

DISTRICT COURT OF QUEENSLAND

CITATION: *TG v CK & Anor* [2021] QDC 258

PARTIES: **TG**
(appellant)
v
CK
(first respondent)
and
THE COMMISSIONER OF POLICE
(second respondent)

FILE NO/S: 2 of 2021

DIVISION: Appellate

PROCEEDING: Appeal pursuant to section 164 of the *Domestic and Family Violence Protection Act 2012*

ORIGINATING COURT: Magistrates Court of Queensland

DELIVERED ON: 20 October 2021

DELIVERED AT: Gympie

HEARING DATE: 18 October 2021

JUDGE: Judge Loury QC

ORDER: **1. Set aside the decision of the learned Magistrate**
2. Remit the matter to the Magistrates Court to be heard by a different Magistrate

COUNSEL: The appellant was unrepresented
The first respondent was unrepresented
J Paratz for the second respondent

SOLICITORS: The appellant was unrepresented
The first respondent was unrepresented
Queensland Police Service Legal Unit for the second respondent

[1] On 15 January 2021 a domestic violence order was made against the appellant by a learned Magistrate. The matter had been listed for hearing in the Magistrates Court on the date the order was made. The application was brought by the Queensland Police Service on behalf of the aggrieved.

[2] The appellant appeals against the making of the order. He seeks an order that the matter be remitted for a rehearing before another Magistrate.

[3] The order made contained the following conditions:

1. The respondent be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved;
2. The respondent be of good behaviour towards the named persons [the husband and two children of the aggrieved] and must not commit associated domestic violence against the named persons and not expose the children to domestic violence;
3. The respondent is prohibited from
 - (i) entering or attempting to enter
 - (ii) approaching to within 100 metres of
 - (iii) the premises where the aggrieved and named associate live or work
4. The respondent is prohibited from locating, attempting to locate or asking someone else to locate the aggrieved and named associate.
5. The respondent is prohibited from contacting or attempting to contact or asking someone else other than a lawyer to contact the aggrieved and named associate and children.

Except when attending an agreed conference, counselling or mediation.

Except when having contact with a child or children as set out in writing between the parties or in compliance with an order of a court.

Except when using an approved Family Law messaging application.

6. The respondent is prohibited from following or approaching to within 10 metres of the aggrieved and named associate when at any place.

Except when appearing personally before a Court or Tribunal.

Except when attending an agreed conference, counselling or mediation.

Except when having contact with a child or children as set out in writing between the parties or in compliance with an order of a court.

[4] The order made was for two years.

[5] The learned Magistrate also amended an order of the Federal Circuit Court dated 21 November 2018. The amendments made (which appear in bold below) were to paragraph [24] and paragraph [22] (which followed on from paragraph [24]) to read:

That both parents undertake to attend individual **or joint** counselling or courses.

Both parties will provide each other with evidence that they have attended and completed such counselling or course within six (6) months of **today**.

[6] It is difficult to know what material was before the learned Magistrate as there is little reference to the material in the transcript of the proceedings. Contained on the file are the following documents which I have had regard to:

1. An application for a protection order signed by the aggrieved.

Importantly, in the section headed “grounds for a protection order” it states that police contacted the appellant by phone. He denied the allegations contained in the affidavit of the aggrieved and made allegations in relation to the aggrieved and her husband toward himself and the children. It further states that police have not been able to confirm the validity of the stated allegations other than some text messages provided by the aggrieved.

Annexed to the application is a copy of a protection order made in favour of the aggrieved against the appellant dated 17 May 2016. That order expired on 16 May 2018.

2. An affidavit affirmed by the aggrieved on 8 June 2020.
3. An affidavit affirmed by the appellant on 21 August 2020.
4. A series of messages and emails which appear to be between the appellant and aggrieved. These messages and emails are not exhibited to any affidavit.

- [7] The aggrieved, in her affidavit, makes a number of allegations against the appellant which he refutes in his affidavit.

