Muir v Nunn [2006] NTSC 71

PARTIES:	MUIR, Warren v NUNN, Peter
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	SC 30 of 2006 (20620329)
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JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

MAGISTRATES
Jurisdiction and procedure generally – special case – whether a Magistrate has the power prior to a full hearing to make an interim order under s 4(1) of the Domestic Violence Act where the defendant is present and opposes the order – no power.

Domestic Violence Act (NT), s 4, s 5, s 6, s 6A and s 8; *Justices Act* (NT), s 162; *Firearms Act* (NT), s 3, s 10, s 13 and s 39

REPRESENTATION:

Counsel:

Applicant:	R Goldflam
Respondent:	R Noble

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Defendant:	Office of the Director of Public Prosecutions

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

Muir v Nunn [2006] NTSC 71
No. SC 30 of 2006 (20620329)

BETWEEN:

MUIR, Warren
Applicant

AND:

NUNN, Peter
Respondent

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 20 September 2006)

Introduction

[1] This is a Special Case formulated for the opinion of the Court pursuant to s 162 of the Justices Act. It concerns the operation of s 4 of the Domestic Violence Act ("the Act"). The questions reserved are as follows:

> "1. Does the Court of Summary Jurisdiction have power to make an order pursuant to s4(1) of the *Domestic Violence Act* 1992 (NT) ("the Act") prior to having finally determined the matter by way of a hearing at which the parties are provided with an opportunity to cross-examine witnesses, where
>
> (a) the defendant is before the Court; and
>
> (b) the defendant opposes the making of the Order?

> 2. In the circumstances set out in question 1, what procedural steps, if any, is it necessary for the Court to take or require before making a valid order?"

Background

[2] I will refer to the parties as "the wife" and "the husband".

[3] On 6 March 2006 the wife filed an application for a restraining order seeking orders restraining the husband from approaching or contacting her except through a third party in relation to the children of the marriage. In support of the application which contained allegations that the husband had harassed and verbally abused the wife since their separation, a document headed "Affidavit" was filed with the application. The "affidavit" was worded as a declaration and was affirmed in the presence of a legal practitioner. However, the "affidavit" did not comply with the relevant provisions of the Oaths Act.

[4] On 9 March 2006 the application came before the same Magistrate who later formulated the opinion for this Court. It was heard in the presence of both parties and their counsel. The wife did not seek to tender the "affidavit" or lead any evidence. The husband did not seek to tender any evidence.

[5] With the consent of the parties, I have had regard to the documentation that was before the Magistrate and to the transcript of the proceedings. The application before the Magistrate was on Form 2 as prescribed by the regulations and sought a restraining order pursuant to s 4 of the Act. The

application identified four specific restraining orders sought by the wife for a period of 12 months.

[6] The transcript discloses that at the outset the learned Magistrate asked counsel for the husband what attitude the husband took to the application. Counsel indicated that the husband opposed the application and denied the allegations. Counsel said that the application would "need to be sent for hearing".

[7] Although the husband was prepared to give an undertaking to keep away from the wife, counsel for the wife informed the Magistrate that the wife was seeking "interim orders". Counsel referred to the "affidavit" that had been filed in support of the application and the allegations contained in the affidavit. Although the application did not make any reference to an "interim order", the Magistrate stated that he was "going to make an interim order in terms of the application".

[8] Before the Magistrate made an order, counsel for the husband was granted leave to present submissions concerning his Honour's power to make an interim order. She contended that there was no power to make such an order in circumstances where the husband did not consent and was present in court. She submitted that the only power to make an interim order was found in s 4(5) which did not apply. In addition, counsel put to his Honour that the "affidavit" was not evidence and that his Honour could not be satisfied of the matters alleged on the balance of probabilities.

[9] The Magistrate rejected the submission that the affidavit was not evidence. His Honour said it was "not tested evidence" and that "in the absence of any other evidence" he could be "satisfied". His Honour brought the discussion to a halt indicating that, in his view, he possessed the necessary powers. His Honour adjourned the matter to 4 May 2006 for "hearing" and stated that he made "an interim order in terms of the application".

