DISTRICT COURT OF QUEENSLAND

CITATION:	*MS v Commissioner of Police* [2020] QDC 51
PARTIES:	**MS** (appellant) **v** **COMMISSIONER OF POLICE** (respondent)
FILE NO/S:	1977/18
DIVISION:	Criminal
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Brisbane
DELIVERED ON:	1 April 2020
DELIVERED AT:	District Court, Brisbane
HEARING DATE:	13 March 2020
JUDGE:	Dearden DCJ
ORDER:	**1. Appeal dismissed**
CATCHWORDS:	APPEAL – where the appellant was convicted of one charge of contravention of a domestic violence order after a trial – whether the Magistrate did not properly consider extraordinary emergency under s.25 of the *Criminal Code* or whether the attempted communication was regarding an emergency involving a child – whether the Magistrate did not properly consider mistake of fact under s.24 of the *Criminal Code* – whether the Magistrate did not properly consider intention – motive under s.23 of the *Criminal Code* – whether the Magistrate did not properly consider the defence of ignorance of law under s.22 of the *Criminal Code* – whether the Magistrate did not properly consider whether the temporary protection order under state legislation was inconsistent with the Family Court orders made under Commonwealth legislation – whether the Magistrate did not properly consider whether the attempted communication was for "parental responsibility" – whether the Magistrate did not properly consider that the defendant had acted in a reasonable way given the circumstances
LEGISLATION:	*Bail Act 1980* (Qld) *Criminal Code Act 1995* (Cth) *Criminal Code Act 1899* (Qld)

	Domestic and Family Violence Protection Act 2012 (Qld)
	Justices Act 1886 (Qld)
CASES:	*Forrest v Commissioner of Police* [2017] QCA 132
	Laner v Dorrington (1993) 19 MVR 75, 79
	McDonald v Queensland Police Service [2017] QCA 255
	McHenry v Stewart (WASC, No.140/1976, 14 December 1976, unreported)
	R v Webb [1986] 2 Qd R 446
	Stingel v The Queen (1990) 171 CLR 312
	Zecevic v Director of Public Prosecutions (1987) 162 CLR 645
COUNSEL:	Appellant in person
	MA Gawrych for the respondent
SOLICITORS:	Appellant in person
	Director of Public Prosecution for the respondent

[1] The appellant, MS was convicted of one charge of contravention of a domestic violence order (aggravated offence) pursuant to s.177(2)(a) of the *Domestic and Family Violence Protection Act 2012* (Qld) (*DFVPA*), after a trial in the Brisbane Magistrates Court on 23 March 2018. The appellant was sentenced on 18 December 2018 and (relevantly in respect of this matter) was sentenced to six months imprisonment, wholly suspended, with an operational period of two years.

The law – appeals

[2] *Justices Act* s.222(1) provides:

> "**222 Appeal to a single judge**
> (1) If a person feels aggrieved as complainant, defendant or otherwise by an order made by justices or a justice in a summary way on a complaint for an offence or breach of duty, the person may appeal within 1 month after the date of the order to a District Court judge.

[3] *Justices Act* s.223 provides:

> "**223 Appeal generally a rehearing on the evidence**
> (1) An appeal under section 222 is by way of rehearing on the evidence (*original evidence*) given in the proceeding before the justices.
> (2) However, the District Court may give leave to adduce fresh, additional or substituted evidence (*new evidence*) if the court is satisfied there are special grounds for giving leave.

(3) If the court gives leave under subsection (2), the appeal is—
(a) by way of rehearing on the original evidence; and
(b) on the new evidence adduced."

[4] In *McDonald v Queensland Police Service* [2017] QCA 255, Bowskill J stated:

> "It is well established that, on an appeal under [*Justices Act*] s.222 by way of rehearing, the District Court is required to conduct a real review of the trial, and the Magistrate's reasons, and make its own determination of relevant facts in issue from the evidence, giving due deference and attaching a good deal of weight to the Magistrate's view. Nevertheless, in order to succeed on such an appeal, the appellant must establish some legal, factual or discretionary error." [citations deleted].[1]

[5] In *Forrest v Commissioner of Police* [2017] QCA 132, Sofronoff P stated:

> "… an appellate court hearing an appeal by way of rehearing must conduct a real review of the evidence and make up its own mind about the case."[2]

