

*McDonagh v Roots* [2007] NTSC 17

PARTIES: McDONAGH, Matthew

v

ROOTS, Gary

TITLE OF COURT: SUPREME COURT OF THE  
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE  
NORTHERN TERRITORY  
EXERCISING APPELLATE  
JURISDICTION

FILE NO: JA 39 of 2005 (20511056)

DELIVERED: 26 February 2007

HEARING DATE: 1 August 2006

JUDGMENT OF: SOUTHWOOD J

**CATCHWORDS:**

DOMESTIC VIOLENCE ACT – Justices Appeal – appeal against restraining order – appeal on grounds of existence of reasonable apprehension of bias – existence of domestic relationship – finding of threats of assault – appeal dismissed

Domestic Violence Act

*Campbell v Australian Mutual Provident Society* (1906) 7 SR (NSW) 99; *Grassby v R* (1989) 168 CLR 1; *Humphrey v Wills* [1989] VR 439; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Rendulic v Bevan* [1971] SASR 340; *Ruffles v Chilman* (1997) 17 WAR 1; *Vakauta v Kelly* (1989) 167 CLR 568; *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248, cited

**REPRESENTATION:**

*Counsel:*

Appellant: Self represented  
Respondent: P Maley

*Solicitors:*

Appellant: Self represented  
Respondent: P Maley

Judgment category classification: B  
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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA  
AT DARWIN

*McDonagh v Roots* [2007] NTSC 17  
No JA 39 of 2005 (20511056)

IN THE MATTER OF the *Domestic  
Violence Act*

AND IN THE MATTER OF an appeal  
under the *Justices Act*

BETWEEN:

**MATTHEW McDONAGH**  
Appellant:

AND:

**GARY ROOTS**  
Respondent:

CORAM: SOUTHWOOD J

REASONS FOR JUDGMENT

(Delivered 26 February 2007)

**Introduction**

- [1] This is an appeal pursuant to s 163 of the Justices Act. The notice of appeal was filed on 12 August 2005. The appellant appeals against a restraining order for domestic violence that was made by the Court of Summary Jurisdiction under the Domestic Violence Act on 3 August 2005.
- [2] The appeal was first mentioned in this court on 14 September 2005. There were then a number of adjournments. The appeal first came before me on 1 June 2006. On that day the appellant appeared in person. Mr Maley

appeared on behalf of the respondent. The appellant sought an adjournment. He told the court that he had sought assistance from the Northern Territory Legal Aid Commission but he had been told belatedly that legal aid had been withdrawn and he would not be provided with any assistance. He felt unable to conduct his appeal in person. He said that he had consulted a lawyer in private practice who had drafted the notice of appeal for him. The adjournment was opposed by the respondent on the basis that the appellant had been engaging in delaying activities. I allowed an adjournment of 21 days to enable the appellant to appeal against the decision to withdraw legal aid and to make other arrangements if that appeal was unsuccessful. The appellant was advised that if he was unable to obtain representation he should be in a position to argue the appeal himself on 22 June 2006.

[3] On 22 June 2006 the appellant again appeared in person. Mr Maley appeared for the respondent. The appellant told the court that legal aid had been refused and that he would be representing himself. The appellant then started making somewhat incoherent and irrelevant submissions and he refused to accept directions as to how he should conduct himself during the appeal. I adjourned the court for a short period of time to enable the appellant to collect his thoughts. Following the short adjournment the appellant still refused to accept directions as to how to proceed. As a result the appeal was further adjourned to 1 August 2006.

[4] The appeal was finally heard by this court on 1 August 2006. The appellant was self represented. Mr Maley again appeared for the respondent. The

appellant asked for a further adjournment on the basis that he had been attacked by a Federal Police Officer. He said that he had sustained three broken ribs and he was unable to proceed because of the medication he was taking and because the police still retained the transcript of the summary hearing that had been marked up by a solicitor on his behalf. The matter was then adjourned for a short period to enable the appellant's copy of the transcript to be retrieved from the police.