The appeal

- [8] Section 164 of the *Domestic and Family Violence Protection Act 2012* (DFVPA) provides for an appeal against a decision to make a domestic violence order. The appeal must be decided on the evidence in the proceedings before the court that made the order.¹ There is provision for the appeal to be heard afresh in whole or part. As the appeal is by way of rehearing pursuant to section 168(1) the powers of the appellate court may be exercised only where the appellant can demonstrate that, having regard to all the evidence before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.²

Consideration

- [9] The application for the domestic violence order was opposed by the appellant who was the respondent to the application in the Magistrates Court. The learned Magistrate indicated that material had been filed and said “it’s hard for me to make a determination of the proceedings. To make that determination, I need to be satisfied that you’re both in a relevant relationship, which you are, and I next then have to decide whether or not domestic violence is being committed by the respondent towards the aggrieved and then decide whether or not an order is necessary or desirable”.
- [10] The learned Magistrate informed the appellant that the police prosecutor had provided a summary to him and told him that neither the appellant nor aggrieved wanted to give evidence. From the transcript of the proceeding the Magistrate appears to have acted on the basis that was the case despite not making an inquiry of the appellant and not informing him of the consequences. Rather he moved to inform the appellant that by not cross-examining the aggrieved and not giving

¹ Section 168(1)

² *HBV v WBI & Anor* [2020] QDC 81 per Moynihan QC DCJ at [18].

evidence that reflected well on both of them. No account of what the police prosecutor informed the Magistrate was indicated.

- [11] The learned Magistrate then informed the appellant about himself including his background as a practitioner in family law, his marital status, some information about the recreational pursuits of his children and his impressions of matters that proceeded through the Family Court (as it previously was) and of persons for whom he had acted.
- [12] Relying upon that background he said that having read the material “it’s not the worst case that I’ve seen”. The Magistrate then turned to the Federal Circuit Court order in place and a questioning of each party as to their compliance with that order.
- [13] The learned Magistrate indicated that he was contemplating making an order for 12 months. He queried the police prosecutor as to whether the appellant had breached the [temporary protection] order and considered that demonstrated, to some extent, that the order had worked. He referred to a statement in the aggrieved’s affidavit that “last time things were better when the order was in place” which was a reference to the earlier domestic violence order imposed on 17 May 2016.
- [14] The learned Magistrate then moved to consider amending the Federal Circuit Court order with a view it seems, to getting the appellant to undertake some counselling.
- [15] When the appellant asked if he could say something, the learned Magistrate responded “yes” however continued, nonetheless, to tell the appellant that he was contemplating amending the Federal Circuit Court order in order to reduce the stresses the appellant was experiencing. The proceeding continued with the learned Magistrate making references to the Department of Child Safety doing welfare checks on children and the role of police.
- [16] Eventually when the appellant was given an opportunity to speak he referred to the difficulties he had communicating with the aggrieved about their children. He said that there were no threats of violence in the text messages but that he revealed his frustration at not being able to communicate with the aggrieved. The learned Magistrate accepted that the text messages did not contain any threats. He went on to say that he was hoping to get both the aggrieved and the appellant to consent to an intervention order on a domestic violence order in order to get the appellant to use some sort of messaging application which filters out upsetting parts of the messages. For an intervention order to be made there had to be a domestic violence order made.³
- [17] The learned Magistrate then referred to the “convoluted legal test” that he had to consider. It appears that was a reference to the decision of *MDE v MLG and Commissioner of the Queensland Police Service*⁴. In that decision in considering section 37 of the DFVPA, Judge Morzone QC wrote in relation to section 37(1)(c):

“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):

³ Section 69 DFVPA.

⁴ [2015] QDC 151

1. Firstly, the court must assess the risk of future domestic violence between the parties in the absence of any order.

There must be 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.

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 of 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.”

[18] Far being from convoluted, in my view, this properly identifies the matters that must be considered pursuant to the legislation and provides helpful examples of matters that are relevant to those considerations.