Grounds of appeal

[6] The appellant's grounds of appeal have been helpfully distilled by the respondent at paragraph 4.1(i)-(vii) of the Respondent's Outline of Submissions[3] as follows:

(i) the Magistrate did not properly consider extraordinary emergency under s.25 of the *Criminal Code* (Qld) or whether the attempted communication was regarding an emergency involving the child;

(ii) the Magistrate did not properly consider mistake of fact under s.24 of the *Criminal Code* (Qld);

(iii) the Magistrate did not properly consider intention – motive under s.23 of the *Criminal Code* (Qld);

(iv) the Magistrate did not properly consider the defence of ignorance of the law – under s.22 of the *Criminal Code* (Qld);

(v) the Magistrate did not properly consider whether the temporary protection order made under state legislation was inconsistent with the Family Court orders made under Commonwealth legislation;

(vi) the Magistrate did not properly consider whether the attempted communication was for "parental responsibility"; and

(vii) the Magistrate did not properly consider that the defendant had acted in a reasonable way given the circumstances.

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1 *McDonald v Queensland Police Service* [2017] QCA 255, [47].
2 *Forrest v Commissioner of Police* [2017] QCA 132 per Sofronoff P at p. 5.
3 Document #6.

[7] The appellant at the hearing of this appeal confirmed on the record that the grounds of appeal as summarised by the respondent accurately reflect all aspects of the appeal that he sought to agitate on the appeal hearing.[4]

[8] The factual circumstances of the charge subject of this appeal are helpfully set out in the Respondent's Outline of Submissions[5] at paragraphs 2.1 – 2.4 as follows:

> "2.1 On 5 September 2017 a temporary variation of a protection order was made in the Magistrates Court at Brisbane. The appellant was present in court. The appellant was named as the respondent and the appellant's ex-partner AW was named as the aggrieved. The order set out a number of conditions. The conditions relevant to the breach are:
>
> ***Condition 4***
>
> *The respondent is prohibited from contacting or attempting to contact or asking someone else to contact the aggrieved.*
>
> *This condition does not apply to the extent that is necessary for the respondent to appear personally before a court or tribunal.*
>
> *This condition does not apply to the extent that it is necessary for the parties to attend an agreed conference, counselling or mediation session.*
>
> ***Condition 6***
>
> *The respondent is prohibited from making telephone calls or sending text messages or emails to the aggrieved.*
>
> *The respondent may without contravening this order make such contact for purposes directly related to parental and contact issues concerning the child/ren but then only as set out in writing between the parties, in compliance with an order of a court or in emergency circumstances.*
>
> 2.2 On 8 September 2017 the appellant, attempted to send an email to the aggrieved and her solicitor by typing the solicitor's email address and a address into the address line and pressing send.
>
> 2.3 The content of that email (Exhibit 8) is as follows:
> *"Barton. You're fucked too see below plus I'll be submitting the evidence of your breach of s. 121".*
>
> 2.4 Beneath that email, included in the same email chain was another email the appellant had sent to another solicitor:

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4 Appeal Transcript 1-3 – 1-4.

5 Document #6.

> *"My son's cunt of a mother needs to know I have been diagnosed with OCD personality disorder so Cam can be monitored in case he has it. I'll be seeing you cunts in court soon for a recovery order. I got the disclosure of the firearms and snake shooting report I deliberately went to jail to get as evidence. Gonna fucking destroy everyone of you cunts for allowing my beautiful little boy to be alienated. You knew those cunts were committing perjury all along cunt. Cam's Daddy."*

[9] The respondent also helpfully summarised the details of the Magistrates Court hearing at paragraphs 3.1 – 3.10 of the Respondent's Outline of Submissions[6] as follows:

