

**IN THE MATTER OF**

The Alcohol Protection Orders Act 2013

No 14 of 2014 (21410332)

BETWEEN:

ISADORE NUMMAR

Plaintiff

AND:

KIRK JOSEPH PENNUTO

First Defendant

NICHOLAS ALEXANDER BENCSEVICH

Second Defendant

ALISTAIR IAIN GALL

Third Defendant

WAYNE TILLEY

Fourth Defendant

ANDREW STUART HEATH

Fifth Defendant

ATTORNEY-GENERAL FOR THE  
NORTHERN TERRITORY

Intervener

**IN THE MATTER OF**

The Alcohol Protection Orders Act 2013  
No 30 of 2014 (21409415)

BETWEEN:

ISADORE NUMMAR  
Plaintiff

AND:

NORTHERN TERRITORY OF  
AUSTRALIA  
  
Defendant

**IN THE MATTER OF**

The Alcohol Protection Orders Act 2013  
No 37 of 2014

BETWEEN:

NORTHERN TERRITORY OF  
AUSTRALIA  
  
Plaintiff

AND:

ISADORE NUMMAR  
Defendant

TITLE OF COURT:

SUPREME COURT OF THE NORTHERN  
TERRITORY

JURISDICTION:

SUPREME COURT OF THE NORTHERN  
TERRITORY EXERCISING TERRITORY  
JURISDICTION

DELIVERED:

8 August 2014

HEARING DATES:

8 August 2014

JUDGMENT OF:

RILEY CJ

## **CATCHWORDS:**

CRIMINAL LAW – Alcohol Protection Orders (APOs) – issuing APOs – requirements for validly issuing APOs – statutory requirement that an officer personally issue an APO or authorise another person to do so – an APO not validly issued is deemed not to exist.

CRIMINAL LAW – Alcohol Protection Orders (APOs)– issuing APOs – requirements for validly issuing APOs – direct notice to the affected person of the fact that an APO has been made and its consequences required – physical delivery of an APO ordinarily sufficient – steps short of physical delivery that are reasonably calculated to bring to the attention of the affected person the fact that an APO has been made and its consequences may be sufficient – what constitutes sufficient steps not defined – held that the steps taken in this particular case not sufficient– APO not validly issued – APO deemed to have never existed.

*Alcohol Protection Orders Act 2013* (NT) ss 3, 5, 6, 7, 9, 23.

*Interpretation Act 1978* (NT) s 25.

*Local Court Act 1989* (NT) s 18.

*Koon Wing Lau v Calwell* (1949) 80 CLR 533, referred to.

## **REPRESENTATION:**

### *Counsel:*

Plaintiff:	A Wyvill SC Counsel for the Plaintiff in Matter 14 of 2014 and Matter 30 of 2014, and for the Defendant in Matter 37 of 2014
Defendant:	R Bruxner Counsel for the Defendants and Attorney-General (intervening) in Matter 14 of 2014, for the Defendant in Matter 30 of 2014 and for the Plaintiff in Matter 37 of 2014

### *Solicitors:*

Plaintiff:	North Australia Aboriginal Justice Agency
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	A
Judgment ID Number:	Ril1411
Number of pages:	12

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

*Nummar v Pennuto & Ors* [2014] NTSC 34

**IN THE MATTER OF**

The Alcohol Protection Orders Act 2013  
No 14 of 2014 (21410332)

BETWEEN:

ISADORE NUMMAR  
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**IN THE MATTER OF**

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No 37 of 2014

BETWEEN:

NORTHERN TERRITORY OF  
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Plaintiff

AND:

ISADORE NUMMAR  
Defendant

CORAM: RILEY CJ

**REASONS FOR JUDGMENT**

(Delivered 8 August 2014)

- [1] On 25 December 2013, Mr Nummar was taken into protective custody following an incident which occurred during midnight mass at St Mary’s Cathedral in Darwin. The events that followed gave rise to a number of issues in relation to the application of the *Alcohol Protection Orders Act 2013* (NT) (“APO Act”). Three sets of proceedings have been commenced and there have been lengthy and detailed discussions between the various parties to those proceedings resulting in

an agreement being reached between the parties as to the proper disposition of the proceedings.

