Montgomery v Montgomery [2004] NTSC 28

PARTIES:	MICHAEL MILES MONTGOMERY
	v
	ELIZABETH MARIA MONTGOMERY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction
FILE NO:	JA 166 of 2003 (20318052)
DELIVERED:	4 June 2004
HEARING DATES:	20 May and 25 May 2004
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	A McLaren
Respondent:	K Hughes

Solicitors:

Appellant:	A McLaren
Respondent:	Northern Territory Legal Aid Commission

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

Montgomery v Montgomery [2004] NTSC 28
No. JA 166 of 2003 (20318052)

BETWEEN:

MICHAEL MILES MONTGOMERY
Appellant

AND:

ELIZABETH MARIA MONTGOMERY
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 June 2004)

[1] This is an appeal from a decision of a stipendiary magistrate who on 10 November 2003 granted a restraining order under the Domestic Violence Act, on the application of Elizabeth Maria Montgomery, against the appellant in the proceedings before this Court, Michael Miles Montgomery.

[2] The order is in the following terms:

> "For a period of 12 months, the defendant Michael Miles Montgomery (Snr)
>
> 1. not approach, remain at or enter any place where Elizabeth Maria Montgomery, Michael Montgomery (jnr) and Maximillian Montgomery are living, staying or working unless otherwise specified through the directions of a Family Court or Custody order;

2. not approach Elizabeth Maria Montgomery, Michael Montgomery (jnr) and Maximillian Montgomery directly or indirectly;
3. not contact Elizabeth Maria Montgomery, Michael Montgomery (jnr) and Maximillian Montgomery either directly or indirectly unless otherwise specified through the directions of a Family Court or Custody order or indirectly only for the limited purpose of Elizabeth Maria Montgomery uplifting personal items of Elizabeth Maria Montgomery and the children from their home;
4. not assault or threaten to assault Elizabeth Maria Montgomery, Michael Montgomery (jnr) and Maximillian Montgomery directly or indirectly;
5. not act in an offensive or provocative manner towards Elizabeth Maria Montgomery, Michael Montgomery (jnr) and Maximillian Montgomery.

[3] The background to the proceedings is as follows:

[4] Elizabeth Montgomery and Michael Montgomery were married on 23 May 1992. The marriage took place in Hungary. Ms Montgomery had two daughters by a previous marriage. The eldest daughter, Chilla Bankuti, wrote a letter in support of her mother's application under the Domestic Violence Act. Both daughters are adults and do not reside with their mother.

[5] In November 1992, Ms Montgomery travelled to Australia to take up residence with Mr Montgomery. They have two sons, Maximillian Miles born 22 December 1992 and Michael (jnr) born 30 June 1994. The two sons are now aged 9 and 11 years.

[6] On 2 September 2003, Ms Montgomery left the family home with their two children and sought shelter at Dawn House.

[7] On 12 September 2003 an interim order was made in the Darwin Magistrates Court pursuant to the Domestic Violence Act. The interim orders effectively restrained Mr Montgomery from approaching or contacting Ms Montgomery and her two sons Maximillian Montgomery and Michael Montgomery (jnr).

[8] The matter was listed for hearing on 7 November 2003. On 7 November 2003 Ms Montgomery was legally represented on the hearing of her application. Mr Montgomery did not have legal representation.

[9] At this hearing, Ms Montgomery gave evidence. An affidavit sworn by her dated 4 November 2003 was tendered in evidence Exhibit 1. Annexed to this affidavit is a copy of the interim restraining order dated 12 September 2003, a letter dated 26 October 2003 signed by Chilla Bankuti daughter of Ms Montgomery and a copy of an article from the NT News dated 4 October 2003 concerning Mr Montgomery who was convicted and fined for possession of illegal weapons.

[10] The affidavit of Ms Montgomery details allegations of abuse and threats toward herself and allegations of inappropriate sexual behaviour toward their two sons. Ms Montgomery gave evidence concerning a previous application for a restraining order that she had obtained and subsequently revoked. Ms Montgomery was cross examined by Mr Montgomery. Essentially she maintained her allegations, made in evidence in chief, that

Mr Montgomery had been abusive and threatening toward her and acted in a sexually inappropriate way toward the two boys.

[11] Mr Montgomery gave evidence denying the allegations of abuse and outlining what he had done for his wife and two sons as a loving, caring and considerate husband.