[19] The learned Magistrate, in determining whether a domestic violence order ought to be imposed commenced by considering what would be the situation if an order was not made. He referred to and acted on the subjective opinion of the aggrieved that “the presence of the earlier order made her feel more comfortable in her dealings with the appellant”. His finding in this regard did not address what was actually required which was the risk of future domestic violence.

[20] Section 37 required the learned Magistrate to consider three things. The first was whether “a relevant relationship” existed between the appellant and aggrieved. From the affidavit material filed there was no dispute as between the parties that a relevant relationship existed.

[21] The second matter the learned Magistrate needed to consider was whether the appellant had committed domestic violence against the aggrieved. Domestic violence is defined in section 8 of the DFVPA. It provides:

“8 Meaning of *domestic violence*

- (1) ***Domestic violence*** means behaviour by a person (the ***first person***) towards another person (the ***second person***) with whom the first person is in a relevant relationship that—
 - (a) is physically or sexually abusive; or
 - (b) is emotionally or psychologically abusive; or
 - (c) is economically abusive; or
 - (d) is threatening; or
 - (e) is coercive; or
 - (f) in any other way controls or dominates the second person and causes the second person to fear for the second person’s safety or wellbeing or that of someone else.
- (2) Without limiting subsection (1), domestic violence includes the following behaviour—

- (a) causing personal injury to a person or threatening to do so;
- (b) coercing a person to engage in sexual activity or attempting to do so;
- (c) damaging a person's property or threatening to do so;
- (d) depriving a person of the person's liberty or threatening to do so;
- (e) threatening a person with the death or injury of the person, a child of the person, or someone else;
- (f) threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;
- (g) causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;
- (h) unauthorised surveillance of a person;
- (i) unlawfully stalking a person."

[22] The learned Magistrate said that he felt that he had to make the order because of the number of text messages that the appellant admitted he sent to the aggrieved. In his affidavit the appellant admitting sending 33 text messages between 28 April and 7 June 2020. He said that the aggrieved responded on four occasions. The appellant said that some of the messages were follow up messages when the aggrieved had not responded. The learned Magistrate indicated that the definition of domestic violence included harassment. That is a reference, it seems, to the definition of "emotional or psychological abuse" set out in section 11 of the DFVPA which states:

"Emotional or psychological abuse means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person."

Examples set out in the section include "repeatedly contacting a person by telephone, SMS message, email or social networking site without the person's consent".

[23] The learned Magistrate said that the reason why he thought the order should be made was because of the nature and way in which the messages were sent. He said that he accepted that there were no threats of any physical violence or harm but he considered that the messages might be considered threatening. He then moved to consider the length of the order.

[24] I do not understand what of the messages that the learned Magistrate determined might be considered threatening. The messages do at times reveal the appellant's frustrations at the difficulties he has communicating with the aggrieved. Based solely upon the text messages and the account of them given by the appellant in his affidavit, it is difficult to understand why the learned Magistrate found that the text messages amounted to "emotional or psychological abuse".

[25] The learned Magistrate then made the domestic violence order. The respondent then asked why the order was being made when there was no domestic violence so

which the learned Magistrate said “that’s why I’ve carefully gone through it, I hope, carefully – to make a decision without hearing evidence”. He went on to say that he reached a conclusion that the messages were harassing and that they constituted domestic violence.