- [2] The parties have placed before the Court evidence and joint submissions which provide the basis upon which the parties submit that the Court should appropriately dispose of each of the sets of proceedings. I have considered the submissions and I agree. What follows repeats and accepts the substance of the material placed before the Court.

### **Alcohol Protection Orders**

- [3] The APO Act provides for the making of alcohol protection orders (APOs). Section 5 of the APO Act provides for the effect of such orders in the following terms:

- (1) An *alcohol protection order* is an order issued in writing to an adult that prohibits the adult, during the period that it is in force, from doing any of the following:
  - (a) possessing alcohol;
  - (b) consuming alcohol;
  - (c) subject to subsection (2), entering or being in licensed premises  
...

- [4] Section 6 of the APO Act provides the grounds for issuing an APO as follows:

An officer may issue, or if it is not practicable for the officer to do so, the officer may authorise a police officer to issue, an alcohol protection order to an adult if:

- (a) the adult has been arrested, summonsed or served with a notice to appear in court in respect of an alleged qualifying offence; and

(b) the officer believes that the adult was affected by alcohol when the adult did the thing that caused the arrest of the adult, or the service of the summons or the giving of the notice to appear to the adult.

- [5] By s 7 of the APO Act, an APO is “in force” for a variety of periods the length of which depends upon whether the APO is the “first” APO issued to a person or a “second” or “later” APO. In each case, the period during which the APO is “in force” commences on and from the date on which it is issued.
- [6] The effect of an APO that is “in force” is significant and, therefore, the question of when it is “issued” is important. A contravention of the prohibitions referred to in s 5 is a criminal offence (s 23), as well as itself being the basis for the imposition of further APOs. Once an APO is in force, there is a short time limit for invoking the right of review provided by the APO Act (s 9).

## **Facts**

- [7] Mr Nummar was taken into protective custody following an incident during the midnight mass at St Mary’s Cathedral.
- [8] Sometime before 3.50am on Christmas Day 2013 Constable Andrew Macleod (one of the officers who had apprehended Mr Nummar) completed a pro forma “Application for an Alcohol Protection Order” in relation to Mr Nummar. The application sought the making of an APO under s 6 of the APO Act. The filled-out application relevantly records that Mr Nummar:

“...has been charged on 25/12/13 by arrest/~~summons/notice to appear~~ with committing a qualifying offence, namely DISTURBING RELIGIOUS WORSHIP DISORDERLY BEHAVIOUR IN PUBLIC PLACE at Darwin on 25/12/13. At the time of committing the offence I believe that the said ISADORE NUMMAR was affected by alcohol.”

- [9] It is common ground that, notwithstanding the reference to “arrest” in the application, Mr Nummar had not been arrested at the time of the application and

nor had he been summonsed or served with a notice to appear in respect of any “qualifying offence” for the purposes of s 6(a) of the APO Act.

[10] At about 3.50am Sergeant Kirk Pennuto completed, signed and dated an “authorisation” appearing at the bottom of the pro forma application as follows:

“I am satisfied on the information before me that this adult was affected by alcohol at the time of the commission of the qualifying offence. I ~~issue~~/authorise the issue of an Alcohol Protection Order”

[11] In the authorisation, Sergeant Pennuto crossed out the word “issue” and circled the words “authorise the issue”. In addition, beneath a heading “Action Taken”, he ticked two boxes beside the words “APO on PROMIS” and “APO ISSUED”. The parties agree that, despite completing the “authorisation” section in the above manner, Sergeant Pennuto did not consider or intend that he was providing authority to anyone else to issue an APO to Mr Nummar. Instead, it was at all material times his intention to, himself, issue an APO.

