SUPREME COURT OF QUEENSLAND

CITATION:	*CAO v Hedges* [2013] QCA 1
PARTIES:	**CAO** (applicant) **v** **HEDGES, Graham Arthur** (respondent)
FILE NO/S:	CA No 127 of 2012 DC No 3339 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	1 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2012
JUDGES:	Fraser and Gotterson JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal refused.** **2. Applicant's application for a directions hearing refused.** **3. No order as to costs.**
CATCHWORDS:	CRIMINAL LAW – GENERAL MATTERS – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MISCELLANEOUS OFFENCES – OTHER MISCELLANEOUS OFFENCES AND MATTERS – where applicant convicted of breaching of a domestic violence order – where domestic violence order later revoked – whether domestic violence order void – whether terms of ouster order were authorised by the *Domestic and Family Violence Protection Act* 1989 (Qld) EVIDENCE – ADMISSIBILITY AND RELEVANCY – IN GENERAL – OTHER CASES – where applicant contends that a copy of the domestic violence order was not complete – where affidavits and submissions filed after hearing – whether evidence tendered after hearing admissible *Crimes Act* 1914 (Cth), s 23F *Domestic and Family Violence Protection Act* 1989 (Qld), s 25, s 25A, s 80(1)(b)

Police Powers and Responsibilities Act 2000 (Qld)

Pelechowski v Registrar, Court of Appeal (NSW) (1999) 198 CLR 435; [1999] HCA 19, cited

COUNSEL: The applicant appeared on her own behalf
D L Meredith for the respondent

SOLICITORS: The applicant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** The applicant has applied for leave to appeal under s 118 of the *District Court of Queensland Act* 1967 from a decision of a District Court judge dismissing the applicant's appeal against her conviction in the Magistrates Court of an offence under s 80(1)(b) of the *Domestic and Family Violence Protection Act* 1989. The offence was that on 20 February 2008 the applicant contravened a domestic violence order made on 12 February 2008, a copy of which order was served on the applicant. No penalty was imposed and no conviction was recorded.

[2] The domestic violence order named the "aggrieved" as HE, the applicant's daughter. The order included as condition 6 (an "ouster order") an order which required the applicant to vacate a residence at Redland Bay within 48 hours after service of the order upon her. There was a proviso that that the applicant was "to be allowed access to the said premises, ONLY in the company of a police officer, and at a time suitable to all parties, to collect [the applicant's] personal property…".

[3] It was common ground at the trial in the Magistrates Court that the domestic violence order was revoked on 26 February 2008, six days after the date upon which the applicant was found to have breached the order. It was not in dispute that the applicant had not vacated the residence. Sergeant Hedges gave evidence for the prosecution that when he attended the Redland Bay premises on 20 February 2008 he found that the applicant was present. The applicant gave evidence that she was at the residence on 20 February when the police arrived and she agreed in cross-examination that she had not moved out of the residence between 12 and 20 February 2008. The applicant maintained that she had no reason to move out because she had not been served with the domestic violence order and that she was given that document only when she was charged on 22 February 2008. She also gave evidence that she had been told by a Federal Magistrate at a hearing well before 20 February 2008 that she should be at the Redland Bay residence to look after her children. The applicant's ex-husband referred to some orders made by the Federal Magistrate that the Australian Federal Police were to recover the applicant's children and return them to the Redland Bay residence. He also said that the Federal Magistrate said words to the effect that the applicant should be there for the children. However, the applicant acknowledged in her evidence that nothing to that effect was contained in any order by the Federal Magistrate.

[4] One issue at the trial was whether, as the prosecution alleged, the applicant was served with the order on 12 February 2008. The prosecution tendered a copy of the domestic violence order which included an endorsement stating that on 12 February 2008 the order was explained to the applicant and she understood its purpose, terms and effect. Underneath that acknowledgement appeared the text "This is inconsistent with the Commonwealth and this Court knows it can not be enforced

anywhere in Australia or NZ". The applicant admitted that this was her handwriting. There was also an attached oath of service by the Registrar of the Cleveland Magistrates Court sworn on 12 February 2008 stating that he served the order upon the applicant by delivering a copy of it to her personally at the counter of the Court registry. The applicant accepted that she was at the Magistrates Court registry on 12 February 2008; she attended in response to the service upon her of the application for the order but arrived late, after the order was made. She denied that she had been served with the order. The applicant's husband gave evidence that on 12 February 2008 he was with the applicant at the Magistrates Court in Cleveland when the applicant filled in some paperwork and showed it to the Registrar. Under cross-examination, the applicant's husband said that the applicant then filled in an order to revoke or vary a domestic violence order which was given to her by the Registrar at that time.

[5] The Magistrate referred to that evidence and found that the domestic violence order had been duly served upon the applicant. The District Court judge found that there was no merit in the applicant's ground of appeal concerning service. The applicant's argument that there was an error in that finding cannot be accepted. The evidence that she was served with the order was strong.

