Hales v Hampton [2004] NTSC 21

PARTIES:	HALES, Peter
	v
	HAMPTON, Leighton Raymond
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 154 of 2003 (20202812)
DELIVERED:	16 April 2004
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

APPEAL – Justices – *Justices Act* 1928 (NT).

Domestic Violence Act 1997, s 5(5) – whether Magistrate erred in requiring compliance with s 5(5) for a consent order to be valid – whether s 5(5) is a mandatory condition precedent to the existence of jurisdiction to make the order – Appeal allowed.

Domestic Violence Act 1997 (NT) s 4, s 5 and s 6.
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355, applied.

REPRESENTATION:

Counsel:

Appellant:	R Carlin
Respondent:	G Smith

Solicitors:

Appellant:	DPP
Respondent:	NTLAC

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

Hales v Hampton [2004] NTSC 21
No. 154 of 2003 (20202812)

BETWEEN:

PETER HALES
Appellant

AND:

LEIGHTON RAYMOND HAMPTON
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 16 April 2004)

[1] This is a prosecution appeal against the decision of a Magistrate to dismiss a complaint that the respondent had failed to comply with the terms of a restraining order issued under the Domestic Violence Act 1997 ("the Act").

[2] On 1 November 2001 the respondent was present in court when a Magistrate made a restraining order pursuant to s 4 of the Act. The order included terms that the respondent not assault or threaten to cause personal injury to the female complainant and that he not act in a provocative or offensive manner towards her. The date of the expiry of the order was fixed at 1 May 2002.

[3] On 23 February 2002 the female complainant confronted the respondent at his residence. After a brief altercation the respondent had a shower and the complainant collected a quantity of her clothes which were inside the premises. When she started to leave with her clothes and her ten month old child, the respondent told her to get back to the flat. The complainant continued walking away from the premises and the respondent followed her. Eventually the respondent ran alongside the complainant and pushed her in the chest with an open hand. The respondent told the complainant to go home and took the pram from her. The complainant went to a neighbour's flat where she called the police.

[4] The respondent was arrested. He made full admissions to the police. He said he had lost his temper and knew that he was in breach of the terms of the restraining order. When asked why he had breached the terms of the order, the respondent said it was just stupid.

[5] Based on the facts to which I have just referred, the respondent was charged with a breach of the restraining order. At a contest mention to set a date for the hearing, in response to a direct question from a Magistrate counsel for the respondent stated that there was "no dispute about service or the existence of the [restraining] order". The hearing was fixed for 2 September 2003 on the basis that the prosecution would not be required to prove the existence of the restraining order or service of it.

[6] On 2 September 2003 before a different Magistrate, the respondent was represented by the same counsel and pleaded guilty to a complaint in the following terms:

> "On the 23 day of February 2002
>
> At Darwin in the Northern Territory of Australia.
>
> 1. Being a person against whom a restraining order issued in accordance with the Domestic Violence Act was in force, and having been served with a copy of that order, you failed to comply with the terms of that order:
>
> contrary to s 10 of the Domestic Violence Act."

[7] After the prosecutor had outlined the essential facts, the Magistrate raised s 5(5) of the Act. Section 5 is concerned with orders made with the consent of the complainant and the defendant. It permits an order to be made notwithstanding that the defendant might have denied or not admitted the allegations or grounds of the application. A consent order may be made by a Registrar of the Local Court or by the Court. Subsection (5) provides that an order shall not be made unless the Court or the Clerk has explained specified matters to the defendant or caused those matters to be explained to the defendant. That subsection is in the following terms:

> "Neither the Court nor the Clerk shall make an order in pursuance of this section unless the Court or the Clerk, as the case may be, has explained or caused to be explained to the defendant –
>
> (a) the purpose and effect of the proposed order;

(b) the consequences that may follow if the defendant fails to comply with the proposed order; and

(c) the means by which the proposed order may be varied or revoked."

[8] The transcript discloses that the Magistrate had regard to the file which contained the order which the respondent admitted breaching. His Worship observed that there was nothing on the file to indicate compliance with s 5(5). He rejected a submission that he was not required to consider the issue because the respondent had acknowledged an awareness of the order in the record of interview and had pleaded guilty to the offence. It is apparent that notwithstanding the plea of guilty, his Worship took the view that the prosecution was required to establish compliance with s 5(5).

[9] Faced with the strong concerns expressed by the Magistrate, the prosecutor sought an adjournment. Counsel for the respondent opposed the adjournment. She described the matter of s 5(5) as a "very valid point which I missed". She added that the charge should be dismissed if his Worship was not satisfied that the facts supported the elements of the charge.