[12] At the time of completing the authorisation, Sergeant Pennuto signed an APO in which Mr Nummar’s name had been electronically printed. The APO bore the pre-printed number 130051, as well as a pre-printed date of 25 December 2013 and a pre-printed time of 2:46am. The stated time and date, which precede the time at which Sergeant Pennuto completed the “authorisation” section of the pro-forma application, was auto-generated when Constable Macleod prepared the pro-forma application.

[13] Immediately below the space on APO 130051 where Sergeant Pennuto signed and entered his name and rank were the words “Officer serving order”. Below that section was another section (separated by a dividing line) which was to be completed “(i)f serving member is not a Sergeant or above ...”. That section included provision for signature by an “Authorising officer (where serving member is not a Sergeant or above)”. Sergeant Pennuto’s name and rank were pre-printed in this section of the APO, but the space for his signature was left blank.

[14] Located adjacent to the copy of APO 130051 in the police records there is a document headed:

“ALCOHOL PROTECTION ORDER ENDORSEMENT OF SERVICE”

[15] The endorsement contains a declaration, completed by Sergeant Pennuto in handwriting (shown below in italics), in the following terms:

“I, *Kirk PENNUTO*, declare that this Alcohol Protection Order 130051 was served on NUMMAR, Isadore at DARWIN at *6.30am* on *25/12/2013*”

[16] Sergeant Pennuto did not, at 6.30am on 25 December 2013, or at any other time, physically provide Mr Nummar with a copy of APO 130051.

[17] At around 6.30am, Sergeant Pennuto entered the cell in which Mr Nummar was being held in protective custody. He approached Mr Nummar, who was asleep. Sergeant Pennuto woke Mr Nummar, spoke to him for approximately 20 seconds, and then left the cell. Mr Nummar soon went back to sleep.

[18] Sergeant Pennuto does not recall the actual words he used in the course of speaking to Mr Nummar, but recalls that they were to the effect that he was arresting Mr Nummar in respect of the incident at St Mary’s Cathedral and that Mr Nummar would be subject to an APO. He also recalls briefly explaining to Mr Nummar (in words he does not specifically recall) what an APO meant.

[19] Sergeant Pennuto considered that, in the circumstances described, he had served APO 130051 on Mr Nummar.

[20] Having regard to (a) the brevity of the interaction between Sergeant Pennuto and Mr Nummar at 6.30am on 25 December 2013; (b) the fact that Sergeant Pennuto also arrested Mr Nummar in the course of the interaction; and (c) the fact that Mr Nummar had just been woken, it is common ground between the parties that Mr Nummar was not sufficiently apprised at that time either of the fact of the making of APO 130051 against him, or the effect of the APO.

[21] Sergeant Pennuto did not have any other relevant interaction or communication with Mr Nummar.

[22] There is an entry in the Police record for 9.34am on 25 December 2013 in the following terms:

“ROBERTS rpts offender granted BTA 11/2/14 at WADEYE by SGT TILLEY. APO served on offender by SGT TILLEY. All property returned and offender released.”

[23] At about 9.34am Sergeant Wayne Tilley and Police Auxiliary Ruth Roberts had a conversation with Mr Nummar during the course of which Sergeant Tilley handed APO 130051 to Mr Nummar and he and Police Auxiliary Roberts advised Mr Nummar both that an APO had been issued against him and of its relevant effect.

[24] Notwithstanding the reference in the 9.34am record suggesting that Sergeant Tilley had “served” an APO on Mr Nummar, at the time Sergeant Tilley handed the APO to Mr Nummar, and at the time he and Police Auxiliary Roberts explained it to Mr Nummar, he was not purporting to do so by way of service. He was not acting on the basis of any request made or authority purportedly conferred by Sergeant Pennuto. He believed, at the relevant time, that Mr Nummar had already been served with the APO.

[25] In summary, on the basis of the matters above, the parties agreed and submitted:

- (a) Sergeant Pennuto had made the decision to issue an APO to Mr Nummar by no later than 3.50am on 25 December 2013.
- (b) At all relevant times, it was Sergeant Pennuto’s intention that he would personally issue the APO and it was never his intention to authorise anyone else to issue the APO.
- (c) At about 6.30am on 25 December 2013, Sergeant Pennuto visited Mr Nummar in the cells, woke him and spoke to him for no more than 20 seconds.