[12] Mr Montgomery tendered two character references (Exhibit D2) and a statement he had prepared dated 6 November 2003 (Exhibit D3). In this statement Mr Montgomery denies the allegations made against him. He alleges certain inappropriate behaviour on the part of his wife towards their two sons. He also outlined difficulties he alleged were created by his wife's daughters by a previous marriage who were living outside the Northern Territory. He maintained his denials of any abusive or threatening behaviour towards his wife and two sons. Mr Montgomery gave evidence about what he described as a nervous breakdown he had in 1987. He stated he had completely recovered from this by 1992. Mr Montgomery denied he had ever promised his wife that he would seek psychiatric help. He denied he was in need of psychiatric assistance. He denied that he had ever said if his wife took their sons away from him he would kill them and then commit suicide. A transcript of the proceedings before another magistrate on 12 September 2003 at which interim orders were made was tendered (Exhibit D4).

[13] The learned stipendiary magistrate made orders on 10 November 2003 granting a restraining order in favour of the applicant, restraining Mr Montgomery from approaching or contacting their two sons Maximillian Montgomery and Michael (jnr) for a period of 12 months. Details of the order are set out in para [2] of this reasons for judgment.

[14] Mr Montgomery has appealed this decision. The Amended Grounds of Appeal are as follows:

> "1. The appellant was not legally represented before the Lower Court and was seriously disadvantaged as a result.
>
> 2. The Lower Court erred in holding that the wife was the more credible witness.
>
> 3. The cumulative consequence of the appellant not having legal representation was miscarriage of justice.
>
> 4. The Lower Court erred in accepting hearsay evidence in all the circumstances of the case.
>
> 5. The Lower Court erred in accepting that the appellant committed acts of sexual impropriety against his sons.
>
> 6. The Lower Court in all the circumstances erred by granting restraining orders against the appellant with regard to his sons.
>
> 7. The Lower Court failed to appreciate or alternatively was not informed that complaints regarding the improper sexual conduct was reported to Family and Children's Services and under police investigation and ought to have reserved its decision awaiting the outcome of such investigation.
>
> 8. The allegations of improper sexual conduct by the appellant against his sons have since been investigated by Police and FACS and the files have been closed. This evidence was not available during the proceedings before the Lower Court.
>
> 9. The Lower Court erred by not taking into consideration the letter from Dr. Foreman marked as Exhibit D2.
>
> 10. The Lower Court in all the circumstances of the case erred by passing the restraining orders against the appellant.
>
> 11. The decision of the Lower Court that there are grounds for a restraining order is unsafe and unsatisfactory."

[15] I shall deal with the grounds of appeal.

Ground 1: The appellant was not legally represented before the Lower Court and was seriously disadvantaged as a result.

[16] Lack of legal representation is not of itself a ground of appeal.

Mr Montgomery did indicate to the learned stipendiary magistrate he had received legal advice and that he wanted to proceed to defend his own case.

[17] Throughout the hearing the learned stipendiary magistrate explained the essential procedure. His Worship explained the rule in *Browne v Dunn* (1893) 6 R 67. He explained the issues on which the appellant should cross examine and the relevant evidence which should be tested. The appellant was advised of his right not to give evidence. He was allowed to recall the respondent to further cross examine her.

[18] The appellant was given the appropriate assistance to enable him to conduct his own defence. I do not consider this ground of appeal has been established.

Ground 2: The Lower Court erred in holding that the wife was the more credible witness.

[19] The learned stipendiary magistrate had the opportunity to hear the witnesses and made observations of the witnesses as such evidence was presented. He stated in the course of his reasons "This is a case which comes down to one person's word against another. It is what is commonly called as an oath against oath case".