[10] The Magistrate gave brief reasons for refusing the adjournment and dismissing the charge. The essence of his Worship's reasons appears in the following passages:

> "The defendant has pleaded guilty to the charge of failing to comply with a restraining order. The prosecution has, in recitation of the précis upon which the finding of guilt must be and can only be made,

> not recited as part of the facts upon which the decision of this court needs to be made any information at all to reflect that there was compliance by His Worship Mr Gillies on 31 October 2001, with subsection (5) of section 5 of the Domestic Violence Act.
>
> My practice of course is of no consequence, and it may be indeed that His Worship gave necessary service to subsection (5) section 5 of the Domestic Violence Act. My practice is to endorse the fact that there has been compliance on the file. The absence of His Worship's similar endorsement is not of course in itself of any consequence, if indeed the explanations required by the subsection in pre-emptory terms were given.
>
> It is my construction of the Domestic Violence Act that there is an absolute prohibition on the court making an order where there has not been compliance of section 5(5). In those circumstances, the absence of leading evidence that there has been compliance, is no different from there being an absence of evidence of an essential element of any crime that is ventilated before the court."

[11] In my opinion the Magistrate erred. By his plea of guilty, the respondent admitted that a restraining order issued in accordance with the Act was in force and that the order had been served upon him. The respondent also admitted that he had failed to comply with the terms of the order. Although it was not necessary for the Magistrate to have regard to the court file, that file confirmed that the order which the appellant admitted breaching had been made. Even if it is assumed, incorrectly in my view, that if a defendant pleads not guilty the prosecution is required to prove compliance with s 5(5), in the circumstances before the Magistrate the prosecution was not required to prove such compliance.

[12] It is undoubtedly correct that there are occasions when a court is entitled and perhaps obliged to decline to act upon a plea of guilty. However, again

assuming that failure to comply with s 5(5) renders an order invalid, in the circumstances before the Magistrate there was no basis upon which his Worship could properly have dismissed the complaint. The absence of a notation on the court file did not amount to evidence that the Magistrate who made the order did not comply with s 5(5). There is no requirement in the Act that such a note be made on the file. The adoption by counsel of the issue raised by his Honour as a "very valid point which I missed" was an adoption of the Magistrate's expressed view that the prosecution was obliged to prove that the previous order was valid. If it was the case for the respondent that the order was invalid because an explanation had not been given in accordance with s 5(5), it was incumbent upon the respondent to apply to change his plea of guilty to one of not guilty. No such application was made.

[13] For these reasons, the appeal must be allowed. Having reached that view, strictly speaking it is unnecessary for me to deal with the question as to whether an order made by consent is valid if the presiding officer fails to comply with s 5(5) of the Act. However, as the issue might be raised again, it is appropriate that I express my view.

[14] It is not uncommon for a penal statute to impose a requirement that a court explain the effect of an order to the person who is the subject of the order. It is also not uncommon for such legislation to contain a provision which expressly states that failure to comply does not affect the validity of the order. However, no such provision exists in the Act. On one view, if the

Legislature had intended that a failure to comply with s 5(5) would not invalidate the order, the Legislature would have said so. However, the practice of including a provision to that effect is not so invariable as to lead to a conclusion that the absence of such a provision necessarily means that the Legislature intended that an order without an explanation would be invalid. The answer must lie in the construction of the particular legislation and a determination of the intention of the Legislature in this regard.

[15] In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, the High Court was concerned with a direction to the Australian Broadcasting Authority contained in s 160 of the Broadcasting Services Act 1992 (Cth). In a joint judgment, McHugh, Gummow, Kerby and Hayne JJ said [91]:

> "An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no decisive rule that can be applied, *Howard v Bodington* (1877) 2 PD at 211, per Lord Penzance; there is not even a ranking of relevant factors or categories to give guidance on the issue."

[16] Later in their judgment, after approving the criticism of the continued use of the "elusive distinction between directory and mandatory requirements", their Honours said [93]:

> "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to "the language of the relevant provision and the scope and object of the whole statute."" (Footnotes omitted).

[17] Speaking generally, the purpose of the Act is to empower the court to make orders for the protection of individuals from violence and apprehended violence in domestic circumstances. Sections 4 and 6 provide procedures for obtaining restraining orders in the absence of a defendant and without service of an application upon a defendant. Section 4 is concerned with written applications while s 6 relates to telephone applications. If the court is satisfied on the balance of probabilities of any of the matters specified in s 4(1) which centre on the violence or behaviour of the defendant towards the person in a domestic relationship with the defendant, in the absence of the defendant the court may make a restraining order. Both sections 4 and 6 require the court to cause a copy of the order to be served on the defendant. Where a defendant was not summoned to appear and the order was made in the defendant's absence, both sections provide that the defendant shall be summoned to appear to show cause why the order should not be confirmed.