- (d) In the course of speaking to Mr Nummar, Sergeant Pennuto placed Mr Nummar under arrest and said to him words considered by Sergeant Pennuto sufficient to amount to service upon Mr Nummar of the APO.
- (e) When, at about 6.30am on 25 December 2013, Sergeant Pennuto completed the Endorsement of Service for APO 130051, he had not physically provided a copy of the APO to Mr Nummar.
- (f) Mr Nummar did not receive a copy of APO 130051, and had little or no understanding of its existence or effect, until the exchange with Sergeant Tilley and Police Auxiliary Roberts at about 9.34am on 25 December 2013.
- (g) When Sergeant Tilley handed the APO to Mr Nummar and explained it to him, he was not, in so doing, acting under any authority provided by Sergeant Pennuto either to issue the APO to Mr Nummar, or to serve it on him.

### **The relevant operation of the APO Act**

- [26] Under the terms of the APO Act, the decision to impose an APO is principally vested in an “officer” - that is, someone at or above the rank of sergeant.
- [27] It is common ground between the parties that in cases where an officer makes a decision to issue an APO under s 6 (and does not provide an authorisation to anyone else to issue an APO) *that officer* must issue the APO.

### **Was APO 130051 issued to Mr Nummar?**

- [28] In the present matter, the question arose as to whether APO 130051 was validly issued by Sergeant Pennuto in accordance with the APO Act.
- [29] The APO Act is silent as to the meaning of “issue” and contains no provision dealing with the manner in which notice of particular matters may be given.
- [30] Section 25 of the *Interpretation Act 1978* (NT) prescribes ways in which a “person may serve a document”. Section 25(5) of the *Interpretation Act* provides that the section has effect for the service of a document whether or not the word “served” is used in the law providing for the service of the document.

- [31] None of the methods of service described in s 25 was adopted by Sergeant Pennuto, or by anyone acting at his request or otherwise under his authority. The actions of Sergeant Tilley and Police Auxiliary Roberts at 9.34am are irrelevant in this context.
- [32] In another legislative context, a provision relating to the “issue” or “issuing” of a written instrument has been treated as requiring actual delivery of the instrument to the person to whom the instrument is directed or, at least, the taking of sufficient steps calculated to ensure that the person is reasonably apprised of the existence and effect of the instrument.<sup>1</sup>
- [33] Having regard to the general scheme of the APO Act, and in particular the immediate and significant effects of an APO once issued including the tightly circumscribed opportunities for seeking review, methods of “issuing” the APO that do not involve direct notice to an affected person both of the fact that an APO is in place, and of the consequences for the person of the APO, will not suffice.
- [34] In the usual course, it may be assumed that physical delivery of an APO to the affected person will be enough. There may also be situations where steps short of physical delivery will be sufficient, provided the steps relied upon as constituting service are reasonably calculated to bring to the attention of the affected person the fact an APO has been made and its consequences.
- [35] It is not necessary, in the present context, for a final view to be expressed as to what may, in a particular case, constitute sufficient steps to “issue” an APO. It is enough to note that it is common ground that the particular steps taken by Sergeant Pennuto were insufficient to bring to Mr Nummar’s attention the fact that he was subject to APO 130051, and what that meant.
- [36] The consequence of this was that APO 130051 was not “issued” to Mr Nummar in accordance with the APO Act and for that reason it never came into existence.
- [37] In those circumstances, it is not necessary to consider Mr Nummar’s alternative contention (which is not common ground) that APO 130051 did not comply with s

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<sup>1</sup> *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 568 per Latham CJ, at 574 per Dixon J.

6(a) of the APO Act because it was “issued” by Sergeant Pennuto no later than 3.50am on 25 December 2013 and therefore *before* Mr Nummar was arrested.

### **The subsequent APOs**

[38] Subsequent APOs were purportedly issued to Mr Nummar on dates between 7 January and 5 February 2014.