[10] In breach of the orders, on 6 April 2006 the husband contacted the wife directly. On 19 April 2006 a complaint was preferred against the husband alleging that he had committed an offence against s 10 of the Act. On the hearing of the complaint, the husband contended that the order made by the Magistrate on 9 March 2006 was invalid.

[11] Against that background the Magistrate reserved the questions to which I have referred. Although there is force in the view that in the absence of an appeal by the husband it is not appropriate to proceed by way of a Special Case, the parties agreed that it was appropriate for me to answer the questions. It is common ground, and stated in the Special Case, that there is a divergence of opinion among magistrates as to whether in the circumstances under consideration his Honour possessed the power to make the orders. It is desirable that the issue be resolved by judgment of this court.

Legislative Scheme

[12] The power to make an order pursuant to s 4 must be considered in the context of the Act in its entirety and, in particular, in the context of the scheme created by s 4, s 5, s 6 and s 6A. Those sections are in the following terms:

> "4. Restraining order
>
> (1) Where, on an application made in accordance with subsection (2), the Court or the Clerk is satisfied, on the balance of probabilities –
>
> (a) that the defendant –
>
> (i) has assaulted or caused personal injury to a person in a domestic relationship with the defendant or damaged property in the possession of that person; and
>
> (ii) is, unless restrained, likely again to assault or cause personal injury to the person or damage the person's property;
>
> (b) that the defendant –
>
> (i) has threatened to assault or cause personal injury to a person in a domestic relationship with the defendant or threatened to damage property in the possession of the person; and
>
> (ii) is, unless restrained, likely again to make such a threat or to carry out such a threat;
>
> (c) that –

(i) the defendant has behaved in a provocative or offensive manner towards a person in a domestic relationship with the defendant;

(ii) the behaviour is such as is likely to lead to a breach of the peace including, but not limited to, behaviour that may cause another person to reasonably fear violence or harassment against himself or herself or another; and

(iii) the defendant is, unless restrained, likely again to behave in the same or a similar manner,

the Court or, subject to subsection (3) and any rule or practice direction under section 20AB, the Clerk, may make an order in accordance with subsection (1A).

(1A) For the purposes of subsection (1), the Court or the Clerk may make –

(a) an order imposing such restraints on the defendant, and for such period as is specified in the order, as are necessary or desirable to prevent the defendant from acting in the apprehended manner; and\or

(b) such other orders as are, in the opinion of the Court or the Clerk, just or desirable to make in the circumstances of the particular case, including, but not limited to, orders requiring the return of personal property to the defendant or the applicant, or the person on whose behalf the application was made.

(2) An application under this section may be made by –

(a) a member of the Police Force; or

(b) a person in a domestic relationship with the defendant –

(i) against whom, or against whose property; or

(ii) acting on behalf of another person in a domestic relationship with the defendant against whom, or against whose property,

the violence or behaviour the subject of the application was or is likely to be directed.

(3) An order under subsection (1) –

(a) may be made by the Court in the absence of the defendant, whether or not the defendant was summoned to appear at the hearing of the application; and

(b) may be made by the Clerk only where the defendant was not summoned to appear at, and has not appeared at, the hearing of the application (and for that purpose the Clerk has the necessary jurisdiction).

(3A) If –

(a) the Clerk is not satisfied that an order referred to in subsection (1) should be made; or

(b) the defendant, not having been summoned, appears at the hearing and does not consent to an order under section 5,

the Clerk shall refer the application to the Court for decision.

(3B) Where the Clerk refers an application to the Court under subsection (3A), the Court may –

(a) make the order sought;

(b) direct that a further affidavit be filed; or

(c) give directions as to the application.

(3C) Where under subsection (3B) the Court directs that a further affidavit be filed, the Clerk may, on the filing of the affidavit, make the order sought.

