

JCM v LJM [2013] NTSC 50

PARTIES: JCM
v
LJM
AND
Commissioner of Police (NT)

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: APPELLATE JURISDICTION

FILE NO: 21328555

DELIVERED: 13 August 2013

HEARING DATES: 5 July 2013

JUDGMENT OF: BLOKLAND J

APPEAL FROM: Court of Summary Jurisdiction

CATCHWORDS:

APPEAL FROM COURT OF SUMMARY JURISDICTION TO SUPREME COURT – Variation of Domestic Violence Order – summary jurisdiction refusal to relist matter prompted appeal to Supreme Court – application to Supreme Court considered urgently – appeal pursuant to 163(1) of the Justices Act – compliance with conditions precedent for appeals dispensed with – *Justices Act* s 163(1)

APPEAL FROM COURT OF SUMMARY JURISDICTION TO SUPREME COURT – Grounds of appeal – failure to properly consider and give due weight to relevant matters – *Domestic and Family Violence Act* s 19(2)(e)

APPEAL FROM COURT OF SUMMARY JURISDICTION TO SUPREME COURT – Relevant considerations in the variation of a Domestic Violence Order – fresh evidence provided as to appropriateness of non-contact order in the circumstances – safety and protection of protected person/s the paramount consideration – living circumstances of parties considered – original Domestic Violence Order made on incomplete information – both parties in a vulnerable situation – non-violence order more appropriate than non-contact order in the circumstances – variation of Domestic Violence Order permitted – appeal allowed.

Legislation:

Justices Act s 163(1)

Domestic and Family Violence Act s 53, s 48, s 21, s 19(2)(e)

REPRESENTATION:

Counsel:

Appellant:	Mr Goodwin
First Respondent:	Mr Brock
Second Respondent:	Ms McMaster

Solicitors:

Appellant:	Domestic Violence Legal Service (NT)
First Respondent:	North Australian Aboriginal Justice Agency
Second Respondent:	Northern Territory Police Force

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

JCM v LJM [2013] NTSC 50
No. 21328555

BETWEEN:

JCN
Appellant

AND:

LJM
First Respondent

And

Commissioner of Police (NT)
Second Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 13 August 2013)

Introduction

- [1] This Court was convened as a matter of urgency, on Friday 5 July 2013, on the application of the appellant with the support of all parties. Orders were made allowing the appeal on one ground. Brief oral reasons were given at the time. These reasons should be read in association with those given at the conclusion of the hearing.
- [2] The appellant is a protected person named in a domestic violence order (DVO) taken out by police. The first respondent is the defendant subject to

the DVO. The second respondent is the Commissioner of Police. Police had originally brought an application in the Court of Summary Jurisdiction to vary the DVO from a 'non-contact' DVO to a 'non-violence' DVO.

- [3] All parties before the Court of Summary Jurisdiction had indicated their consent to the police application to vary the original Police Domestic Violence Order that had been imposed on 1 July 2013. The Police Domestic Violence Order restrained the first respondent from approaching, contacting or remaining in the company of the protected person, and approaching, entering or remaining at any place where the Protected Person is living, working, staying, visiting or is located; (the non-contact order). The DVO non contact order also included MM, (DOB 20 September 2010) as a protected person. MM is the daughter of the appellant and the first respondent. All parties indicated their consent to vary the non-contact order to an order restraining the first respondent from causing harm or attempting or threatening to cause harm to the protected persons; causing or attempting to cause damage to the property of the protected persons; and intimidating or harassing or verbally abusing the protected person(s); (the non-violence order).
- [4] The Court of Summary Jurisdiction refused to grant the variation sought after a brief, routine hearing. The application to vary was adjourned for one week. I do not use the description 'routine' in any pejorative sense; this application was but one of many heard or mentioned during a busy domestic violence application list. A further confounding factor was that the first

respondent was unrepresented at the hearing of the application before the Court of Summary Jurisdiction. As the application was refused and adjourned for one week, the full non-contact order remained in place.