[39] Under s 6(a) of the APO Act, the power to issue an APO is conditioned upon an adult having been arrested, summonsed or served with a notice to appear in court “in respect of an alleged qualifying offence”.

[40] Although s 6 contemplates action in the absence of proof of actual offending, there is an implied requirement in s 6(a) that the offence said to be a qualifying offence is one that *could*, as a matter of law, have been committed – in other words that it is an offence that *exists*.

[41] Section 23 of the APO Act relevantly provides:

#### **23 Offence by adult subject to alcohol protection order**

(1) An adult who is subject to an alcohol protection order commits an offence if:

(a) the adult intentionally engages in conduct; and

(b) the conduct results in the contravention of the alcohol protection order.

[42] According to s 3(2) of the APO Act a person is “subject to an alcohol protection order” if at the time in question “an alcohol protection order has been issued to the person and it is in force”.

[43] It is common ground that each of the subsequent APOs was issued on the basis of an alleged contravention by Mr Nummar of s 23(1) in relation to an earlier APO. Thus, APO 140078 was issued on the basis of an alleged contravention of APO 130051; APO 140178 was issued on the basis of an alleged contravention of APO 140078; and so on.

[44] The consequence of APO 130051 not having been issued as contemplated by s 6 is that the offence of contravening it could not as a matter of law have been committed. As such, no offence of contravening APO 130051 could form the basis for validly issuing APO 140078. In a similar way, it followed that there could be no offence of contravening APO 140078, or any of the other subsequent APOs.

### **Disposition**

[45] In all the circumstances, the parties agree there should be orders in proceeding SC 14 of 2014 as follows:

1. A declaration that none of the alcohol protection orders bearing the following numbers and dates:

- i. APO 130051 dated 25 December 2013;
- ii. APO 140078 dated 7 January 2014;
- iii. APO 140178 dated 15 January 2014;
- iv. APO 140298 dated 23 January 2014; and
- v. APO 140481 dated 5 February 2014;

was validly issued to Isadore Nummar in accordance with s 6 of the APO Act and each is void and of no effect.

2. Relief in the nature of certiorari be granted quashing APOs 140078, 140178, 140298 and 140481.<sup>2</sup>

3. An order that the defendants pay the plaintiff's costs of the proceedings to be taxed if not agreed.

[46] I make those orders.

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<sup>2</sup> Relief in those terms in respect of APO 130051 is not appropriate because on the agreed facts that APO was never "issued".

- [47] In relation to SC 30 of 2014, as APO 140481 has been disposed of in proceedings 14 of 2014, the subject matter of those review proceedings ceases to exist. The parties are agreed that the plaintiff should have leave to discontinue that proceeding, but disagree as to the appropriate costs order.
- [48] In relation to APO 140481, the plaintiff exercised his rights under s 10 of the APO Act to seek reconsideration by a senior officer. Following that review, he exercised his rights under s 11 of the Act to seek a review of the merits of the senior officer's decision in the Local Court. On 24 March 2014, a magistrate ordered that the proceedings (including any issues of costs before the Local Court) be transferred to the Supreme Court pursuant to s 18(3) of the *Local Court Act 1989* (NT). There was no challenge to that order.
- [49] It was thought necessary for the plaintiff to exercise those statutory rights of review because, had he not done so, he may have risked losing his prerogative relief challenge to APO 140481 on discretionary grounds. I accept the submission of the plaintiff that, in the unusual circumstances that applied, it was not unreasonable to have proceeded in this manner. Although the issue raised in the process was not resolved on its merits it was a necessary step in the proceedings that did resolve all issues between the parties. However, I do not accept the submission that the issues raised by the review were of such complexity as to justify the award of costs at 100% of the Supreme Court scale.
- [50] In all the circumstances, I order that the defendant pay the plaintiff's costs of proceedings SC 30 of 2014 to be taxed if not agreed, such costs to include the costs in Local Court proceedings No 21409415 which are to be taxed at 50% of the Supreme Court scale.
- [51] I order that proceeding SC 37 of 2014 is dismissed with no order as to costs.

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