(4) As soon as practicable after an order under subsection (1) is made, the Clerk shall cause a copy of the order to be served on the defendant and shall forward a copy of the order to the Commissioner of Police and, where the applicant is not a member of the Police Force, the applicant.

(5) Where an order under subsection (1) is made in the absence of the defendant and the defendant was not summoned to appear at the hearing of the application, the defendant shall be summoned to appear before the Court to show cause why the order should not be confirmed by the Court.

(6) – (7) [Omitted]

(8) Without limiting the generality of subsection (1), the Court or the Clerk may make an order under that subsection, or refuse to make an order, restraining the defendant from entering premises, or limiting the defendant's access to premises, whether or not the defendant has a legal or equitable interest in the premises, but before making or refusing to make such an order it or he or she shall consider the effect of making or refusing to make the order on –

(a) the accommodation of; and

(b) any children of or in the care of,

the persons affected by the proceedings.

5. Consent orders

(1) Notwithstanding section 4(1)(a), (b) and (c) and (3), but subject to this section, the Court or the Clerk (and for that purpose the Clerk has the necessary jurisdiction) may, with the consent of the defendant and the person making an application, or on whose behalf an application was made, under section 4 or 6, make an order under that section.

(1A) An order referred to in subsection (1) may be made by the Court or the Clerk notwithstanding that the defendant has not admitted, or has expressly denied –

(a) an allegation made against him or her; or

(b) the grounds of the application.

(2) If the Clerk is not satisfied that an order referred to in subsection (1) should be made, he or she shall refer the application to the Court for decision.

(3) Where the Clerk refers an application to the Court under subsection (2), the Court may –

(a) make the order sought;

(b) direct that a further affidavit be filed; or

(c) give directions as to the application.

(4) Where under subsection (3)(b) the Court directs that a further affidavit be filed, the Clerk may, on the filing of the affidavit, make the order sought.

(5) 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.

6. Restraining order made by magistrate

(1) If it is not practicable in particular circumstances to obtain from the Court or Clerk an order under section 4(1), a police officer may apply to a magistrate for an order under this section.

(2) The application may be made by telephone, facsimile or other form of electronic communication.

(3) Subject to subsections (5) and (6), the magistrate may make an order under this section in the same terms as an order the Court may make under section 4(1).

(4) The order may be made even though the defendant has not been given an opportunity to answer any allegation in the application.

(5) The magistrate may make the order only if satisfied –

(a) it is not practicable in the circumstances to obtain an order under section 4(1); and

(b) had the magistrate been sitting as the Court – the magistrate might reasonably have made an order under section 4(1).

(6) In addition, before making or refusing to make an order of the type referred to in section 4(8), the magistrate must consider the effect of making or refusing to make the order on –

(a) the accommodation of the persons affected by the order; and

(b) any children of or in the care of the persons affected by the order.

(7) The order has effect as if it were an order made under section 4(1).

(8) The magistrate must record on the order the reasons for making it and the time and place for its return.

(9) For subsection (8), the time for the return of the order must be as soon as practicable after its making.

(10) The magistrate must inform the police officer of the terms of the order, the reasons for making it and the time and place for its return.

(11) The police officer must –

(a) complete a form of order as directed by the magistrate and write on it the magistrate's name and the date and time it is made; and

(b) as soon as practicable after the form of order is completed –

(i) serve a copy of it on the defendant; and

(ii) send the original of it to the Clerk.

(12) The form of order served is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the order should not be confirmed by the Court.

6A. Restraining order made by police officer

(1) An authorised police officer may make an order under this section if satisfied –

(a) it is not practicable in the circumstances to obtain an order under section 4(1); and

(b) it is necessary to ensure the immediate safety of the person for whose protection the order is to be made; and

(c) the Court might reasonably have made an order under section 4(1).

(2) In addition, before making or refusing to make an order of the type referred to in section 4(8), the police officer must consider the effect of making or refusing to make the order on –

(a) the accommodation of the persons affected by the order; and

(b) any children of or in the care of the persons affected by the order.

