Balchin v Anthony [2008] NTSC 02

PARTIES:	BALCHIN, Vivien Lynette
	v
	ANTHONY, Sampson
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	JA 43/2007 (20721673)
DELIVERED:	4 January 2008
HEARING DATES:	20 December 2007
JUDGMENT OF:	RILEY J
APPEAL FROM:	Carey SM

CATCHWORDS:

MAGISTRATES – appeal against dismissal of complaint – effect of a "confirmation" order under the Domestic Violence Act – whether decision inconsistent with the legislation – appeal dismissed.

Domestic Violence Act 1992, s 4, s 6, s 8, s 10; *Domestic Violence Regulations*, Form 3; *Justices Act 1978*, s 163

Peach v Bird [2006] NTSC 14, considered.
Police v Lyons (1999) CSJ 9900866 22 July 1999, applied.

REPRESENTATION:

Counsel:

Appellant:	C Baohm
Respondent:	J Truman

Solicitors:

Appellant:	Office of the Director of Public Prosecutions
Respondent:	North Australian Aboriginal Justice Agency

Judgment category classification:	A
Judgment ID Number:	ril0723
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Balchin v Anthony [2008] NTSC 02
No JA 43/2007 (20721673)

IN THE MATTER OF the *Domestic Violence Act*

AND IN THE MATTER OF an appeal under the *Justices Act*

BETWEEN:

VIVIEN LYNETTE BALCHIN
Appellant

AND:

SAMPSON ANTHONY
Respondent

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 4 January 2008)

[1] This appeal raises for consideration the operation of the Domestic Violence Act and, in particular, the effect of the "confirmation" of an order as provided for in s 8C of that Act.

[2] The purpose of the Act is to provide for the making of restraining orders in relation to situations of actual or apprehended domestic violence. Section 4 permits the Court of Summary Jurisdiction or, in some circumstances, the Registrar of the Local Court, to make an order restraining a defendant for a

period specified in the order to prevent the defendant from assaulting a person, damaging property in possession of that person, threatening to do those acts or behaving in a provocative or offensive manner towards that person.

[3] The order may be made in the absence of the defendant. As soon as practicable after the order is made the clerk shall cause a copy to be served on the defendant. Section 4(5) then provides:

> "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."

[4] In certain circumstances s 6 of the Act permits a magistrate to make an order in the same terms as an order under s 4(1) "by telephone, facsimile or other form of electronic communication." Such an order must be served on the defendant as soon as possible. The form of an order so granted and 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.

[5] Section 6A of the Act also permits an authorised police officer to make such an order if satisfied that it is not practicable in the circumstances to obtain an order under s 4(1) and it is necessary to ensure the immediate safety of the person for whose protection the order is to be made. Such an order will only be made where the Court "might reasonably have made an order under

s 4(1)." The order must include the time for the return of the order and that must be as soon as practicable after its making. A copy is to be served upon the defendant. When the order has been served it is to be taken as 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.

[6] Subsequent provisions of the Act permit a party to proceedings in which a restraining order has been made to apply to the Court for a variation or revocation of the order.

[7] Section 8C of the Act deals with what is to happen upon a confirmation hearing and is in the following terms:

> "8C. Confirmation of order
>
> (1) This section applies if a defendant is summoned under section 4(5), 6(12), 6A(9), 6B(10), 8A(7) or 8B(8) to appear before the Court to show cause why a restraining order or variation of a restraining order should not be confirmed.
>
> (2) Subject to section 20AC, the person on whose behalf the order is made may appear at the hearing.
>
> (3) If the defendant has been summoned under section 6(12) or 6A(9), a police officer or representative of the Police Force must appear at the hearing.
>
> (4) At the hearing, the Court may confirm, vary or revoke the order.
>
> (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.

(6) As soon as practicable after the Court makes its decision, the Clerk must serve a copy of the order recording the decision on the defendant."

[8] The issue to be addressed in these proceedings is the status of a "confirmed" restraining order after the return date and prior to the confirmed order being served upon the defendant.