[20] This would appear to be a reference to the High Court authority of *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* 73 ALJR 306 Kirby J paras [91] and [92]:

> "[91] All of the foregoing considerations leave to be weighed, in some cases at least, the impression which the trial judge holds of a particular witness, perhaps influenced by the witness's demeanour and the kinds of considerations commonly referred to such as hesitation or displays of partisanship not readily conveyed, or conveyed at all, by the printed record. One can hold different views about whether such considerations should intrude in the assessment of qualified expert witnesses. One can strive to minimise resort to such considerations in the case of lay witnesses, out of recognition of the fallibility of human assessment of credibility from appearances. But because trials remain public procedures for the resolution of disputes, it is inescapable that, in some cases at least, credibility assessments will be required where there is no documentary, electronic or other incontrovertible evidence to resolve the conflict presented for decision. In such cases it will remain the fact that, try as it might, the appellate court cannot procure from the printed record exactly the same materials on which to base the judicial decision as the trial judge had.
>
> [92] This conclusion may, as I think, be true of a relatively limited class of case: basically those where the decision depends upon resolving a clash of critical oral testimony, oath against oath. But in such cases, because the appellate court cannot, in presently available records, recapture all of the information properly used to assist the trial judge's decision, the old strictures about that judge's advantage remain as relevant today as they were when first written more than a century ago. In such cases, the appellant court's rehearing must be conducted within a constraint which is set by the somewhat more restricted data available to it. This limitation is not confined to Anglo-Australian law. It is recognised in other countries of the common law and doubtless beyond."

[21] The hearing before the learned stipendiary magistrate was a case in which the decision depended upon resolving a clash of "critical oral testimony, oath against oath". Accordingly, I would give the learned stipendiary

magistrate's assessment of the credibility of the witnesses considerable weight.

[22] The learned stipendiary magistrate correctly identified the onus of proof as being on the balance of probabilities and stated correctly "I should say that the burden of proof falls squarely on the shoulders of the applicant". His Worship then gave reasons why he accepted the evidence given by Ms Montgomery and stated as follows (tp 70):

> "One, of course, looks at the presentation of each witness in the witness box, what is known as their demeanour, and that is but one tool in assessing the credibility and reliability of a witness.
>
> Mrs Montgomery clearly was in a very emotional state when she was in the witness box. She was able to give, in my view, a fairly clear coherent account of things that she says have happened between her and her husband, but she presented as a lady who was visibly upset by having to recall a number of things that have happened in the past and things of a more recent origin. She struck me as being genuine in the way that she gave her evidence, and I really cannot see anything in her evidence which would suggest to me that she was being less than truthful.
>
> She was subjected to cross-examination, and I must say that Mr Montgomery conducted himself very well in the way he cross-examined the applicant, and there was no need, of course, for questions to be directed through the court. However, I consider that at the end of that cross-examination, Mrs Montgomery was unshaken in the evidence that she gave."

[23] The learned stipendiary magistrate then compared this with the evidence given by Mr Montgomery when he stated:

> "Mr Montgomery, in giving his evidence, and I think this was something which was apparent in his cross-examination of the applicant, was at pains, in my view, to try and rationalise the situation. He was at pains to say, 'Well, these things could not have happened because I've been a good father, I've been a loving

husband'. There seemed to be a tendency, in my view, to try to over-rationalise the situation and there was, in my view, this conscious attempt to explain these allegations by diverting attention from what I think were the real issues in this case.

I said the other day that Mr Montgomery, during the relationship, may well have been a person of good virtues, a loving father, a loving husband. But it is a fact of life that there is good and bad in every relationship and what I am being asked to do in this case is look to see if there is enough grounds to make the orders which are being sought.

I think it is significant that in relation to the incidents involving the two boys, Mr Montgomery answered those allegations by saying, 'Well, they were different types of incidents and there was nothing really harmful about those particular occurrences.' So again there seemed to be an attempt to divert attention from what I consider to be very serious allegations."

[24] These findings were open to the learned stipendiary magistrate on the evidence.

[25] I would dismiss this ground of appeal.

Ground 3: The cumulative consequence of the appellant not having legal representation was miscarriage of justice.

[26] The appellant has not demonstrated any such miscarriage of justice. The learned stipendiary magistrate correctly applied the principles established under the Domestic Violence Act. Section 4 provides that before granting a restraining order the Court must be satisfied on the balance of probabilities of one or more of the following:

(a) That the defendant has assaulted or caused personal injury or damage to property of a person in a domestic relationship with the defendant;

(b) has threatened to assault or cause personal injury or damage to property of a person in a domestic relationship with the defendant; or

(c) behaved in a provocative or offensive manner towards a person in a domestic relationship with the defendant, and in each case the defendant is, unless restrained, likely again to behave in the same or similar manner.