> "3.1 The hearing initially involved three charges:
>
> Charge 1: Contravention of the domestic violence order aggravated offence) under s. 177(2)(a) of the *Domestic and Family Violence Protection Act* 2012.
>
> Charge 2: Using carriage service to menace, harass or cause offence under s 474.17(1) *Criminal Code (Cth)*.
>
> Charge 3: Breach of bail condition under s 29 of the *Bail Act* 1980.
>
> 3.2 At the conclusion of the prosecution's case the defendant made a submission there was no case to answer in relation to all charges [Trial transcript 23/3/2018, p. 1-72]. After hearing submissions of the appellant and the prosecutor, the learned magistrate found there was no case to answer in relation to charges 2 and 3. The summary of evidence will be limited to the charge the appellant was convicted of.
>
> 3.3. During the hearing the appellant made an admission that he was the sender of the relevant emails [Trial transcript 23/3/2018 p. 1-23].
>
> 3.4 Two email chains were tendered through the aggrieved, as Exhibit 8. She gave evidence that she did not receive the email from the appellant but that it was forwarded to her by her solicitor. She gave evidence "they (Exhibit 8) looked to be emails that were forwarded to me by my lawyer, of which were attempted to be sent me because I can see my email address on there." [Trial transcript 23/3/2018 p. 1-47].
>
> 3.5 The aggrieved did not give evidence about why the email did not reach her but its inferred that [the] email address is no longer in use. The prosecutor later incorrectly stated that

[6] Document #6.

the email address the appellant had used had never belonged to the aggrieved. [Trial transcript 23/3/2018 p. 1-81]. However, a review of the affidavit from the Family Court proceedings that was tendered as Exhibit [10] shows that the appellant had previously used that email address to effectively contact the aggrieved at some point in time.

3.6 In any event, the email address contained parts of the aggrieved's name, the appellant did not challenge that he had attempted to contact her [Trial transcript 23/3/2018 p.1-51] by using the email address and the submissions of the appellant regarding the communication being one of parental responsibility and emergency involving the child support that he did attempt to contact the aggrieved.

3.7 In relation to the no case submission for this charge the appellant made the following submissions [Trial transcript 23/3/2018 pp. 1-61 – 1-64].

(a) the Family Court orders required him to communicate with the aggrieved regarding matters, parental responsibility and if there was any dispute about that s.68Q of the *Family Law Act* 1975 (CDH) validated the family law orders;

(b) the communication was in relation to mental health [issues] that may affect their son;

(c) he had not asked the solicitor to forward the communication on [in relation to the second email the prosecution relied on];

(d) the prosecution had not proven [to] the requisite standard that he had the motive to do anything other than act in accordance with the Family Court orders. [Trial transcript 23/3/2018 p. 1-64];

(e) the appellant was acting in accordance with his duty under s 286 of the *Criminal Code*.

3.8 The Magistrate found there was a case to answer in relation to Charge 1 and discharged the defendant on the other charges. The prosecutor and the appellant gave closing addresses and the Magistrate reserved his decision.

3.9 On 24 May 2018 the learned Magistrate gave his decision. He found that the attempted communication was in breach of Condition 4 and that none of the exemptions provided for by the temporary protection order of the Family Court orders afforded the appellant an exemption.

3.10 The learned Magistrate found that the defendant's belief that "it was an emergency to inform the complainant aggrieved of his medical position" was "without proper foundation" and the "analysis of the attempted contact does not enliven the emergency exceptions to condition 6, nor to paragraph 18 of the Family Law Act exception." [Trial transcript, 24/5/2018 pp. 1-3 1-4].

Elements of the offence

[10] The appellant was charged as follows:

"That on the 8th day of September 2017 at Caboolture in the state of Queensland one MS being a respondent against whom a domestic violence order had been made contravened the order namely a Temporary Protection Order made on 5th day of September 2017 in the Magistrates Court at Brisbane and MS was present in court when the order was made."

[11] The elements of the offence which must be proved by the prosecution, beyond reasonable doubt[7] are as follows:

(1) A domestic violence order has been made against the defendant named as respondent in the order; and

(2) The defendant –

1. was present in court when the order was made; or

2. has been served with a copy of the order; or

3. has been told by a police officer about the existence of the order and the respondent has been told about the condition that it is alleged the defendant contravened; and

(3) The defendant contravened that order.

[12] Trial Exhibit 7 is a copy of an order titled "Temporary Variation of A Protection Order". On its face, it names the respondent as "MS"; the aggrieved as "AW"; was made on "05/09/2019"; at the "Magistrates Court"; at "Brisbane"; contains a notation "The respondent was present in Court when this order was made"; and is signed by a magistrate and dated "05/09/2017".[8]

Discussion

[13] The relevant "domestic violence order" is the Temporary Variation of A Protection Order made at the Brisbane Magistrates Court on 5 September, 2017.[9] The first element is satisfied beyond reasonable doubt.