(3) The police officer may make the order in the same terms as an order the Court may make under section 4(1).

(4) The order may be made even though the defendant has not been given an opportunity to answer any allegation made in relation to the making of the order.

(5) The order has effect as if it were an order made under section 4(1).

(6) The police officer must record on the order the reasons for making it and the time and place for its return.

(7) For subsection (6), the time for the return of the order must be as soon as practicable after its making.

(8) As soon as practicable after the order is made, a police officer must –

(a) serve a copy of it on the defendant; and

(b) inform the defendant of the defendant's right to apply for a variation or revocation of the order under section 6B; and

(c) send the original of the order to the Clerk.

(9) The order served is taken to be a summons to the defendant to appear before the Court, at the time and place shown on the order for its return, to show cause why the order should not be confirmed by the Court.

(10) In this section –

"authorised police officer" means –

(a) a police officer of or above the rank of Senior Sergeant; or

(b) the officer in charge for the time being of a police station."

[13] The fundamental requirement for the making of an order pursuant to s 4 is that the court be satisfied on the balance of probabilities of a matter set out in s 4(1)(a), (b) or (c). That requirement applies to all orders made under s 4.

[14] Section 4(4) contains a general requirement that as soon as practicable after an order has been made under s 4(1) a copy of the order be served on the defendant. However, pursuant to s 4(3), an order may be made by the Court in the absence of the defendant regardless of whether the defendant was summoned to appear at the hearing of the application. If the order is made

in the absence of the defendant, and the defendant was not summoned to appear at the hearing of the application, s 4(5) requires that the defendant be summoned to appear before the Court to show cause why the order should not be confirmed. In other words a defendant not summoned is given an opportunity to be heard before the order is "confirmed".

[15] No specific reference is made to an order by made by the Court in the absence of a defendant who was summoned to appear at the hearing. By inference if a defendant is summoned and fails to appear, an order made by the Court in the defendant's absence is not subject to any form of confirmation. Presumably the legislature took the view that a defendant who fails to attend after being summoned has waived the right to be heard on the application. Such a defendant can apply for an order varying or revoking the order pursuant to s 8.

[16] A Registrar of the Local Court, referred to in the legislation as "the Clerk", is given jurisdiction to make an order in the absence of a defendant who was not summoned to appear. However, if a defendant, not having been summoned, appears at the hearing and does not consent to an order, the Clerk is required by s 4(3A)(b) to refer the application to the court "for decision". In that event s 4(3B) empowers the court to make the order sought, direct that a "further affidavit" be filed or give directions as to the application. If the court directs that a further affidavit be filed, on the filing of that affidavit the Clerk may make the order sought (s 4(3C)).

[17] The reference to a "further affidavit" appears to contemplate the existence of an affidavit in support of the application. However, no reference is made in the Act to the filing of an affidavit in support of the application. In addition, although the form of application set out in the regulations made under the Act contains a section headed "Basis of Application", there is no reference in the regulations or the prescribed forms to an affidavit in support of an application.

[18] Additional provision for ex parte orders is found in s 6 and s 6A. Pursuant to s 6, if it is "not practicable" to obtain an order under s 4(1) from the Court or Clerk, a police officer may apply to a magistrate for an order under s 6. Before making an order, the Magistrate must be satisfied that it is not practicable in the circumstances to obtain an order under s 4(1) and that had the Magistrate been sitting as the Court, the Magistrate "might reasonably have made an order under s 4(1)".

[19] Upon making the order, the Magistrate is required to inform the police officer who made the application of the terms of the order, the reasons for making it "and the time and place for its return". Subsection (11) requires the police officer to complete a form of order and, as soon as practicable after the form of order is completed, serve a copy of it on the defendant and send the original to the Clerk. Pursuant to s 4(12), the form of order served "is taken to be a summons to the defendant to appear before the Court, at the time and place shown on it for its return, to show cause why the order should not be confirmed by the Court".

