[28] In the Magistrate's reasons there is no explicit process of assessing the risk of future domestic violence between the parties in the absence of an order, nor the need to

[11] At [55].

protect the aggrieved form that domestic violence nor whether the protection order is explicitly "necessary or desirable".

[29] The Magistrate's reasons do not analyse the question of whether the protection order was necessary or desirable at all. Thus the matters which were required to be considered in the exercise of the jurisdiction, as set out in *GKE v EUT* and *MDE v MLG & Queensland Police Service* were not addressed. Had they been, it is difficult to see how the Magistrate could avoid the conclusion, on the sworn evidence, that there was no ongoing relationship between the parties and the impact this should have had on the assessment referred to above. It is very hard to see how there was any future risk of violence giving rise to a need for protection in the future. Thus, in my respectful view the Magistrate erred in exercising the discretion by acting upon a wrong principle in determining whether the order was "necessary or desirable" and allowed erroneous or irrelevant matters to be taken into account, as occurred in *MDE v MLG & Queensland Police Service.*

[30] The respondent concedes that the Magistrate did not expressly refer to the analysis outlined above or the relevant tests set out in *MDE v MLG & Qld Police Service.* The respondent argues, however, that such a consideration was implicit in the decision. Reference is made to the terms of the email. However, in my view, it must be kept in mind that the sending of the email occurred some six months prior to the hearing, and it seems to be common ground between the parties that there had been no further misconduct during that time and, as I have said, the sworn evidence from both parties was that there was no ongoing relationship.

[31] As the respondent further conceded the Magistrate's findings were also made in the context of criticism of the evidence of the aggrieved. She said:

> *"this is a difficult matter from the point of view that I have – is very confronting in a matter where an aggrieved gives evidence in which the aggrieved confirms time and time again during the evidence that her affidavits have been untruthful with respect to certain points, particularly of a length of time of the relationship. All manner of points seem to have been confirmed by the aggrieved as being untruthful.*
>
> *As a witness with respect to this matter, the aggrieved has been confused, hard to understand, hard to follow logic – the logic of some of the statements that have been made. I have come away with an impression that I do not know. I really do not know whether the aggrieved's husband did not know about the relationship with the respondent, about who knew. I do not think the aggrieved really knew herself what her relationship was with the respondent from some of the statements that were made. And the aggrieved was incredibly relaxed in making these statements. Can I warn the aggrieved: if you were to make statements of a similar nature in the future, you could find yourself in a situation where you are penalised for making statements of that nature."*

There was reference to making statements which needed to be true when made for court proceedings.

[32] In this context, I note that some of the attachments to exhibit F include what appeared to be a text message exchange, or possibly exchanges sent by Facebook messenger, which indicate consistently that Ms R was very much involved in a relationship with

the appellant; doubtful about her relationship with the husband; and indicating to the appellant, falsely it seems, that a pregnancy she had terminated was a child of the appellant's, not her husband's. That no doubt is part of the context for those observations by the Magistrate critical of Ms R's evidence.

Conclusion

[33] I approach this matter on the basis that the court ought not interfere with the decision to make the protection order unless it is effected by an error of principle, there has been failure to appreciate a salient feature, or there is otherwise a miscarriage of justice.[12]

[34] I 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 The King*[13].

[35] As to the prerequisites for exercise of the power contained in s 37, it was open for the Magistrate to conclude that (a) a relevant relationship existed and (b) there had been domestic violence within the meaning of the legislation in the sense that emotional or psychological abuse took place (namely the sharing of an email showing the aggrieved and the appellant having sex, with the appellant's husband and mother)[14]. However, as outlined above, in my view the Magistrate erred in exercising her discretion under s37 (1)(c):

> - By acting upon a wrong principle (i.e. not turning her mind to the "necessary and desirable" element);
>
> - Allowing extraneous or irrelevant matters to guide or affect her decision (including an unjustified conclusion that, *as at the date of hearing* the appellant "wants there to be an ongoing conversation about this matter"[15]);
>
> - Not taking into account material considerations relevant to s 37(1)(c) and (2) (in particular the uncontested evidence that there was no ongoing relationship).

[36] There is no exposure of how the trial Magistrate reached her conclusion, if she did reach one, as to "necessary and desirable" but in any case such a conclusion, if it was reached, was not justified on the evidence, in my view. The evidence before the Magistrate was that neither party had any interest in any future relationship. The police prosecutor at the hearing was reduced to submitting, on the topic of whether an order was necessary and desirable, that the respondent had behaved for the last six months while a temporary protection order was in place (i.e. she implied – without explicitly saying so - that the good behaviour was only because of the order), whilst acknowledging the appellant's sworn evidence that the relationship was over. This proposition - that the only thing restraining the respondent's behaviour for six months was the protection order rather than his sworn lack of interest in the relationship - was never put to the appellant in cross-examination. Thus it is a difficult proposition to give weight to in the Magistrate's reasoning process. Again, because the reasoning was not really exposed, it is hard to know whether weight was given to that consideration or not. If so, it would have been a further error.

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12 *MDE v MLG* at [80].
13 [1936] 55 CLR 499 at 504-505.
14 Compare *CPS v CNJ* [2014] QDC 47 at [19].
15 Decision p3 l8-9.

[37] Thus the errors in the Magistrate's decision were as follows:

(a) Failing to explicitly consider whether an order was necessary or desirable as required by the legislation, whether as analysed in *MDE v MLG* as outlined above or otherwise;

(b) If her Honour did consider this question implicitly, reaching a wrong conclusion on that issue;

(c) Erring in the exercise of her discretion both in the errors outlined above and as set out in paragraph [35] above.

[38] On the material before me, I am unable to find that there was, or is now, any risk of future domestic violence between the parties in the absence of an order. I am not satisfied that there was, or is now, demonstrable need to protect the first respondent, the aggrieved from any domestic violence in the absence of an order. It follows that the imposition of a protection order is neither necessary nor desirable to protect Ms R from domestic violence (or indeed, anyone else).

[39] Another ground of appeal accuses the Magistrate of demonstrated partiality. In view of the conclusion above, it is not necessary for me to resolve that issue.

Order

[40] I therefore make the following orders:

1. Appeal allowed;
2. The orders made in the Magistrates Court at Southport on 3 October 2017 are set aside;
3. The application for a domestic violence order is dismissed.