[14] Trial Exhibit 7, on its face, notes that "The respondent [MS] was present in court when this order was made." On the face of it, subject to the discussion below, this element is satisfied beyond reasonable doubt.

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7 Further Outline of Argument of the Appellant accurately summarises the applicable criminal law on the burden of proof and standard of proof.

8 Trial Exhibit 7.

9 Ibid.

[15] The word 'contravene' is not defined in the *DFVPA*. It is defined in the Macquarie Dictionary as follows:

> "1. To come or be in conflict with; go or act counter to; oppose.
>
> 2. To violate, infringe or transgress: "to contravene the law".

[16] "Violate" relevantly means:

> "1. to break, infringe or transgress (a law, rule, agreement, promise, instructions, etc)".

[17] "Infringe" relevantly means:

> "1. to commit a breach or infraction of; violate or transgress".

[18] "Transgress" relevantly means:

> "2. to go beyond the limits imposed by (a law, command, etc); violate; infringe; break".

[19] Synthesising those various definitions, it is clear that to 'contravene' an order is to 'be in conflict with', or 'go counter to' or breach the order – in other words, to do an act or make an omission contrary to or in conflict with the relevant provisions of the order.

[20] In respect of the element that the appellant was present in court when the temporary protection order was made, I sought and received further written submissions from the appellant and respondent.

[21] The respondent submits as follows:

> " 2.1 The respondent submits that the sealed Temporary Protection Order which was tendered and marked as exhibit 7 in the summary trial, was sufficient evidence to satisfy the learned Magistrate of this element.
>
> 2.2 At the bottom of that order, it is stated "The respondent was present in court when this order was made".
>
> 2.3 The order was made pursuant to sections 48 and 91 of *the Domestic and Family Violence Protection Act* 2012. Section 48 provides the power to make a Temporary Protection Order and section 91 provides for the variation of a domestic violence order. Section 99 of the act provides:
>
> (1) If a court varies a domestic violence order, the varied order takes effect-
>
> a. If the respondent is present in court when the court varies the order – when the court varies the order; or if the respondent is not present in court when the court varies the order, on the earliest of the following-
>
> (i) When the respondent is served with a copy of the varied order;

(ii) When the varied order otherwise becomes enforceable under section 177.

2.4 The appellant's presence in court determined when the order took effect. The Magistrate made the order with the intention that it started immediately hence which is why it was necessary such a fact was included in part of an order. The order contained proof therein of the defendant's presence in court to give effect to the order as such was a condition of it being made in the circumstances in which it was.

2.5 The tendered Temporary Protection Order had been sealed by the court and it was admissible under s53(1)(a)(d)(f) of the *Evidence Act 1977* as proof of the judicial proceedings."[10]

[22] As previously noted, the respondent accurately identifies the notation on Trial Exhibit 7 which reflects the appellant's presence in court when the order was made on 5 September, 2017. The appellant does not, in his Addendum Outline, dispute that he was present when the order was made.[11]

[23] The respondent accurately identifies the power to make and vary a Temporary Protection Order pursuant to DFVPA ss.48 and 91. The order made on 5 September 2017 came into effect when the court varied the order (DFVPA s.99(1)).

[24] Finally, I am satisfied on examination of Trial Exhibit 7 that it is a document "sealed with the seal of the court" and is therefore admissible pursuant to *Evidence Act* s53(1)(a) – "other order" and s.53(1)(f) "a document purporting to be a copy of the order … sealed with the seal of the court."

[25] It follows that all of the elements of the offence have been made out by admissible evidence in the trial before the learned magistrate, subject to the various matters identified in the appellant's grounds of appeal, canvassed below.

Grounds of appeal

1. The Magistrate did not properly consider s.25 of the Criminal Code, extraordinary emergency, or whether the attempted communication was regarding an emergency involving the child

[26] *Criminal Code* s.25 provides:

> "**25 Extraordinary emergencies**
> Subject to the express provisions of this Code relating to acts done upon compulsion or provocation or in self-defence, a person is not criminally responsible for an act or omission done or made under such circumstances of sudden or extraordinary emergency that an ordinary person possessing ordinary power of self-control could not reasonably be expected to act otherwise."