[18] Section 4(5) and 6(9) provide that where a defendant is summoned to show cause why an order should not be confirmed, the order has no effect after the conclusion of the hearing to which the defendant is summoned unless the defendant does not appear in obedience to the summons or the court, having considered the evidence adduced by the defendant and any other evidence

before it, confirms the order. Although those subsections do not expressly state that the court must be satisfied of one or more of the matters identified in s 4(1) concerning the behaviour of the defendant, it is implicit that before the court confirms the order it is required to be satisfied of one or more of those matters.

[19] It is also implicit in s 4(5) and s 6(9) that if a defendant having been summoned does not appear at the hearing, an order made in the absence of the defendant continues to be in effect.

[20] If a defendant appears in answer to the summons, and the court having considered the evidence before it confirms the order, there is no requirement that the court explain to a defendant the purpose and effect of the order or the consequences that may follow if the defendant fails to comply with the order. Nor is the court required to explain to the defendant the means by which the order might be varied or revoked.

[21] Both ss 4 and 6 direct that after the conclusion of the hearing the Clerk of the Court shall cause a copy of the order recording the decision of the Court to be served on the defendant. Form 3 of the Domestic Violence Regulations provides that the order to be served upon the defendant shall contain the following words:

> "Non-compliance with a restraining order renders the defendant liable to a term of imprisonment for not more than six months or to a fine of not more than $2,000 for a first offence; for a second or subsequent offence the defendant would be liable to a mandatory

term of imprisonment for not less than 7 days or more than 6 months".

[22] Sections 4 and 6 deal with the circumstances where a defendant has been summoned to appear but does not appear or, the defendant having appeared, the court considers the evidence and determines to confirm the original order. In neither situation is the court required to give an oral or written explanation of the effect of the order to the defendant other than by way of subsequent service of the order.

[23] The lack of a requirement in those circumstances to give such an explanation is to be contrasted with the requirements of s 5 which apply when a defendant appears in answer to a summons and consents to an order being made. Section 5 provides that notwithstanding that a defendant has not admitted or has expressly denied an allegation or the grounds of the application, if the defendant consents to an order being made the court may make such an order. Section 5(1) specifies that the order is made under s 4 or s 6. In those circumstances, where an order is made by consent, both sections 4 and 6 direct the court to serve a copy of the order upon the defendant.

[24] The point of distinction between the ss 4 and 6 and the s 5 procedures is found in s 5(5). That subsection directs that where a defendant consents to an order, the court shall not make an order pursuant to s 5 unless the court has explained or caused to be explained to the defendant the purpose and effect of the proposed order, the consequences that may follow if the

defendant fails to comply with the proposed order and the means by which the proposed order may be varied or revoked. It is this provision which the respondent contends goes to jurisdiction to make the order. The respondent submits that if the explanation is not given, a consent order purportedly made pursuant to s 5 is invalid.

[25] There are good reasons to require the giving of an explanation before a consent order is made. First, the court is not required to be satisfied that there is any substance in the application or the allegations made in support of the application for the restraining order. Secondly, the order may be made notwithstanding that a defendant has expressly denied the grounds of the application and the allegations. In these circumstances, the evident purpose of s 5(5) is to ensure that a defendant is aware of the consequences before a consent order is made. The giving of the explanation in advance of an order enables a defendant to withdraw consent before an order is made.

[26] This purpose provides a ready explanation for the Legislature choosing to direct the court to provide the explanation to the defendant before making the order rather than specifying that upon the making of the order the court shall explain or cause to be explained to the defendant the effect of the order. In my opinion, s 5(5) is a procedural direction aimed at ensuring fairness to a defendant in the sense that before a consent order is made the defendant is made aware of consequences that will flow from the making of the order. It is not intended to be a mandatory condition precedent to the existence of the jurisdiction to make the order.

[27] My view in this regard is confirmed by a consideration of the consequences of interpreting s 5(5) as a condition precedent to the existence of the jurisdiction to make the order. An order made in the presence of the defendant after the court has considered the evidence is valid notwithstanding the absence of an explanation. It would be a rather strange result if an order without an explanation in those circumstances is valid, but an order made by consent without the explanation would be invalid. In my view the proper construction of the legislation does not support such a conclusion.

[28] For these reasons, in my opinion if a court fails to provide all or part of the explanation set out in s 5(5) before making a consent order, that failure does not affect the validity of the order made by consent.

[29] The appeal is allowed and the order of the Magistrate dismissing the complaint is set aside. Although the matter could be remitted to a Magistrate for the imposition of penalty, I have determined that it is appropriate that I should hear counsel and exercise the power contained in s 177 of the Justices Act to impose penalty.