- [5] The transcript was obtained and the hearing resumed. Having perused the medical report and certificate that the appellant handed to the court and observed the appellant's condition and appearance in court I did not accept his submission that he was unable to proceed and the adjournment was refused. The appellant appeared not to be in pain, lucid and quite capable of proceeding with the appeal. He told the court that he relied on the grounds of appeal pleaded in the notice of appeal dated 12 August 2005 and he handed up the transcript of the proceeding in the Court of Summary Jurisdiction with the pages on which he relied in support of his appeal flagged with yellow stickers by his Legal Aid solicitor. The appellant then left the court room. Mr Maley did not make any oral submissions. He simply relied on the respondent's written submissions which were filed on 30 May 2006. Judgment was reserved so that I could consider the pages of transcript that had been marked on behalf of the appellant.

### **The grounds of appeal**

[6] The grounds of appeal pleaded in the notice of appeal dated 12 August 2005 are that the learned magistrate erred: in failing to disqualify himself from the proceeding; in finding that there had been a domestic relationship upon which to ground the order; in failing to properly consider the evidence; and, in finding that the appellant had threatened to assault or cause personal injury to the respondent and that the appellant unless restrained was likely to again make such a threat.

### **The background to the appeal**

[7] The background to the appeal is as follows. On 28 April 2005 Mr Maley, who acted on behalf of the respondent, filed an application for a restraining order in the Court of Summary Jurisdiction. The respondent pleaded the following grounds for seeking the restraining order for domestic violence and claimed the following relief:

1. Details of the [respondent's] relationship to the [appellant]:

Former de facto partner of the [appellant's] current de facto partner.

2. The [appellant] has threatened to assault or cause personal injury to the [respondent] and is unless restrained likely again to make such a threat or carry out such a threat.

3. The [appellant] has damaged property in the possession of the [respondent] and is likely unless restrained to again cause damage to property in the possession of the [respondent].

4. The [appellant] threatened to damage property in the possession of the [respondent] and unless restrained is likely again to make such a threat or carry out that threat.
5. The [appellant] has behaved in a provocative or offensive manner towards the [respondent]; the behaviour is such as is likely to lead to a breach of the peace, including but not limited to, behaviour that may cause the [respondent] to reasonably fear violence or harassment from the [appellant] and the [appellant] is, unless restrained, likely again to behave in the same or similar manner.

#### RESTRAINING ORDERS THAT YOU WANT THE COURT TO MAKE

The [Appellant]:

1. Not approach or remain at any place where the [respondent] is living, staying or working;
2. Not approach the [respondent] directly or indirectly;
3. Not contact the [respondent] directly or indirectly;
4. Not assault or threaten to assault the [respondent] directly or indirectly;
5. Not damage or threaten to damage property in the possession of the [respondent]; and
6. Not act in an offensive or provocative manner towards the [respondent].

[8] The respondent provided details of the appellant's conduct, which was the subject of his complaint, in three statements that were attached to the application for restraining order that Mr Maley filed in the Court of Summary Jurisdiction. The contents of the three statements is summarised

as follows. The respondent used to work for the Salvation Army as a truck driver. Danielle Day used to work at the Berrimah Family Stores. While the respondent and Ms Day worked for the Salvation Army, they separated from their respective life partners and they came to know each other. The respondent separated from Jeanette Roots and Ms Day separated from the appellant. The respondent and Ms Day started seeing each other and Ms Day started to stay at the respondent's home at Woodcote Crescent, Humpty Doo. The appellant became jealous of the relationship that developed between the respondent and Ms Day. As a result the appellant telephoned the respondent numerous times; told the respondent on the telephone, "You can not stop me. I will use a shotty, you fucken dickhead"; said to the respondent on the telephone while the appellant was in the presence of Ms Day, "Go on tell him, tell him that he took my virgin wife and turned her into a slut, no you can not because you are too busy crying"; said to the respondent on the telephone, "I changed my mind fuckwit! I am going to kill you for fucking my wife"; left a message on the respondent's answering service, "Yeah, Jeanette Ryan? Do you want to know about the bast..., the woman your husband has been sleeping with? Give me a call"; slashed the tyres of the respondent's BMW motorcycle; made insulting comments to the respondent at a shopping centre; stole the respondent's walking stick; drove his car towards the respondent in a car park; and made death threats to the respondent on several occasions. Details were provided

of some of the occasions that death threats were said to have been made by the appellant to the respondent.