[27] In the alternative to *Criminal Code* s.25, the appellant submits that the email falls within the exception to Condition 6 of the temporary protection order which

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10 Addendum Outline of Submissions on behalf of the Respondent paras 2.1 – 2.5.

11 Further Outline of Argument of the Appellant.

prohibits the appellant from sending "emails to the aggrieved", but permitting an exception "in emergency circumstances".[12]

[28] In *R v Webb* [1986] 2 Qd R 446, 449, the Court of Appeal, in respect of *Criminal Code* s.25 noted that "the existence of the emergency could either be factual or the product of an honest and reasonable, but mistaken, belief".

[29] The appellant has an evidential onus in respect of *Criminal Code* s.25, but the onus of excluding the operation of the excuse is on the prosecution.[13]

[30] The appellant elected not to give or call evidence at the trial.[14]

[31] In cross-examination AW was asked:

> *"Q. The email that your solicitor forwarded to you was an email to inform you that I had been diagnosed with an hereditary mental illness wasn't it? - - - I married you with an hereditary mental illness. I knew that you had OCD back in 2008.*
> *Q. I'm asking you what the email that the solicitor forwarded to you was about. It was about my recent diagnoses of OCD personality disorder, wasn't it? - - - That was part of the email.*
> *Q. And that's an issue of parental responsibility isn't it? - - - for you, it might be.*
> *Q. Well, don't you need to know? Have you - - - ? - - - I knew. I knew.*
> *Q. Did you know that I had OCD personality disorder? - - - OCD is a personality disorder is my understanding.*
> *Q. ... Did you know that – did you know – well, that email is specifically about a new diagnosis of a type of OCD, isn't it? - - - I don't know, then. I don't know. I'm not – I'm not a – I don't have a medical field. I don't know. All I know is the words you said – my understanding is that it was – you just told me what I already knew.*
> *Q. Well - - - ? - - - That you have OCD.*
> *Q. Well my submission to – yes OCD, but there are forms of OCD? - - - Ok.*
> *Q. And I've been diagnosed – recently diagnosed with OCD personality disorder, which you have adverted to as a type of OCD disorder in previous submissions to the court haven't you? - - - I can't recall.*
> *Q. Ok. But, anyway – ok. So I emailed you about a diagnosis of an hereditary condition that may affect our son Cameron, is that right? - - - I'm not – I'm not – It's not for me to say that it would affect our son.*
> *Q. Ok? - - - You just notified me of it. Yes"*[15]

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12 Document #3, Outline of Argument of the Appellant p.3, para (h).
13 *Laner v Dorrington* (1993) 19 MVR 75, 79 citing *McHenry v Stewart* (WASC, No.140/1976, 14 December 1976, unreported).
14 T1-61, ll 28-31; T1-73, ll 25-28.
15 T1-50, l 25 – 1-51, l 11.

[32] In my view, the appellant has not satisfied the evidentiary onus sufficient to raise "circumstances of sudden or extraordinary emergency" and accordingly, there was no obligation on the prosecution to exclude s.25 beyond reasonable doubt. Alternatively, I find that the information contained in the email could not amount to "emergency circumstances" pursuant to Condition 6 of the temporary protection order issued 5 September 2017.

[33] The appellant's reliance on *Stingel v The Queen* (1990) 171 CLR 312 is of no assistance, as it is relevant to the defence of provocation, not extraordinary emergency.

[34] This ground of appeal fails.

2. The Magistrate did not properly consider s.24 the Criminal Code, mistake of fact

[35] The appellant submits that he was mistaken "about the facts on which I acted which were that the Family Court orders applied to my communication at 18 to Condition 6 of the DVO even if that belief is unreasonable but honestly held".[16]

[36] In the context of the defendant's admissions that he sent the relevant email,[17] the purported reliance on *Criminal Code* s.24 (mistake of fact) is misconceived. The appellant's submission is in fact a claim of ignorance of the law (*Criminal Code* s.22) and "does not afford any excuse"[18] for his act of sending the relevant email. This ground of appeal must fail.