[27] His Worship gave reasons why he accepted the evidence of Ms Montgomery in preference to that given by the appellant and the relevant passage from his reasons for decision have been quoted under Ground of Appeal 2.

[28] At tp 71.9 the learned stipendiary magistrate stated:

> "The test, of course, is whether it's more likely than not, more probable than not, that the applicant is telling the truth in this matter. At the end of the day the court cannot make orders unless it is reasonably satisfied on the balance of probabilities that the applicant is telling the truth. And applying the Briginshaw test, the court must be actually persuaded in that regard.
>
> Of course there must be sufficient evidence before the court, evidence of a sufficiently cogent nature to support any such finding."

[29] The learned stipendiary magistrate has correctly applied the law and there is no basis in this ground of appeal.

Ground 4: The Lower Court erred in accepting hearsay evidence in all the circumstances of the case.

[30] Section 12 of the Domestic Violence Act provides as follows:

> "12. Evidence
>
> In making, confirming, varying or revoking a restraining order the Court or a magistrate may admit and act on hearsay evidence."

[31] The learned stipendiary magistrate paid regard to the evidence given by Ms Montgomery in her affidavit sworn 4 November 2003 of a conversation with the defendant's sister, Emesa. Paragraph 11 of this affidavit reads as follows:

> "Immediately before I left, on Friday 29 August 2003, I received a telephone call from the Defendant's sister, Emesa, who lives in Sydney and who stayed with us in Darwin for approximately 4 days last year. She told me that she recently spoke with the Defendant and he told her: 'my sons are everything to me. If someone takes them away from me I will kill them". She also told me that the Defendant took her to our shed when she was visiting Darwin and showed her a gun, and said: "I would kill them all if someone takes my sons away". She said that she never told this to me before, but that, after her recent conversation with her brother, she became very concerned for our safety."

[32] In her evidence in chief to the court, Ms Montgomery gave evidence in similar terms to the matter referred to in her affidavit of 4 November 2003 (tp 29).

[33] His Worship also had regard to the letter signed by Ms Montgomery's daughter, Chilla Bankuti dated 26 October 2003, which was annexed to Ms Montgomery's affidavit. In this letter, Ms Bankuti details offensive and abusive behaviour by Mr Montgomery towards herself and her mother Elizabeth Montgomery. Chilla Bankuti is the eldest daughter of Ms Montgomery by a previous marriage. Chilla Bankuti asserted that she had

left her mother's home some years before hand, primarily because of the behaviour of the appellant, Michael Montgomery.

[34] The learned stipendiary magistrate was entitled to have regard to these pieces of evidence. In his reasons for granting the restraining order his Worship had stated (tp 69):

> "This is a case which really boils down to one person's word against another. It is what is commonly called as an oath up oath case. However, having said that, the court does have other material before it, indeed annexure B which is a letter or statement from the eldest daughter, Chilla.
>
> In cases of this type the court is not confined to acting upon direct evidence, the court can admit and act on hearsay evidence and in this case there has been some hearsay evidence, in particular the statement from Chilla amounts to hearsay evidence, and in relation to the incident involving Max, again, that is based on hearsay evidence. And the evidence concerning the telephone call between Mrs Montgomery and the defendant's sister, again falls within the category of hearsay evidence.
>
> There is also further hearsay evidence, that being concerned with the conversation which allegedly took place between the defendant and his sister whilst the sister was in Darwin."

and at tp 71:

> "When one looks at the letter from the eldest daughter, and I accept it is only hearsay evidence, however it does raise some very serious concerns about Mr Montgomery's behaviour in the past, and in my view it is something that I cannot ignore and it is something that I must factor into the decision that I have to make.
>
> I already mentioned the evidence, the hearsay evidence, relating to the conversation between Mrs Montgomery and the defendant's husband. I again accept that is hearsay evidence, but I do not believe that that piece of evidence has been contradicted. I accept that the defendant may not accept that piece of evidence, but there is no evidence that contradicts that piece of evidence and it is a matter that I think the court can attach some weight to.

> Mind you, the content of that evidence is of a very disturbing nature, and again, it is something which I think can form part of the matrix in which the evidence in this case must be considered, evaluated and weighed.
>
> There is also the evidence about the defendant's sister having visited Darwin, and again, the content of that evidence in my view is of a disturbing nature, and again, is something that I feel I cannot ignore in determining where the truth in this matter lies."