- [9] On 3 August 2005 there was a summary hearing of the respondent's application for a restraining order for domestic violence in the Court of Summary Jurisdiction. Before the hearing started the presiding magistrate requested his orderly to ask the appellant if he objected to him hearing the case. The appellant told his Honour's orderly that he did not object to the presiding magistrate hearing the case. At the start of the hearing the presiding magistrate again asked the appellant if the appellant objected to him hearing the case. His Honour did not state the reasons why he thought that the appellant may object to him hearing the case. However, it was apparent that the issue was raised because the presiding magistrate had prior dealings with the appellant. The question of whether the appellant objected to the presiding magistrate hearing the case was further raised when the appellant informed the Court of Summary Jurisdiction that he would be calling Ms Day as a witness. The presiding magistrate said, "I have heard you on numerous occasions a few years ago, apropos of Danielle Day, saying to me in court, 'She is mad! Do not believe a word she says about anything.' The difficulty that arises is not only that I might be prejudiced against you, I am grateful that you do not feel that, from our many dealings, but the difficulty is that having heard you say that about Danielle Day more than once, and if you are going to call her as a witness, it might also be thought that I might be prejudiced against Danielle Day and unlikely to

accept what she says.” The appellant responded, “Well, no, see it is nothing like that.”

[10] There was then the following exchange between the appellant and the presiding magistrate:

HIS WORSHIP: Yes. The other thing Mr McDonagh is this. If you think now, and really the decision has been made now so it's pretty conjectural, but if you think now that Danielle Day is going to be an important witness in this case, you might want to think again about having me hear it. Because as I say I've heard you say on numerous occasions, you can't believe a word this woman says. She is crazy.

MR McDONAGH: Yeah, well, that's right. I don't believe there is much – like I said I don't whether she had an affair with this bloke. I don't really give a crap. But I don't know why this guy's harassing me over it. That's the thing I don't get.

HIS WORSHIP: But if you are happy with that we can start. But you realise that - - -

MR McDONAGH: Well, first of all, your Honour, I'll just – first of all I'm just going to pick on his own evidence.

HIS WORSHIP: Can I say this? As far as I know I have never heard Danielle Day say anything. I have seen her in court once or twice but I don't know that she has given evidence before me. If she has I have forgotten it. So I don't have any initial problems with hearing Danielle Day's evidence, but you – if you are going to be relying on her I will have in the back of my mind what you said about her in the past numerous times.

MR McDONAGH: Yeah, no I understand that your Honour. But it is like – but I also - can you go on Garry's statement to police? His very own statement? That's what I was going to go through first. The times that he has threatened me and harassed me.

HIS WORSHIP: So, Mr McDonagh, in that case if you do want the matter to go up before me we will be starting soon - basically

straight away. And if you do need time to locate Ms Day then you will probably have until lunchtime if nothing else.

MR McDONAGH: Okay, that's cool.

[11] At the summary hearing in the Court of Summary Jurisdiction evidence was called from the respondent, the respondent's wife, Mrs Jeanette Diane Roots, Mr Ben James Worthington, the appellant and Ms Danielle Loretta Day.

[12] The presiding magistrate gave the following reasons for decision:

This is an application for a restraining order for domestic violence at court by Garry Neil Roots against Matthew John McDonagh. Both of who have given evidence. In Mr Root's case further evidence was given by his wife, Jeanette and by Ben Worthington, and in Mr McDonagh's case further evidence was given by his ex-partner, Danielle Day.

The case is one in which various assertions were made by Mr Roots, corroborated slightly by Jeanette Roots and one in particular by Ben Worthington, and resolutely denied by Matthew McDonagh and also, from a different perspective, denied by Danielle Day.

As to compiling on the balance of probabilities, a complete history of the relations between the persons concerned, I think that would be a difficult task. The denials have in some respects been credible. The allegations have in other respects been persuasive and there is some, though not much, common ground between the applicant's side and the defendant's side.

For example, and here is a piece of common ground, I can be satisfied that the applicant and Mr McDonagh are in a domestic relationship in accordance with the definition of the Domestic Violence Act, because it is not in dispute that Mr McDonagh is the former de facto partner of Ms Day, and according to the definition in s 3(2) of the Domestic Violence Act, 2(a), that makes him a relative of Danielle Day, it is likewise not in dispute that Danielle Day has resided with Mr Roots, and therefore according to s 4(2)(c) is

included among those persons, and her relatives are included among such persons as being the Domestic Violence Act, and there we are.