[20] In making provision for the obtaining of an order without notice to and in the absence of a defendant where it is not practicable to obtain an order from the Court of Clerk, the legislative scheme requires notice of the order to be given to the defendant and provides an opportunity for the defendant to be heard before the order is confirmed. The same scheme is evident in s 4(1) and in s 6(A) which empowers an "authorised police officer" to make an order if it not practicable in the circumstances to obtain an order under s 4(1) because it is necessary to ensure the immediate safety of the person for whose protection is to be made. Again provision is made for service of the order on the defendant and the order served is taken to be a summons to the defendant to appear before the Court to show cause why the order should not be confirmed by the Court.

[21] It is evident from the scheme permitting orders to be made without notice to and in the absence of a defendant that the legislature intended to provide a defendant with the opportunity to be heard before a permanent order is put in place. Although the Act does not speak in terms of "an interim order", in substance the first order made in the absence of a defendant is an interim order because of the requirement that the defendant be given an opportunity to be heard before such an order is "confirmed". This view is reinforced by the Firearms Act which provides for consequences in connection with firearms if orders are made under the Act. The Firearms Act distinguishes between an "interim restraining order" and an order which is not subject to confirmation. An "interim restraining order" is defined in s 3 of the

Firearms Act as an order made under s 4(1) of the Act and to which s 4(5) applies. It is s 4(5) that directs that where an order is made in the absence of a defendant who was not summoned to the hearing, the defendant shall be summoned to appear before the Court to show cause why the order should not be confirmed. An "interim restraining order" under the Firearms Act also includes orders made under s 6 and 6A of the Act made in the absence of a defendant who was not given notice of the application. By way of contrast, a "restraining order" is defined in s 3 of the Firearms Act as an order made under s 4(1) of the Act to which s 4(5) of the Act does not apply. In other words, it is an order made in the presence of a defendant or in the absence of a defendant who was summoned to appear at the hearing.

[22] If a defendant is subject to an interim restraining order, s 39 of the Firearms Act provides that a licence, permit or certificate of registration in connection with a firearm is automatically suspended on the making of such an order and the suspension remains in force until the order is confirmed or revoked. A person who is subject to a "restraining order" is, by virtue of ss 10 and 13 of the Firearms Act, automatically prohibited from holding a licence or permit in connection with a weapon for a period of five years after the expiration of the restraining order. These consequences support the view that the legislature intended that a defendant be given an opportunity to be heard and present evidence before a permanent restraining order is put in place.

[23] Provision is also made in the Act for variations of orders. It is unnecessary to canvass the details of those provisions except to note that again it is readily apparent that the legislature intended to give a defendant the opportunity of being heard before a variation of an order made in the absence of the defendant is confirmed.

[24] Finally in connection with orders made in the absence of a defendant, s 8C is instructive. It applies when a defendant is summoned to appear before the Court to show cause why a restraining order or variation of a restraining order should not be confirmed. Section 8C(4) provides that at the hearing, the Court may confirm, vary or revoke the order. Subsection (5) directs that the Court must not confirm the order unless it has considered any evidence before it and submissions from the parties:

> "(5) However, the Court must not confirm the order unless –
>
> (a) it is satisfied the defendant has been served with a copy of the order in accordance with section 10(2); and
>
> (b) it has considered any evidence before it and submissions from the parties."

[25] In the context of the Court receiving evidence, in addition to s 8C(4) and (5), other sections contemplate the giving of oral evidence and provision is made for the Court to give procedural directions "necessary to ensure the fair and expeditious determination of the application": s 20AA, s 20AC and s 20AD. Section 12 provides that the Court may admit and act upon hearsay evidence.

[26] I turn to the issue of the procedures applicable before any order is made when a defendant appears on the application. If the defendant consents to the making of an order, s 5 of the Act provides that an order may be made notwithstanding that the defendant has not admitted or has expressly denied an allegation against the defendant or the grounds of the application. The power to make the order by consent is a special power which prevails over the general requirement in s 4 that an order may only be made if the court is satisfied, on the balance of probabilities, of a matter set out in s 4(1)(a), (b) or (c). In order words, where the parties consent and notwithstanding denials by the defendant, the court is not required to be satisfied of any of the matters in s 4(1).