- [26] The respondent became upset which led the respondent and the aggrieved to have an argument about the end of their marriage which the learned Magistrate allowed to continue in his presence. During that argument the aggrieved accused the respondent of strangling her. The learned Magistrate after telling the respondent that he had explained his reasoning to him told him that as a result of what the aggrieved had said during the argument with him, that he could understand why she was feeling scared of the appellant and why the order was necessary.
- [27] The transcript of the proceedings gives the impression that what the learned Magistrate attempted to do was to mediate the proceedings as between the parties. He seems to have acted upon the contents of the affidavit filed by the aggrieved without giving the respondent a chance to be heard in circumstances where he was disputing much of what she alleged against him.
- [28] Section 38 of the DFVPA required the learned Magistrate to “hear and decide the application” or adjourn the application or dismiss the application. In *DMO v RPD*⁵ McGill DCJ said, in the context of the predecessor legislation, the *Domestic and Family Violence Protection Act 1989*, that the obligations of procedural fairness applied in the determination of an application for a protection order. So to do the obligations of procedural fairness apply to proceedings under the DFVPA. Similar statements emphasising the requirement for procedural fairness to be afforded in hearings under the DFVPA were made by Dick SC DCJ in *LKL v BSL*⁶ and by Dearden DCJ in *RIS v DOL & Anor*⁷.
- [29] The statutory power to make a protection order must be exercised fairly. The making of a protection order is a serious step because it can impinge upon a person’s freedoms, for example the imposition of an ouster condition⁸ can impact upon a person’s ability to approach or enter a premises in which they have a legal or equitable interest; or in which they live. It can prohibit a person from attending a public place if the aggrieved is known to frequent that place. Such orders have serious consequences to those who are licensed under the *Weapons Act 1990*. A contravention of a domestic violence order amounts to a criminal offence and is potentially punishable by imprisonment. These examples demonstrate that the exercise of a power to make a domestic violence order directly affects the rights and interests of a person subject to it.
- [30] What then did the duty to act fairly require in the way of procedural fairness in this particular case? The DFVPA section 143 states that for a proceeding under the Act before a Magistrate the provisions of the *Justices Act 1886* apply. Section 145 states that a court is not bound by the rules of evidence or any practices of procedures applying to courts of record and may inform itself in any way it considers appropriate.

⁵ [2009] QDC 92

⁶ [2015] QDC 337

⁷ [2021] QDC 154

⁸ Section 64

[31] As McGill DCJ said in *DMO v RPD*⁹

“Provisions of this nature are familiar, and they do not exclude an obligation to accord procedural fairness. Nor do they have the effect that an order can be made without any proper basis; the position is simply that the formal rules of evidence do not apply, so that it would be open, for example, in an appropriate case to receive material which would ordinarily be excluded as hearsay or to receive evidence in written form. But there must still be evidence, in the sense of there being some material put before the court which provides a rational basis for arriving at the state of satisfaction contemplated by [s20] and it must be put before a court in a way which gives the opposite party the opportunity to challenge that evidence and to put the opposite’s party’s case in relation to the matter.” (citations removed)

[32] Section 145(4) of the DFVPA provides that the court need not have the personal evidence of the aggrieved before making a domestic violence order.¹⁰ However, the learned Magistrate was required to conduct a fair hearing which required him to listen fairly to both sides. The learned Magistrate acted on what the police prosecutor told him which was that neither party wanted to give evidence. He also acted upon whatever it was that the police prosecutor told him of the matter in the absence of the appellant. The appellant wasn’t asked if he wanted to give evidence. Rather he was told that by not giving evidence that reflected well on him as well as on the aggrieved. No adverse inference could properly be made against a person who decided to give evidence in the proceedings particularly in circumstances where he was challenging much of what the aggrieved had alleged against him.

[33] The appellant was not invited to make submissions about any of the findings that the learned Magistrate was required to make or to address the evidence contained in the affidavit filed by the aggrieved. He was not, in my opinion given a fair opportunity to advance his case. Indeed he was deterred from advancing his case by being told that by not giving evidence that would be looked upon favourably.

[34] I consider that the appellant was denied procedural fairness.

[35] That amounts to an error which warrants the order being set aside and the matter remitted to the Magistrates Court. As in the case of *RIS v DOL & Anor*, as the learned Magistrate failed to afford the appellant procedural fairness, it is appropriate that the matter be heard by a different Magistrate particularly when the learned Magistrate was told of things by the police prosecutor which are not recorded in the transcript and for which the appellant was not present.

⁹ At [9]

¹⁰ Section 145(4)