The Question of Urgency

[5] All parties were legally represented before this Court. This Court was informed of fresh evidence that was unable to be placed before the Court of Summary Jurisdiction, possibly to due to listing issues and the first respondent being unrepresented. The fresh evidence and associated submissions included information about the extreme circumstances that had arisen for all parties the subject of the non-contact order. The appellant and MM had for a short time moved to a shelter after the police DVO was taken out. The appellant's personal possessions were stolen while she was at the shelter. The appellant and MM moved back into their home necessitating the first respondent to move out to comply with the non-contact order. He had no accommodation so he slept in his car. The first respondent financially supports the appellant and their child.¹ The first respondent needed his tools to be able to work, however, his tools were in their home and the non-contact order effectively prevented his access to them. The first respondent suffers from a mental illness. He had attended the Royal Darwin Hospital crisis centre for mental health after the police DVO had been taken out. He had an appointment later on the day of Court, and the following day with mental health services to enable him to commence treatment. The

¹ Affidavit JCN, 5 July 2013

treatment was supported by the protected persons.² The appellant and MM wanted to continue living with the first respondent. Police, (as effectively second respondents to this appeal), were satisfied a non-violence order was the appropriate order in the circumstances.

[6] In those circumstances I agreed to hear the appeal filed by the protected person. Adjournment of the proceedings meant that an arguably inappropriate order would remain for at least another week. In my opinion a protected person is a party to proceedings with standing to bring an appeal pursuant to s 163(1)(b) *Justices Act* (NT). It may be noted that a protected person, police or a defendant are all granted the right to apply to vary or revoke a DVO.³ Pursuant to s 165 of the *Justices Act* (NT), compliance with the usual conditions precedent for appeals was dispensed with, save that three grounds of appeal were formulated and filed in Court. Leave was granted to file fresh evidence.⁴ Counsel for the protected person gave an undertaking to comply with the *Justices Act* (NT) within seven days. The Court file indicates that the undertaking has been complied with.

Grounds of Appeal

[7] The grounds filed were as follows:

- 1) Failing to properly consider and give due weight to the matters under the *Domestic and Family Violence Act*, s 19(2)(e);

² Affidavit, LJN, 5 July 2013.

³ s 48 *Domestic and Family Violence Act* (NT)

⁴ Fresh evidence may be admitted by consent under s 176 *Justice Act* (NT)

- 2) Denying procedural fairness by not allowing the defendant to be properly heard at the first instance; and
- 3) Denying procedural fairness to the defendant and the protected person by refusing to allow the matter to be re-listed.

To consider these grounds, the court relied on the description of proceedings given by the parties in the Court of Summary Jurisdiction without the benefit of transcript, however, given the fresh evidence before this Court, ground one was substantially determined on the basis of the fresh evidence and associated submissions.

[8] Relevant matters to be considered when a Court is asked to vary a DVO are the same as those relevant to the decision to order a DVO.⁵ The safety and protection of the protected person is of paramount importance.⁶ Other matters provided for in the *Domestic and Family Violence Act* (NT) relevant to this appeal are the accommodation needs of the protected persons; the defendant's criminal record and previous conduct and any other matter the Court considers relevant.⁷ To determine the content of the DVO, the Court may impose restraints it considers necessary to prevent the commission of domestic violence against the protected person. The Court may also make an order imposing obligations on the defendant to ensure the defendant

⁵ s 53 *Domestic and Family Violence Act* (NT)

⁶ s 19 *Domestic and Family Violence Act* (NT)

⁷ s 19(2)(e) *Domestic and Family Violence Act* (NT)

accepts responsibility and encourages the defendant to change their behaviour.⁸

[9] The protected person here, (the appellant) wishes to remain in a relationship with the defendant.⁹ That by itself would not necessarily be sufficient to satisfy the Court that the content of the DVO should be changed. Indeed, in many cases the stated desire to stay in the relationship may be an indication of ongoing dependence, violence or intimidation, however, a number of other factors were pointed out to the Court in this case: the police DVO was originally made on incomplete information, (it should be noted there was and is no criticism of police because of this; such a determination on incomplete information is almost inevitable in circumstances when police DVO's are ordered); the first respondent had not had any breaches of domestic violence orders for approximately five years; forcing either the first respondent or the appellant and her child out of the home by operation of the non contact order placed the protected persons in a vulnerable situation¹⁰; the first respondent has a mental illness and was in the process of commencing treatment; the protected person (the appellant) supported the treatment¹¹; living in his car would compromise both the first respondent's ability to work and his mental health; the first respondent has a sound relationship with their daughter supported by the appellant.¹²