So perverse that may seem to most people, the definition of the class of persons, it's a very wide class of people now, and it didn't used to be, in the Domestic Violence Act means that Mr McDonagh and Mr Roots are in a domestic relationship.

By that route alone, whether or not Mr Roots and Ms Day ever shared a bed together, voluntarily or not on Ms Day's part, as long as they lived under the same roof for a while, which they unquestionably did, a couple of weeks by the sound of it. That necessary link is established.

As I cast my mind over all the evidence in the case, I have to say, although, obviously, one is suspicious as to the cause of the slashing of the tyres of Mr Roots' motorcycle, I'm not satisfied on the evidence before me that I could be satisfied beyond reasonable doubt, or even on the grounds of probabilities is what matters here, that it was Mr McDonagh who slashed those tyres, it would seem that he was in the vicinity on the day.

I don't think much of Mr McDonagh's suggestion that Mr Roots may have slashed the tyres himself, but it's difficult to see, even if Mr McDonagh uttered the words attributed to him by Mr Roots, as he may have done, that Mr McDonagh was doing anything other than celebrating the fact that he had seen Roots 'bicycle' damaged. And if he didn't utter those words, which weren't the most persuasive part of Mr Roots' evidence, so much weaker the case.

So I'm not satisfied of any damage to property that Mr McDonagh's done to Mr Roots' goods and possessions, but the question of threats alleged is another matter.

The evidence of Ben Worthington was, in my view, quite convincing in relation to the incident at Casuarina Square and seemed to be pretty solid corroboration for Mr Roots account of that event and in my view solid enough to refute Mr McDonagh's account of that event. Particularly Mr McDonagh's suggestion which seemed laughable when he made it, it seemed even more laughable in light of Mr Worthington's evidence, that it was Danielle Day's voice that Roots and Worthington may have heard on that occasion. Ms Day is

not even sure if she said anything and doesn't know if she did say anything.

MR McDONAGH: Hang on, I didn't say that. I didn't say – I said I put it – I put it to him as a suggestion that it could have been Danielle Day on the grounds that they couldn't see.

HIS WORSHIP: Yes. You said that Mr McDonagh - - -

MR McDONAGH: Not that I said it was her yelling and screaming.

HIS WORSHIP: I know that.

MR McDONAGH: All right.

HIS WORSHIP: And Danielle Day's own evidence is that if she said anything, and she may have done, that she's not sure she said it loud enough for anybody to hear her. The voice of Mr McDonagh is, as he himself said in his evidence, a loud one. It's I would think an unmistakable one to anyone who has been exposed to it from time to time, as I have over the years.

And I am satisfied that the words alleged, pretty much to the word, were spoken by Mr McDonagh on that occasion after he did his U-turn, whether it be legal or illegal, I don't know. So as far as that one goes I am satisfied, comfortably on the balance of probabilities that a threat was uttered to the applicant on that occasion.

I don't regard Ms Roots, Jeannette Roots, as being as independent as Mr Worthington appeared to be. Mr Worthington, I should say, was happy to agree with Mr McDonagh's suggestions about various regrettable bits of conduct by Mr Roots. He seemed to be entirely open in that respect and a non partisan witness. And I am sure if Mr Roots had been up here, charged with say, being armed with an offensive weapon, Mr Worthington would have given exactly the same evidence. This would have tended to incriminate Mr Roots, although Mr Roots may well have had a defence to that charge, based on self defence. He may or may not. I'm just saying that I thought Worthington was an entirely objective witness and not frightened to

put Mr Roots in it any more that he was frightened to put evidence against the interests of Mr McDonagh.

Ms Roots was not that independent; she claimed she had had a bad time as a result of what had been happening. I accept what Mr McDonagh put to her that of the disturbing information that has reached her ears or eyes; virtually all of it has come through her husband.

She herself has only been exposed to a few telephone calls from the man she believes to be McDonagh, and I believe to be McDonagh as well. For the same reason that I don't think – well, I think anyone can be trusted to remember his voice, identify it, but apart from one sighting and the court here last time on 1 July, and a few telephone calls, the rest of the disturbing information which has reached her has come by her husband.