[35] The learned stipendiary magistrate noted that this was hearsay evidence and that it was not inconsistent with the evidence given by Ms Montgomery. His Worship was clearly aware of the limitations of hearsay evidence and that it was a question of weight. He noted such hearsay evidence was not contradicted. He also noted his concerns about the evidence given by Mr Montgomery which he described as a "tendency, perhaps to over rationalise the situation and to divert attention from what are the essential issues in this case".

[36] I am not persuaded the learned stipendiary magistrate has been shown to be in error. I would dismiss this ground of appeal.

Ground 5: The Lower Court erred in accepting that the appellant committed acts of sexual impropriety against his sons.

[37] The learned stipendiary magistrate found (tp 72):

> "… there has been behaviour towards the two boys which I consider to be of a provocative or offensive nature, likely to lead to a breach of the peace".
>
> and:

> "I also consider that given all the evidence in this case, the history of the relationship, I consider that unless orders are made, that it is likely that the applicant will again be threatened and that there will be continuing offensive or provocative conduct directed at the two sons."

[38] This finding satisfies the requirement under the provisions of s 4(1) of the Domestic Violence Act.

[39] This finding was open on the evidence given by Ms Montgomery who gave instances of the appellant behaving in a sexually inappropriate way towards their two sons and making threats toward herself which included saying to her that she would "end up in Kerepesi cemetery sooner than later".

[40] In arguing this ground of appeal, Ms McLaren on behalf of the appellant, sought to draw attention to conflicts in the affidavit sworn by Ms Montgomery on 4 November 2003 and a Statutory Declaration of Elizabeth Montgomery dated 4 September 2003.

[41] The Statutory Declaration sworn 4 September 2003 was not before the learned stipendiary magistrate who conducted the hearing of the application. It was tendered by consent on the appeal as it had been before another magistrate who had granted an interim restraining order on 12 September 2003. A transcript of the proceedings relating to the interim restraining order was Exhibit D4 on the hearing of the application which is the subject of this appeal.

[42] I do not accept the submission that there are significant conflicting statements made by Ms Montgomery. A reading of both documents reveals substantially the same picture. There are some differences in detail. For example, in para 9 of her affidavit of 4 November 2003, Elizabeth Montgomery states:

> "In late August 2003 my concerns about the Defendant's inappropriate behaviour towards our sons intensified. On one occasion, our son Michael was trying to protect me when the Defendant was yelling at me. The Defendant went into Michael's room, walked up to Michael who was sitting at his desk and pushed his penis at Michael's thigh. The Defendant was naked at that time. Michael started crying and I told the Defendant that if he didn't stop his behaviour I would call the Police. The Defendant threatened me by saying that I would end up in Kerepesi cemetery 'sooner than later'. Around this time the Defendant used to threaten me with Kerepesi on an almost daily basis. …"

[43] In the Statutory Declaration dated 4 September 2003 at para 17:

> "I can't say the exact date, but a few weeks ago it started when the small boy, Michael (jnr) wanted to protect me. Michael (snr) went into the little boy's room and walked up to him and pushed his penis in little Michael's side. Little Michael started to cry and I went in there and said that I would call the police. Michael then threatened me, saying that I would end up in the 'Kerepesi' sooner than later. This is the large cemetery in Hungary that he used to talk about."

[44] The difference between the two versions on the submission made on behalf of the appellant are the use of the word "thigh" and "side". I do not consider this to be a distinction of any significance. It is explainable by the difficulties Ms Montgomery had with the English language. The important thing is that both versions refer to an incident in substantially similar terms

in which the appellant acted in a provocative and offensive way toward his son Michael (jnr) and threatened his wife.

[45] There were other distinctions between the two documents that were drawn to my attention. I do not propose to detail those, they were, in the context of these allegations against the appellant, of a very minor nature. A reading of the affidavit of 4 November 2003, the Statutory Declaration of 4 September 2003 and the transcript of evidence given by Ms Montgomery in the Court of Summary Jurisdiction on 7 November 2003 reveal a substantially similar account of the behaviour of the appellant which was the basis for the application for a restraining order.

[46] I would dismiss this ground of appeal.

Ground 6: The Lower Court in all the circumstances erred by granting restraining orders against the appellant with regard to his sons.