[6] The judge also rejected a contention by the applicant that Sergeant Hedges had lied in evidence he gave concerning a police notebook which he reported to be lost. The judge found that there was nothing to support that contention and, in any event, the Magistrate formed her decision primarily upon the applicant's own admissions and the evidence of her husband. In relation to the applicant's argument that the police officer's failure to caution her contravened the *Police Powers and Responsibilities Act* 2000, the judge concluded that a caution was not required because the offence was not an indictable offence and, in any event, the Magistrate's conclusions were based primarily on the applicant's own evidence and that of her husband. The judge also found that it was open to the Magistrate not to accept the applicant's evidence that a Federal Magistrate had told her to remain in occupation, and that even if that had occurred it would not have provided the applicant with a defence to the charge.

[7] The grounds of the applicant's application for leave to appeal in this Court essentially replicate the arguments she advanced in the District Court. Those grounds were unsustainable for the reasons given by the District Court judge.

[8] It is appropriate at this point to mention three matters. First, the applicant's reliance upon s 23F of the *Crimes Act* 1914 (Cth) for her contention that she should have been cautioned before being arrested was based upon a misunderstanding that the Act applied in relation to simple offences against State law. Secondly, the applicant contended that the District Court judge had private communications with a prosecution clerk before the completion of the District Court proceedings on 27 April 2012. It emerged in her oral argument that she was referring to the publication in open court of the judge's decision on 27 April 2012. In discussions at the end of the hearing the judge had foreshadowed that he might deliver the judgment that afternoon when, as the applicant mentioned, she might be in transit to her home in New South Wales. The applicant's contention that there was a private communication between the judge and the prosecution clerk was misconceived.

[9] The third matter concerns the applicant's argument that the domestic violence order was void because it was set aside on 26 February 2008 by further orders made in the

Magistrates Court. The judge found that the orders were set aside because, contrary to an apprehension upon which they were made, the children whom the orders were designed to protect were not residing at the Redland Bay premises at the material times and there were no relevant safety concerns about them. The judge concluded that the Magistrate correctly found that the setting aside of the orders did not render them of no force and effect at the time when the applicant earlier breached the orders. That conclusion was plainly correct.

[10] At the hearing of the application in this Court the applicant handed to the Court what she submitted was a copy of the original application for the domestic violence order. The Court looked at the application but declined to admit it in evidence. There was no evidence that it was the original application, rather than a photocopy of parts of it. The Court raised a question though whether the terms of the ouster order in condition 6 of the domestic violence order were authorised by the empowering legislation. If not, it might be contended that that the ouster order was void on the ground that it was not within the jurisdiction of the Magistrate to make it and that the applicant had been free to ignore that condition with impunity: see *Pelechowski v Registrar, Court of Appeal*.[1] The applicant did not articulate that or any similar argument in her application for leave to appeal or otherwise, but the Court thought it appropriate to seek submissions on the point in view of the applicant's unrepresented status. The respondent did not oppose that course.

[11] The respondent subsequently lodged a short supplementary submission which referred to the relevant provisions of the *Domestic and Family Violence Protection Act* 1989 and submitted that the domestic violence order of 12 February 2008 was made within jurisdiction. One submission which proved to be contentious was that the copy of the domestic violence order application which the applicant had sought to tender was not a complete copy. The respondent filed an affidavit by Mr Patty, an employee in the Office of the Director of Public Prosecutions, which annexed a certified copy of the original domestic violence order application, comprising 16 pages. The pages in the respondent's certified copy which were not included in the applicant's copy included a page headed "Urgent Temporary Protection Order" which included notification of the application by the applicant's daughter for the ouster order.

[12] In reply, the applicant submitted that the certified copy had been "illegally given" [2] to Mr Patty. She filed an affidavit in which she deposed that Exhibit "A" to her affidavit (a copy of nine pages of the domestic violence order application) was "the copy of the Domestic Violence Order of [the applicant's daughter] of the 6th February 2008, which was handed to me that day by [the Registrar of the Magistrates Court at Cleveland]". That statement is not easy to reconcile with the evidence the applicant gave in the Magistrates Court on 30 August 2011 that "I knew nothing of any child protection order application by my daughter until the 20th of - of February and basically, when the police arrived at my home …"[3]

[13] Nothing in the applicant's affidavit or submissions discloses any substantial ground for thinking that the certified copy application exhibited to the affidavit of Mr Patty is not a true copy of the application which was before the Magistrate who made the domestic violence order. I note also that the domestic violence order contained the

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1 (1999) 198 CLR 435 at [27], [71].

2 Applicant's reply to further submissions of the respondent dated 7 November 2012.

3 Record Book 79.

ouster order, including the same residential address of the Redland Bay house, which was set out in the page of the certified copy application but which was not included in the copy supplied by the applicant.