That doesn't make it any less disturbing, but it gives her reason to dislike Mr McDonagh, and because she obviously still seems fine with her husband, and gives her reason to blame Mr McDonagh for the discomfort of fear and the disturbance of her life that has been taking place, about which she was very eloquent.

So, I warned myself about that, and about the opportunities she has had to get together with Mr Roots, if they were so inclined to make things up.

But even in the face of those warnings, I must say, I found her evidence fairly persuasive. I don't think she showed any sign of wishing to exaggerate the number of occasions on which she had seen Mr McDonagh, what the length of the conversations, the tone of the conversations were, or the wording of the conversations. They were short to the point and didn't really sound or seem like embellished accounts, embellished neither by her will nor by disturbances taken place in her life over these matters. In particular, bearing in mind the warning I – caution I gave myself – the warning I gave myself.

I was satisfied about these words that she says were spoken by Mr McDonagh here in court on 1 July, which as it happens, also heard by Mr Roots and that too, in my view, clearly constituted another threat, a disturbing one. I am further satisfied by her evidence and there is no corroboration for this, as to the telephone

call early on in the piece in which Mr McDonagh said something about revenge, which I would regard as a threat.

And I am satisfied further of one more conversation in Mr Roots' account of the matter, that was one which had a particular appeal to me in the way Mr Roots said, it that was the conversation which Mr Roots attributed to happening on 23 November. 'I've changed my mind, fuck wit; I'm going to kill you for fucking my wife'. In any event, whether that last one is right or not, and that's the – what I found as, as it were, least probable than more likely than not.

I haven't gone on to consider the various other allegations in any detail because it seems to me sufficient for my purposes today to be satisfied with those four individual threats, there might have been more if I really put my mind to it, some of the matters Mr Roots put forward could well have happened, but I have come to the conclusion that I am not satisfied on the balance of probabilities that they did. But I am looking here for, as it were, minimal findings for the purpose, findings I can be happy with and those ones I can be happy with.

I'm therefore satisfied the defendant has threatened to cause personal injury to the applicant on those four occasions. I am also, as it happens, satisfied that Mr McDonagh made the gesture to Mr Worthington at lunchtime, or to the world, I don't know what, that is the finger across the throat, and it's that sort of folly which satisfies me, quite apart from the number of threats that had already been made, and I am satisfied about, that unless restrained, Mr McDonagh is likely again to make such a threat to Mr Roots.

I don't know that Mr McDonagh is particularly likely to carry out those threats, as he points out, it's been a long time since he has even been accused of any personal violence towards anybody, but concerned as I am to come to, as it were, minimal findings.

As I say given the impulsiveness with which he speaks and the threatening way in which he speaks at the best of times, the kind of impulse, whatever it was that caused him to make the gesture to Mr Worthington, satisfies me that unless restrained that he is likely again to make such a threat and that is enough for present purposes.

I don't know, and I make no findings, and don't need to make any findings, as to whether Ms Day slept with, had a de facto

relationship, whatever, an affair with Mr Roots, probably they did but I don't know, I don't know and I am not necessarily persuaded that what's got on Mr McDonagh's goat in relation to Mr Roots is just old fashion jealousy, Mr McDonagh insists that's not the case, and perhaps it's not, perhaps he has been moved by some sort of chivalrous idea, perhaps Danielle Day has asked for him for help to rid herself of Mr Roots. It seems entirely possible that Danielle Day has told a lot of lies to Mr Roots and a lot of lies to Mr McDonagh and that the untruths that she has told has led to the two of them taking the view of each other that they have.

So, as I say, to ink the whole story would be difficult but that's not what I am required to do today. What I am required to do is decide the points I have decided and being so satisfied as I am in relation to the domestic relationship, the threats that have been made, the likelihood that they are likely again to be made, I do propose to make the orders in terms of the orders sought numbers 1 to 6. And Mr Maley unless you can persuade me otherwise, I propose to make those orders remain in force for 12 months from today.