[9] In the present case the respondent was served with a restraining order in relation to his de facto wife, PJ, on 31 July 2007. The order contained a "Notice and Summons" to the respondent which included the following advice:

> "You should attend the Court of Summary Jurisdiction on the 3rd day of August 2007 at 9:30 a.m. at Katherine Court of Summary Jurisdiction in the Northern Territory of Australia, to show cause why the order should not be confirmed and continued for a further period of time by the Court. If you do not attend on this day a warrant may issue for your arrest and the order can be confirmed and continued for a further period of time in your absence."

[10] In the Notice the return date for the order was expressed to be 3 August 2007 and on that date the order was confirmed in the absence of the respondent. On 10 August 2007, and before the confirmed order had been served upon the respondent, he again assaulted PJ. He was charged with

unlawful assault and also with an offence under s 10(1) of the Act which provides as follows:

> "10. Breach of order
>
> (1) Subject to subsections (1D) and (3), a person is guilty of a regulatory offence if:
>
> (a) there is a restraining order in force against the person; and
>
> (b) the person has been served with a copy of the order; and
>
> (c) the person contravenes the order.
>
> Maximum penalty: For a first offence – $2000 or imprisonment for 6 months."

[11] When the matter came before the Court of Summary Jurisdiction the learned magistrate dismissed the charge under s 10 of the Act observing that, in his view, the restraining order expired on 3 August 2007 and was then replaced by a different order made in the same terms. The second order not having been served the respondent could not have been in breach. He dismissed the charge.

[12] The language employed in the legislation is inconsistent with the approach adopted by his Honour. The Act refers to the "confirmation of the order" and permits the Court to "confirm, vary or revoke the order". If the order was to expire on the return date there would be nothing to confirm or revoke. The provision would have been expressed in terms of permitting the

Court to make a fresh order on such terms and conditions as it thinks fit or to make no order.

[13] The alternative construction would create a situation where the ex parte order automatically expired on the return date and any further order designed to protect the person would not take effect until it had been served upon the defendant. Consequently, the person intended to be protected would lose the protection afforded by the existing restraining order and would be without protection until service of the new order could be effected. The thrust of the legislation is to ensure the ongoing protection of people who fall within the ambit of the Act. It does so by permitting the imposition of restraining orders. It is unlikely that the intention was that one order would expire and not be replaced by another order until service of the new order could be effected. The interpretation adopted in the Court below has that result.

[14] In my view the proper construction of the provision is that the ex parte order continues in force unless revoked. The confirmation process does not give rise to a new order. If an order is "confirmed" it is, to adopt the dictionary definitions, established more firmly or ratified. It does not cease to exist. It is not replaced by another order. The requirement that there be service of the confirmed order upon the defendant is necessary to make the defendant aware of any changes to the terms of the order and to alert him to the duration of the order. In the event that the order is varied, until service of the varied order, the defendant will continue to be bound by the terms of the

order with which he was originally served save insofar as those terms may have been ameliorated upon the confirmation hearing.

[15] In this case the respondent was served with a notice which included advice to him that "the order can be confirmed and continued for a further period of time in your absence". The wording of the notice did not suggest that the order expired on the return date.

[16] A similar view was reached by Mr Wallace SM in *Police v Lyons* (CSJ 990-0866, 22 July 1999) where his Honour said:

> "In my view, the proper interpretation of the word 'confirmed' means that the first order does indeed continue in force and the confirmation process does not give rise to a new order.
>
> I say that in view of the obvious intentions of the Act that an applicant be protected, one would think, continuously, and it would be a bizarre and repellent reading -- repellent to common sense, to create an order free period, be that a matter of minutes, days, weeks or in some cases, months before the final orders can be served."

[17] The respondent to the appeal submitted that there is no power to bring this appeal pursuant to s 163(1) of the Justices Act and sought the dismissal of the appeal. The appellant acknowledged that there was no right of appeal pursuant to s 163(1) but maintained it proceeded pursuant to s 163(3) and s 163(5) of the Act. In my view an appeal is available pursuant to those provisions and I adopt with respect the observations of Southwood J in *Peach v Bird* [2006] NTSC 14 at par 7 et seq.

[18] Although I have determined that error occurred, in all the circumstances, including the fact that this is a Crown appeal and the respondent has been dealt with for the assault and sentenced to a period of imprisonment, I will take no further action. I dismiss the appeal.

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