

Leigh v Kaur [2005] NTSC 17

PARTIES: ALLAN LEIGH
v
JASWANT KAUR

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY exercising Territory jurisdiction

FILE NO: JA 80/04 (20408567)

DELIVERED: 31 March 2005

HEARING DATES: 22 March 2005

JUDGMENT OF: THOMAS J

CATCHWORDS:

REPRESENTATION:

Counsel:

Appellant: A Leigh (self represented)
Respondent: M Johnson

Solicitors:

Appellant: Allan Leigh (self represented)
Respondent: NT Police Domestic Violence Unit

Judgment category classification: C
Judgment ID Number: tho200502
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Leigh v Kaur [2005] NTSC 17
No. JA 80/04 (20408567)

BETWEEN:

ALLAN LEIGH
Appellant

AND:

JASWANT KAUR
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 31 March 2005)

- [1] This is an appeal by the appellant, Allan Leigh, from a decision of a magistrate on 15 September 2004 under the Domestic Violence Act in respect of an application by the appellant to revoke a Domestic Violence Order and by the respondent to extend the Domestic Violence Order.
- [2] There is a considerable history between the parties of applications for Domestic Violence Orders and variations of such orders.
- [3] The first application was made ex parte on 25 March 2004 by Mr Leigh.

[4] On 10 April 2004, Constable Christopher Galati, on behalf of Jaswant Kaur, obtained an order under s 6 of the Domestic Violence Act against Mr Leigh.

[5] There were two grounds on which the application under s 6 of the Domestic Violence Act was made:

- 1) Assault (the details of which are set out on the application form).
- 2) Behaving in a provocative or offensive manner (the details of which are set out on the application form (Exhibit 1) on this appeal).

[6] On 14 April 2004, an order was made in the Court of Summary Jurisdiction pursuant to s 4 of the Domestic Violence Act. This order was made by consent and without admissions on the part of the appellant (s 5 Domestic Violence Act) (Exhibit 2) on this appeal. This order, omitting formal parts, reads as follows:

“Date of Application: 13th April 2004
The COURT hereby orders:

By consent and for a period of 12 months, the defendant Allan Leigh:

1. must not enter or remain near the premises situated at 2/5 Airlie Circuit Brinkin unless in the company of police so that he can collect personal property
2. must not assault, cause or threaten to cause personal injury to Jaswant Kaur
3. must not cause or threaten to cause damage to property in the possession of Jaswant Kaur

4. must not act in a provocative or offensive manner towards
Jaswant Kaur

Dated 14th April 2004 at Darwin in the Northern Territory.

(signed)
Clerk of the Court

This order shall, unless it is sooner revoked or varied, continue in
force to and including the 14th April 2005.”

- [7] This order was subsequently varied on 23 April 2004 and 27 August 2004. It was to remain in force until 14 April 2005.
- [8] There were a number of applications between the parties which it is not necessary for me to detail. They are summarised in the written submissions of Mr Johnson dated 18 March 2005.
- [9] On 15 September 2004, there was a hearing in the Court of Summary Jurisdiction. The hearing involved an application by the appellant, Mr Leigh, to revoke the order dated 14 April 2004 as subsequently varied and an application by the respondent for a further variation to the Domestic Violence Order.
- [10] I have had an opportunity to read a transcript of the evidence presented at the hearing on 15 September 2004 and to peruse the exhibits which were tendered. Mr Johnson appeared as counsel for the respondent. Mr Leigh was self represented. The respondent gave evidence and also called Constable Galati and tendered a number of documents. The appellant did not give oral evidence. He tendered an affidavit he had prepared sworn 17 August 2004 with supporting annexures (Exhibit 5). He did call a psychiatrist, Dr McLaren, who gave evidence to the Court.