### **Ground one of the appeal - bias**

- [13] In my opinion, having perused the whole of the transcript of the summary hearing in the Court of Summary Jurisdiction including those pages marked on behalf of the appellant, the presiding magistrate did not err in failing to disqualify himself from hearing the application for a restraining order. This ground of appeal must fail.
- [14] The ordinary rule is that a magistrate who may reasonably be suspected of bias is disqualified from hearing or determining a case. A reasonable apprehension of bias exists where there is a reasonable apprehension of possible partiality by an independent observer with sufficient knowledge of the subject to make a reasonable judgment: *Humphrey v Wills* [1989] VR 439.

[15] There is no evidence of actual bias on the part of the presiding magistrate. There are four possible grounds of apprehended bias. I have said possible because the presiding magistrate did not precisely identify the issues that were raised by his prior dealings with the appellant. First, that the presiding magistrate had previously dealt with the appellant for similar matters: *Rendulic v Bevan* [1971] SASR 340. Secondly, that the presiding magistrate had formed a pre-conceived view of the appellant or the appellant's credibility: *R v Watson, Ex parte Armstrong* (1976) 136 CLR 248; *Ruffles v Chilman* (1997) 17 WAR 1. Thirdly, the presiding magistrate had previously expressed views about the credibility of the appellant in earlier cases: *Grassby v R* (1989) 168 CLR 1; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288. Fourthly, the presiding magistrate expressed views as to the credibility of Ms Day: *Vakauta v Kelly* (1989) 167 CLR 568.

[16] The presiding magistrate raised his prior dealings and knowledge of the appellant and Ms Day with the appellant and his Honour gave the appellant a fair opportunity to raise any concerns and to object to him hearing the case. The appellant did not object to the presiding magistrate hearing the case.

[17] In the above circumstances the appellant waived any objection to the presiding magistrate hearing the case on the grounds of bias and as a result the appellant can not rely on the ground of bias in this appeal: *Campbell v Australian Mutual Provident Society* (1906) 7 SR (NSW) 99; *Vakauta v Kelly* (supra). Further, the presiding magistrate expressed no final view on

the credibility of Ms Day indeed he went onto state, “Can I say this? As far as I know I have never heard Danielle Day say anything. I have seen her in court once or twice but I don’t know that she has given evidence before me. If she has I have forgotten it. So I don’t have any initial problems with hearing Danielle Day’s evidence, but you – if you are going to be relying on her I will have in the back of my mind what you said about her in the past numerous times.”

**Ground 2 – The presiding magistrate erred in finding that there had been a domestic relationship upon which to ground the domestic violence order.**

[18] Under the Domestic Violence Act an application for a restraining order can only be made by an applicant against a defendant who is in a domestic relationship with the applicant. Section 3(2) of the Domestic Violence Act provides that:

(2) For the purposes of this Act, a person is in a domestic relationship with another person if he or she –

(a) is or has been a relative of the other person, namely –

- (i) a spouse or de facto partner or a former spouse or de facto partner;
- (ii) a father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law;
- (iii) a son, daughter, grandson, granddaughter, stepson, stepdaughter, son-in-law or daughter-in-law;

- (iv) a brother, sister, half-brother, half-sister, brother-in-law or sister-in-law;
- (v) an uncle, aunt, uncle-in-law or aunt-in-law;
- (vi) a nephew or niece;
- (vii) a cousin;
- (viii) a relative according to Aboriginal tradition or contemporary social practice;
- (ix) a great-uncle, great-aunt, great-nephew, great-niece, great-grandfather, great-grandmother, great-grandson or great-granddaughter; or
- (x) a great-great-uncle, great-great-aunt, great-great-nephew, great-great-niece, great-great-grandfather, great-great-grandmother, great-great-granddaughter or great-great-grandson,

of the other person;

- (b) has or had the custody or guardianship of, or right of access to, the other person, or is or has been subject to the custody or guardianship of the other person or that other person has or has had a right of access to the person;
- (c) ordinarily or regularly resides or has resided with the other person, or with a relative, as specified in paragraph (a), of the other person;
- (d) is or has been a relative, as specified in paragraph (a), of a child of the other person; or
- (e) has or has had a personal relationship with the other person.

[19] It follows that a person is in a domestic relationship with another person for the purposes of the Domestic Violence Act if he has resided with the de facto partner or former de facto partner of the other person: s 3 (2)(d) & (2)(a)(i) of the Domestic Violence Act.