Husband's contentions

[27] In substance, counsel for the appellant advanced the following propositions as applicable in the absence of the appellant's consent:

- As the "affidavit" did not comply with the provisions of the Oaths Act it could not qualify as evidence to be considered by the Magistrate in determining whether the Magistrate was, as required by s 4(1), satisfied on the balance of probabilities of a matter set out on s 4(1)(a), (b) or (c).

- The "affidavit" was not tendered and could not, therefore, qualify as evidence.

- There was no “evidence” of anything.

- Section 4 operates to commence inter parties proceedings except in specific circumstances in which the Court is empowered to make ex parte orders. While there is power to make an order which has the effect of being an interim order when an order is made in the absence of a defendant who was not summoned to appear at the hearing, there is no such power if a defendant appears. No provision is made for the making of an “interim order” in the presence of a defendant to be “confirmed” at a subsequent hearing and a power to make such an order cannot reasonably be inferred.

- The scheme of the legislation contemplates that before an order in final form is made, a defendant is to be given an opportunity to be heard and call evidence.

Conclusions

[28] When a defendant is present and opposes the making of an order, there is no express power to make an order pursuant to s 4 which is subject to confirmation. From a practical point of view, it is obviously desirable that in these circumstances a Magistrate unable to embark on a full hearing should have the power to make interim orders “on the papers” until a hearing is held and a final resolution of the application is achieved. On this view, a power should be inferred. However, in my opinion the legislative scheme and the consequences of making an order pursuant to s 4 in these

circumstances does not permit of that interpretation. If an order is made in these circumstances pursuant to s 4, it is not subject to confirmation pursuant to s 4(5). As s 4(5) does not apply, such an order would automatically trigger the serious consequences under the Firearms Act to which I have referred. In that situation those consequences would follow notwithstanding that a defendant had not had an opportunity to be heard and present evidence before an order pursuant to s 4 was made. Such a result would be contrary to the legislative scheme which is designed to ensure that a defendant has an opportunity to be heard and present evidence before an order is made.

[29] The practical consequences of denying the existence of a power to make an interim order when a defendant is present and opposes the application are inconvenient, but they are not such as to defeat the objects of the legislative scheme. If, for practical reasons, a Court is not in a position to conduct a full hearing, it can reasonably be said that it is not practicable to obtain an order from the Court pursuant to s 4 and the alternative ex parte procedures become available to an applicant. In many situations the inconvenience of proceeding ex parte could be avoided if a defendant is prepared to give appropriate undertakings to the Court pending the hearing and final resolution of the application.

[30] For these reasons, the answer to question 1 is “no”.

[31] As to question 2, the fundamental requirement is that the Court conduct a hearing which is fair to both parties. Generally speaking, those procedures are well known and in common practice. In particular, a defendant is entitled in the usual way to test evidence advanced on behalf of the applicant, to lead evidence and to make submissions in opposition to the application.

[32] Section 20AC empowers the Court to "give such procedural directions as it thinks necessary to ensure the fair and expeditious determination of the application …". This would include directions that evidence be received by affidavit. However, before it can be said that a Court has received evidence in affidavit form, the affidavit must be tendered. The Court should not rely upon the contents of an affidavit which has not been tendered. A party is entitled to test the evidence presented on behalf of the opposing party and this includes cross-examining the deponent to an affidavit tendered by the opposing party.

[33] Other than making these general observations, it is inappropriate to answer question two.

[34] It follows from the negative answer to question 1 and these reasons that the Magistrate did not have the power to make the orders on 9 March 2006 which were subsequently contravened by the husband on 6 April 2006. The prosecution should withdraw the complaint based on the conduct of the husband on 6 April 2006. Alternatively, proceedings can be taken in this

Court to quash the orders of 9 March 2006. The quashing of those orders may be necessary to avoid the consequences under the Firearms Act.