⁸ s 21(1)(b) *Domestic and Family Violence Act* (NT)

⁹ Affidavit JCM, 5 July 2013

¹⁰ See para [5] above

¹¹ Affidavit JCM, 5 July 2013, Affidavit LJD, 5 July 2013

¹² Affidavit JCM, 5 July 2013

[10] I accepted, as submitted by all parties that this was a situation where there was a need for a DVO but the DVO would be more effective in terms of protecting the appellant and MM with appropriate conditions. Those conditions required a non-violence order; not a non-contact order. It would also facilitate the first respondent taking responsibility, as well as his rehabilitation and treatment which is referred to in s 21 (1)(b) of the Act. Although no specific orders were sought or made imposing conditions under s 21(1)(b), clearly the Act envisages that treatment and rehabilitation are relevant, secondary of course to protection, when making orders under the Act. In my opinion this is a matter relevant to the making of and variation of an order, capable of consideration within s 19(2)(e) of the Act as “other matters the authority considers relevant”. On the facts here, it is relevant that the first respondent had engaged in treatment for his mental illness and had taken responsibility for his behaviour. Further, although the factual basis for the police DVO is somewhat disputed, accepting all domestic violence is serious and needs to be addressed, this was not an incident of such gravity that nothing short of a non-contact order would provide protection.

[11] The non-contact order may well be counterproductive to the protection of the protected persons in these circumstances particularly when the appellant wanted to stay in the relationship and wanted the first respondent to have a parental relationship with MM. On behalf of the second respondent, it was submitted that a non contact order would set up the first respondent to fail.

I agree with the submission that generally DVOs that are appropriate to the circumstances are more conducive to protection than those that are not.

[12] After receiving the fresh evidence and hearing all parties, I agreed that the appropriate order, most supportive of protection of the protected persons was a non violence order. A non-violence order was also likely to result in treatment of and the Defendant further taking responsibility, therefore supporting protection in the context of an ongoing relationship. I declined to hear and determine grounds two and three without having the benefit of transcript. Further, in respect of ground three, it was unclear as to what the re-listing procedure referred to in that ground was in relation to matters of this kind. The appellant has since advised the Registrar in writing that grounds two and three are to be withdrawn.

Orders

[13] The following orders were made on 5 July 2013:

1. The Applicant, as a Protected Person on a domestic violence order (DVO) made by Court of Summary Jurisdiction, has standing to appeal the order to the Supreme Court under s 163(1)(b) of the *Justices Act*;
2. The Supreme Court dispenses with the requirement to lodge a Notice of Appeal under s 165 of the *Justices Act* as compliance is impracticable due to the urgent nature of the matter;
3. Ground one of the appeal is made out;

4. No decision is made on grounds two and three of the appeal. Decision is withheld until transcripts from the hearing in the Court of Summary Jurisdiction on 5 July 2013 are obtained.

5. The order of the Court of Summary Jurisdiction made on 5 July 2013 is quashed and substitute orders are made under s 177(2)(c) of the *Justices Act*;

The Police DVO varied by removing orders 1 and 2 and making orders in terms 8, 9 and 10. The order now states:

For a period of 12 months, the defendant, by consent and without admissions to liability, is restrained from directly or indirectly:

(8) Causing harm or attempting or threatening to cause harm to the Protected Person/s;

(9) Causing damage to property, or attempting or threatening to cause damage to property of the Protected Person/s;

(10) Intimidating or harassing or verbally abusing the Protected Person/s ;

This order shall, unless it is sooner revoked or varied, continue in force to and including the 4th July 2014;

6. The date of the next mention of the matter in the Court of Summary Jurisdiction listed for 12 July 2013 is vacated; and

7. The Appellant is to file a Notice of appeal within 7 days.

Further Order

[14] Appeal grounds two and three are withdrawn and dismissed.

[15] By arrangement with the representatives of the parties, these reasons will be forwarded to them.