[20] The presiding magistrate found that the respondent was in a domestic relationship with the appellant because the respondent had resided with Ms Danielle Day who was a former de facto partner of the appellant. On the evidence he was entitled to do so. It was not in dispute that the appellant was the former de facto partner of Ms Day. Nor was it in dispute that Ms Day resided with the respondent for a short period of time. This ground of appeal must fail.

### **The remaining grounds of appeal**

[21] Having perused the whole of the evidence, including the pages of transcript marked on behalf of the appellant and the presiding magistrate's Reasons for Decision, it is my opinion that the presiding magistrate carefully considered the evidence and he was entitled to find that the appellant had threatened to assault or cause personal injury to the respondent and that the appellant unless restrained was likely to again make such a threat.

[22] The presiding magistrate was satisfied that the respondent had proven on the balance of probabilities that the appellant made four threats to the respondent. The first occasion on which a threat was made was when the respondent was delivering goods for the Salvation Army to the Family

Stores at Casuarina in early 2005. The respondent's evidence was the appellant pulled up in his red Falcon station wagon and threatened to come into the respondent's home and "do" him in front of his wife and children. The evidence of the respondent was corroborated by the evidence of Ben James Worthington who the presiding magistrate found to be an independent and honest witness. Mr Worthington's evidence was that he heard the appellant say to the respondent "that he was going to do him in his own house."

[23] The second occasion on which a threat was found to have been made by the presiding magistrate was at the Court of Summary Jurisdiction on 1 July 2005. Mrs Roots gave evidence that while she and the respondent were seated at the bottom of the stairs in the Court House, the appellant said to the respondent, "Oh its firecracker night tonight. You could burn in your house." Her evidence was corroborated by the evidence of the respondent. The respondent gave evidence that when the appellant was walking up the stairs in the Court House he said, "Don't forget its firecracker night tonight. You could burn in your own house on a night like this." Neither witness was shaken in cross examination about this evidence.

[24] The third occasion on which a threat was found to have been made by the presiding magistrate was when Mrs Roots received a telephone call early in the piece from the respondent. Mrs Root's evidence was that:

Garry and I separated for a little while back in October last year. And during that period he had a relationship with Danielle Day and

was, I understand it, had separated from Mathew McDonagh. Gary and I were always on good terms, we were still good friends all through our separation. He was quite concerned. He became friends with Danielle and he was quite concerned and was – about her safety because apparently Mathew McDonagh had been threatening her and it was quite a violent relationship from my understanding. He started – Gary was telling me that he started following – that he and Danielle were being followed. And Gary was quite concerned for his safety and Danielle's. Danielle ended up going back with Mathew McDonagh and Gary moved back into the house with us because he was quite concerned about our safety as well. I got a few phone calls from Mathew McDonagh wanting to know where Gary was. He told me he wanted to get revenge.

...

He said, "This is Mathew McDonagh." He said that my husband had been fucking his wife and wanted to know why I would put up with it or something along those words. And I said at the time we were separated and it was no concern of mine what Gary did. We were living separate lives and I said that I was of the understanding that Danielle had also separated from him so, what they did, they were both consenting adults, it was no concern of either of ours. He said that he wanted to know where he was because he needed to get his revenge.... He was obviously very upset over what had happened with Gary and Danielle.

[25] The fourth occasion on which a threat was found to have been made by the presiding magistrate was when the respondent received a telephone call from the appellant on 23 November 2004 on his mobile telephone. The respondent gave the following evidence:

Well he has got a very obvious voice and I know his voice. And he tells me, he tells me his name. He didn't at that time. It's just like, I changed my mind, I'm going to kill you for fucking my wife, and then hung up. He never gave me a chance to say anything

.... There's only one that was when he said what I just went through. He used to ring and hang up a lot, which I got all them down.

[26] All of the above evidence was capable of being accepted by the presiding magistrate and no error is demonstrated in his reasoning in this regard. His Honour did not find proven on the balance of probabilities that the appellant had slashed the tyres on the respondent's motor cycle or that he had stolen his walking stick. Nor did his Honour go on to finally consider whether all of the other allegations had been made out by the respondent.

[27] Based on the above findings, which relate to serious threats that were made over an extended period of time, the presiding magistrate was entitled to be satisfied, that unless restrained, the appellant was likely to again make such threats to the respondent.

[28] The appeal is dismissed and I will hear the parties further as to costs.

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