[47] The matters set out in the affidavit of Elizabeth Montgomery, sworn 4 November 2003 Exhibit 1 paragraphs 4, 5, 6, 8 and 9, relate to provocative and offensive behaviour toward the two sons of the marriage.
Ms Montgomery gave evidence upon which she was cross examined and maintained her statements concerning the appellant's behaviour towards the two boys. This evidence was accepted by the learned stipendiary magistrate. It included allegations of sexual impropriety towards the two boys and generally offensive and provocative behaviour.

[48] There was sufficient evidence for the magistrate to be satisfied that it was appropriate to make a restraining order in respect of the two boys.

Ground 7: The Lower Court failed to appreciate or alternatively was not informed that complaints regarding the improper sexual conduct was reported to Family and Children's Services and under police investigation and ought to have reserved its decision awaiting the outcome of such investigation.

[49] In the context of this case, there was no reason for the magistrate to adjourn the hearing or to reserve his decision and await the outcome of other proceedings. Neither of the parties made an application for an adjournment. The learned stipendiary magistrate could only deal with the case as presented to him. I note that with respect to order number 1, the learned stipendiary magistrate has left the way open for any subsequent Family Court or Custody order. He has not been shown to be in error.

Ground 8: The allegations of improper sexual conduct by the appellant against his sons have since been investigated by Police and FACS and the files have been closed. This evidence was not available during the proceedings before the Lower Court.

[50] Counsel for the appellant, Ms McLaren, did make application for fresh evidence to be adduced on this appeal. This was in the form of an affidavit sworn by the appellant Michael Montgomery on 11 May 2004 with supporting documentation. The application to introduce this fresh evidence on the appeal hearing was opposed by Ms Hughes, counsel for the respondent. The fresh evidence was to the effect that the allegations of improper sexual conduct by the appellant toward his sons had been

investigated by Police and the Department of Family and Children's Services, both of whom took no action and closed their files.

[51] I have already ruled and given reasons for my ruling on 25 May 2004 as to why such application to adduce fresh evidence was refused. This is essentially because having read the affidavit material put forward as fresh evidence, I have found that such evidence was not likely to have produced a different result – see *Greater Wollongong City Council v Cowan* (1955) 93 CLR 435.

[52] The fact that the Police Department and the Department of Family and Children's Services were taking no further action could be for a number of reasons. It had no bearing on whether Ms Montgomery was able to prove on the balance of probabilities that she was entitled to a restraining order under the Domestic Violence Act.

Ground 9: The Lower Court erred by not taking into consideration the letter from Dr. Foreman marked as Exhibit D2.

[53] The learned stipendiary magistrate did not make any specific reference to the character reference provided by Dr Foreman. The transcript of the proceedings (tp 47.4) indicates he did take time to read the references and then allowed them to be formally tendered.

[54] The fact that Dr Foreman has a high opinion of the appellant and is unaware of any violence or mistreatment by the appellant of the appellant's family is not proof this did not occur. It only goes to the state of knowledge of

Dr Foreman at the time and even though accepted does not advance the matter one way or the other.

Ground 10: The Lower Court in all the circumstances of the case erred by passing the restraining orders against the appellant.

[55] This ground has been sufficiently dealt with under the other grounds of appeal and has not been made out.

Ground 11: The decision of the Lower Court that there are grounds for a restraining order is unsafe and unsatisfactory.

[56] A reading of the transcript of proceedings in the Court of Summary Jurisdiction together with the documents tendered in these proceedings and the Statutory Declaration dated 4 September 2003 which has been tendered to this Court, do not lead to a conclusion that the restraining order made by the learned stipendiary magistrate is unsafe and unsatisfactory.

[57] His Worship correctly identified the matters upon which he had to be satisfied before making such a restraining order under the Domestic Violence Act. He analysed the evidence presented to him. He assessed the credibility of both Elizabeth Montgomery and Michael Montgomery. He noted there was hearsay evidence and that it was consistent with the evidence presented by Ms Montgomery. He gave reasons why he did not accept the evidence given by Mr Montgomery. He correctly stated that it was Ms Montgomery who bore the onus of proof.

[58] This ground of appeal has not been substantiated.

[59] For the reasons stated above, the appeal is dismissed. The orders made by the learned stipendiary magistrate on 10 November 2003 are confirmed.

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