- [11] The onus of proof on the application for revocation of the order lay with the appellant. The onus is on the balance of probabilities. The onus of proof on the balance of probabilities with respect to the application for variation of the order lay with the respondent.
- [12] At the hearing on 15 September 2004, the learned stipendiary magistrate refused Mr Leigh's application to revoke the order dated 14 April 2004 as subsequently varied. He granted the application by Ms Kaur for a further variation of the Domestic Violence Order.
- [13] At the time of refusing the application for revocation, the learned stipendiary magistrate stated in his reasons for decision that he found Mr Leigh had not deliberately assaulted Ms Kaur on 10 April 2004. The reason his Worship refused to revoke the order was on the basis of the behaviour of Mr Leigh at the time and since 10 April 2004. The learned stipendiary magistrate referred to matters set out in an affidavit prepared by Mr Leigh dated 17 August 2004 and supporting documentation (Exhibit 5). The learned stipendiary magistrate made particular reference to the letters and communications made by Mr Leigh to Ms Kaur, which the learned stipendiary magistrate considered to be provocative or offensive toward Ms Kaur.
- [14] I have had an opportunity to read the affidavit of Mr Leigh and his various communications. The assessment made by the learned stipendiary magistrate was open to him on the evidence.

[15] At the conclusion of the hearing the learned stipendiary magistrate made the following orders:

- 1) I vary the order dated 27 August in favour of Kaur and against Leigh to add a fifth paragraph: 5) must not enter or remain near the premises situated at 2/5 Airlie Circuit, Brinkin, or any other place where Jaswant Kaur is living, working and staying. The registry is to serve that on Leigh;
- 2) I dismiss the application of Leigh to entirely revoke the order as it has not been made out;
- 3) I substitute hereafter Chris Galati's name and order only Jaswant Kaur's name to be used where relevant.

[16] Mr Leigh has filed an appeal against this decision. He has filed a very well prepared written summary of his submissions which I have read. In his oral submissions to this Court, Mr Leigh stated his primary concern was the appeal against the order made by the learned stipendiary magistrate refusing to revoke the existing Domestic Violence Order.

[17] Mr Leigh indicated that the gravamen of his concern about the existing order is that it was based on fraud committed by Ms Kaur in stating she was assaulted by Mr Leigh. Mr Leigh stated he was particularly concerned about this because of his own background. He explained that he had earlier in his life spent a considerable amount of time in gaol, before being ultimately acquitted. He stated that the reason he was held in gaol at all was based on a fabrication. He stated he was not prepared to again be the subject of fraudulent allegations.

[18] Whilst Mr Leigh is deserving of sympathy for the earlier incident in his life, I do not consider there is evidence of fraud in this matter.

[19] It was for the magistrate to assess the credibility of Ms Kaur. The magistrate found that she had not lied to him but because of her state of intoxication on 10 April 2004, he could not rely on her account of an alleged assault and could not say that she had been deliberately assaulted.

[20] The reason the learned stipendiary magistrate refused to revoke the restraining order, was on the basis of matters set out in the affidavit of Mr Leigh and letters and communications he had made. His Worship stated (tp 49):

“Since 16 July when she was restrained from contacting him if she has continued to contact him in any way it is illegal and I wish her to know that, but I am not sure that there has been, all I know is I am not impressed and I do find that Leigh by his continued behaviour in these SMS’s and letters that in my view contain some harassment has acted in a way that is provocative or offensive towards Kaur. ...”

This is clearly a reference to s 4(1)(c) of the Domestic Violence Act.

[21] Having read the affidavit of Mr Leigh and annexures (Exhibit 5) together with other exhibits, I am satisfied such a finding was open to the learned stipendiary magistrate.

[22] Essentially, Mr Leigh is concerned about what he states is the learned magistrate’s reliance on evidence given by Ms Kaur and that there was no foundation for the order being made on 14 April 2004.

[23] A reading of the reasons for decision by the learned stipendiary magistrate make it clear that he was very well aware that Ms Kaur was not without fault in terms of the relationship between the parties. He did not make any finding to the effect that Ms Kaur had fabricated evidence. He did find that the fact she had been drinking on 10 April 2004, affected her reliability as a witness to what occurred on that date. His Worship found Mr Leigh did not deliberately assault Ms Kaur on that date. There was no evidence before the learned stipendiary magistrate sufficient to base a finding that Ms Kaur acted from motives of revenge as asserted by Mr Leigh.

[24] Mr Leigh complains that the magistrate did not make findings relating to psychiatric evidence concerning Ms Kaur. In the circumstances of this application such a finding was not necessary. The magistrate essentially refused the application to revoke the order on Mr Leigh's own evidence on affidavit with supporting annexures and other documents tendered in the proceedings, as to Mr Leigh's own conduct and continued communications with the respondent and members of her family. His Worship's finding that this amounted to behaviour that was provocative or offensive has not been shown to be in error.

[25] Accordingly, I dismiss the appeal.