

Turnbull v Dinale [2000] NTSC 14

PARTIES: HELEN LOUISE TURNBULL

v

JOHN ATTILIO DINALE

TITLE OF COURT: SUPREME COURT OF THE NORTHERN
TERRITORY

JURISDICTION: SUPREME COURT OF THE NORTHERN
TERRITORY EXERCISING TERRITORY
JURISDICTION

FILE NO: JA7 of 2000 (9925762)

DELIVERED: 24 March 2000

HEARING DATES: 17 March 2000

JUDGMENT OF: ANGEL J

REPRESENTATION:

Counsel:

Appellant: Mr S Southwood

Respondent: Mr R Jobson

Solicitors:

Appellant: Mr T Svikart

Respondent: Mr R Jobson

Judgment category classification: C

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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. JA7/00 (9925762)

Turnbull v Dinale [2000] NTSC 14

BETWEEN:

HELEN LOUISE TURNBULL
Appellant

AND:

JOHN ATTILIO DINALE
Respondent

CORAM: ANGEL J

REASONS FOR JUDGMENT

(Delivered 24 March 2000)

- [1] This is an appeal from a decision of Mr R Wallace SM sitting as the Court of Summary Jurisdiction at Darwin on 7 January 2000.
- [2] In proceedings before the learned Magistrate, the appellant, a police officer, applied under s 4 Domestic Violence Act (NT) for certain restraining orders against the respondent which were calculated to protect the respondent's wife. Section 4(2)(a) enables a member of the Police Force to bring such an application. The learned Magistrate, without deciding the merits of the application, dismissed the application because the respondent's wife did not wish the application to proceed and had refused to offer any evidence against her husband in the proceedings.

- [3] The appeal largely turns on the construction of s 8(4) Domestic Violence Act (NT).

Section 8(1) provides –

“A party to a proceeding in which a restraining order has been made may, at any time, apply to the Court for a variation or revocation of the order.”

Section 8(4) provides –

“The person on whose behalf an application is made under section 4 or 6(1) is, in addition to the member of the Police Force or the person who made the application, a party to a proceeding in respect of the application.”

- [4] The learned Magistrate held that a person on whose behalf an application for a restraining order is brought by a member of the police force pursuant to s 4(2)(a) of the Act, is a party to those proceedings by virtue of s 8(4). His Worship said:

“So, Mrs Dinale is a party to these proceedings. I take that view of subsection 4 notwithstanding that it’s contained within s 8 which largely deals with variations. Subsection (4) doesn’t seem to deal with just with variations, it deals with everything under the sun, or at least applications under 4 and 6(1)”.

[5] His Worship dismissed the application because Mrs Dinale, as a party to the proceeding, did not want the application to proceed. He said:

“In a case where a victim, who is a party to the matter, has plainly indicated to the court as Mrs Dinale has through her letter, that she does not wish the action to proceed, then it seems to me the action ought not to proceed and the court ought to dismiss the application and that’s what I propose to do”.

[6] Mr Southwood for the appellant submitted alternative arguments as to the interpretation of s 8(4). First he argued that s 8(4), if narrowly construed, applied only to applications for the revocation or variation of restraining orders pursuant to s 8(1). The victim, it was said, is only deemed a party to an application to vary or revoke an existing restraining order and not an application for a restraining order under s 4. It was submitted that the learned Magistrate erred in finding that Mrs Dinale was a party to the proceeding.

[7] Mr Southwood, in the alternative, argued that even if the broader interpretation of s 8(4) taken by the learned Magistrate is correct, which deems the victim to be a party to the proceedings of an application by a police officer for a restraining order under s 4(2)(a), it does not follow that the victim’s consent to such an application is a pre-condition to such an application. He contended that the words ‘is a party to the proceeding’ in s 8(4) merely deem a victim to be a party to the application but does not

make the victim's participation a pre-condition to the proceedings.

Mr Southwood contended that if that were the intention of the legislature, then words such as 'shall be a party to the proceedings' would necessarily be required.

- [8] In all the circumstances, Mr Southwood submitted that the learned Magistrate erred by not hearing the merits of the application before deciding whether a restraining order should have been granted. The mere fact that the alleged victim does not consent to the application should have no bearing, it was said, on whether the learned Magistrate hears the merits of the application.
- [9] Mr Jobson on behalf of the respondent did not dispute (as did some grounds in the notice of appeal) that a member of the police force can apply under s 4(2)(a) for a restraining order. However he argued that this legislative power does not enable the police to supersede the rights of a victim and if a victim wished to oppose an application by a member of the police force then the application should ipso facto be dismissed. He argued that it could not possibly be the purpose of the Act to enable the police to pursue relief in the face of active opposition of the victim. He submitted that the words 'on whose behalf an application is made' in s 8(4) meant that a member of the police force acted merely as an agent for and on behalf of the victim when making an application under s 4(2)(a) of the Act.

[10] As a matter of construction, I agree with the learned Magistrate that s 8(4) deems an alleged victim to be a party to the proceeding per se and not just in relation to an application under s 8(1) to vary or revoke an order already made. The terms of s 8(4) are not limited to an application under s 8(1) for variation or revocation of an order; they expressly refer to s4 and s 6. I think the learned Magistrate correctly concluded that Mrs Dinale was a party to the present proceeding. She was not formally joined in the present appeal and I have received no submissions on her behalf. However her interests in the present appeal are the same as the respondent and I am satisfied Mr Jobson has said everything that could be said for that interest.

[11] Despite an alleged victim being a party to an application made by the police under s 4(2), it does not follow that because the alleged victim does not consent to the application proceeding that it should automatically be dismissed. The applicant police officer and the alleged victim are each parties to the proceedings in their own right. The appellant police officer is no mere agent of the respondent's wife. Section 8(4) expressly provides the alleged victim is a party additional to the applicant police officer.

[12] It follows that it was the duty of the learned Magistrate to hear the application on its merits, even given the attitude of the respondent's wife, and if satisfied of proof of relevant matters in s 4(1) to exercise his discretion to grant or not to grant, as the case may be, the application for restraining orders pursuant to s 4(1).

[13] The appellant's application raises very grave allegations of domestic violence. The learned Magistrate can act on hearsay evidence, s 12. Mrs Dinale's attitude and opposition to the matter proceeding and any order being made is clearly a relevant circumstance as to whether, ultimately, any order should be made. The appellant police officer will no doubt inform the Court why an order should be made against the respondent, himself a police officer, notwithstanding Mrs Dinale's opposition. As I have said, that opposition is a relevant circumstance to the exercise of the Court's discretion. However, it is not necessarily a decisive consideration; sometimes the victim of domestic violence is not the best judge of what is, and what is not, in his or her best interests, and sometimes the victim of domestic violence is not a free agent. Another consideration in the present case is that both the appellant and respondent are members of the police force and the motive or motives for bringing the application may be in issue. It is eminently an application to be decided in all its circumstances on the merits.

[14] The appeal is allowed, the order of the learned Magistrate dismissing the application is set aside and the case is remitted back to the Court of Summary Jurisdiction for further hearing.