[14] However it is not appropriate to admit the evidence which either party sought to tender after the hearing. A certified copy of the protection order was duly admitted in evidence in the prosecution case against the applicant. In the applicant's evidence in her own defence in those proceedings she commenced by referring to her daughter's application for a domestic violence order against her but she did not refer to the terms of her daughter's application or seek to tender it in evidence. She did tender a letter from the Registrar of the Magistrates Court at Cleveland which referred to the order setting aside the original domestic violence order made on 12 February 2008 and she relied upon that second order for a contention that the original order could not form the basis of a charge. No question whether the application for the domestic violence order included an application for the ouster order was litigated in the proceedings for breach of the domestic violence order against the applicant. The applicant did not submit in those proceedings that any aspect of the order was not within the jurisdiction of the Magistrate who made it. The Court should not now embark upon an attempt to adjudicate upon the dispute which has arisen for the first time upon the affidavits and submissions filed after the hearing of the application in this Court.

[15] In the applicant's supplementary submissions she also argued that the ouster order was wrongly made for a different reason. Section 25 of the *Domestic and Family Violence Protection Act* 1989 empowers a court to make an order that includes an ouster order under s 25(3)(b) prohibiting the applicant from remaining at, entering or attempting to enter, or approaching within a stated distance of, stated premises. As I have mentioned, condition 6 of the protection order made on 12 February 2008 was such an ouster order. Section 25A of the *Domestic and Family Violence Protection Act* 1989 applied if a court made an order under s 25 that includes an ouster order: s 25A(1). The applicant relied upon s 25A(3) and (4):

> "(3) In imposing the ouster condition, the court must consider including in the order another condition allowing the respondent—
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> (a) if the respondent is no longer at the premises—to return to the premises to recover stated property; or
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> (b) if the respondent is at the premises—to remain at the premises to remove stated property.
>
> (4) For another condition under subsection (3), the court must state in the order—
>
> (a) if the respondent is present in court when the order is made—
>
> (i) the time at which, without breaching the order, the respondent may return to the premises and then must leave the premises; or
>
> (ii) for how long the respondent may, without breaching the order, continue to remain at the premises; or

(b) if the respondent is not present in court when the order is made—

(i) the time at which, without breaching the order; the respondent may return to the premises and must leave the premises based on the time of service of the order on the respondent; or

(ii) for how long the respondent may, without breaching the order, remain at the premises based on the time of service of the order on the respondent.

Example for paragraph (b)(i) —
The respondent may, without breaching this order, return to the premises at noon on the day after the day this order is served on the respondent by a police officer. If the respondent chooses to return to the premises under the order, the respondent must leave the premises no later than 2p.m. on the same day."

[16] The applicant submitted that the Magistrate who made the domestic violence order did not comply with s 25A(3)(a) and s 25A(4)(b)(i). Plainly enough there was no contravention of s 25A(3). Condition 6 itself demonstrates that the Magistrate did consider including "another condition allowing the respondent … to return to the premises to recover stated property …". The provision in condition 6 that "[the applicant] is to be allowed access to the said premises, ONLY in the company of a police officer, and at a time suitable to all parties, to collect [the applicant's] personal property (namely personal property.)" is "another condition under subsection (3)" within the meaning of the introductory words in s 25A(4).

[17] It is arguable, I accept, that that condition did not comply with the requirement in s 25A(4)(b)(i). The reference in the condition to the respondent being "allowed access to the said premises" sufficiently conveyed that she could return to the premises "without breaching the order", but it is arguable that the provision that she was allowed access to the premises "at a time suitable to all parties" did not comply with the requirement that the court state in the order "the time at which … the respondent may return to the premises and must leave the premises based on the time of service of the order on the respondent …". But if there was a non-compliance in that respect, it would not invalidate the ouster order itself. Section 25A(4) does not prescribe conditions which must be stated in an ouster order. Rather, it prescribes matters which must be stated in "another condition under subsection (3)". The court making an ouster order is not obliged to include "another condition". That is clear from the introductory words in s 25A, the obligation being only that the court "must consider including … another condition". The applicant's argument that there was a non-compliance with s 25A does not justify a conclusion that the ouster order itself was not authorised by the legislation such that it was outside the Magistrate's jurisdiction to make it. The applicant was obliged to comply with that order until it was set aside.

[18] The applicant also submitted that there was a contravention of s 25(6):

"(6) The court may also consider—

(a) the accommodation needs of all persons affected by the proceedings; and
(b) the order's effect on a child of the aggrieved; and
(c) existing orders relating to guardianship or custody of, or access to, a child of the aggrieved.

[19] Those are necessarily important factors to be considered, where relevant, when a court is making a domestic violence order. It is clear, however, that these are discretionary considerations. There is no reason to think that they were not considered by the Magistrate. In any event, there is no reason to think that the domestic violence order was made without jurisdiction such that it was void at the time when the applicant was found to have contravened it.

[20] After the hearing the applicant filed an application for a directions hearing. The application sought to have various persons "brought before the court for contempt of court", including counsel who appeared for the respondent and Mr Patty, and directions about further submissions and further hearings. The application was filed on the premise that leave should be granted for the applicant to adduce further evidence, including her affidavit filed on 4 November 2012. That leave should not be granted. The application for directions should be dismissed.

Proposed orders

[21] The application for leave to appeal should be refused. The applicant's application for a directions hearing should also be refused. I would not make any order for costs.

[22] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[23] **DAUBNEY J:** I respectfully agree with Fraser JA.