3. The Magistrate did not properly consider s.23 of the Criminal Code, intention - motive

[37] *Criminal Code* s.23(1) provides:

> **"23 Intention—motive**
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
> (a) an act or omission that occurs independently of the exercise of the person's will; or
> (b) an event that—
> (i) the person does not intend or foresee as a possible consequence; and
> (ii) an ordinary person would not reasonably foresee as a possible consequence.

[38] The applicant has admitted sending the email in question[19], and any submission on his behalf that he was acting pursuant to a belief that sending the email was not an offence cannot be sustained, given particularly the provisions of *Criminal Code* s.22.

[39] This ground of appeal therefore fails.

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16 Document #3 – Outline of Argument of the Applicant/Appellant, p.3, para (h).
17 Trial transcript 23/3/2018 p 1-51 ll 8-9; p 1-64 ll 9-14 p 1-86 ll 10-24.
18 *Criminal Code* s.22(1).
19 Trial transcript 23/3/2018 p 1-51 ll 8-9; p 1-64 ll 9-14 p 1-86 ll 10-24.

4. The Magistrate did not properly consider s.22 of the Criminal Code, ignorance of the law

[40] The appellant submits that the conditions of the temporary protection order were not defined by statute and accordingly he has a defence pursuant to *Criminal Code* s.22.

[41] *Criminal Code* s.22(3) provides:

> "22(3) A person is not criminally responsible for an act or omission done or made in contravention of a statutory instrument if, at the time of doing or making it, the statutory instrument was not known to the person and had not been published or otherwise reasonably made available or known to the public or those persons likely to be affected by it."

[42] The offence provision of the *DFVPA* provides:

> "177 **Contravention of domestic violence order**
> (1) This section applies if a respondent against whom a domestic violence order has been made—
> (a) was present in court when the order was made; or
> (b) has been served with a copy of the order; or
> (c) has been told by a police officer about the existence of the order.
> (2) The respondent must not contravene the order.
> Maximum penalty—
> (a) if, within 5 years before the commission of an offence against this subsection, the respondent has been previously convicted of a domestic violence offence—240 penalty units or 5 years imprisonment; or
> (b) otherwise—120 penalty units or 3 years imprisonment.
> (3) For subsection (1)(c), the respondent may be told by a police officer about the existence of an order in any way, including, for example, by telephone, email, SMS message, a social networking site or other electronic means.
> (4) However, a court may not find a respondent contravened an order merely because a police officer told the respondent about the existence of the order, unless the court is satisfied the police officer told the respondent about the condition that it is alleged the respondent contravened.
> (5) The prosecution bears the onus of proving, beyond a reasonable doubt, that the respondent has been told by a police officer about the existence of an order, or a condition of an order.
> (6) It is not a defence in proceedings for an offence involving a recognised interstate order that a person did not know—
> (a) it is an offence to contravene the recognised interstate order in Queensland; or
> (b) the recognised interstate order could be varied in Queensland; or

(c) if the recognised interstate order is a registered New Zealand order—that the New Zealand order could be registered or varied in Queensland."

[43] The temporary variation of the protection order was made in the Magistrates Court at Brisbane on 5 September 2017 and the appellant was present in court[20] when that order was made and commits an offence if the order in contravened.[21]

[44] The relevant "statutory instrument" is the *DFVPA*.[22]

[45] In the circumstances, this defence is not available to the appellant, and this ground of appeal must fail.

5. The Magistrate did not properly consider whether the temporary protection order made under State legislation was inconsistent with the Family Court orders made under Commonwealth legislation and whether it was therefore invalid

[46] The appellant submits that the temporary protection order (made pursuant to the *DFVPA*) and the Family Court orders (made pursuant to the *Family Law Act 1975* (Cth)) are inconsistent.

[47] *Family Law Act* s.68Q provides:

"**FAMILY LAW ACT 1975 - SECT 68Q**
Relationship of order or injunction made under this Act with existing inconsistent family violence order

(1) To the extent to which:
   (a) an order or injunction mentioned in paragraph 68P(1)(a) is made or granted that provides for a child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with a child; and
   (b) the order or injunction is inconsistent with an existing family violence order; the family violence order is invalid.

(2) An application for a declaration that the order or injunction is inconsistent with the family violence order may be made, to a court that has jurisdiction under this Part, by:
   (a) the applicant or respondent in the proceedings for the order or injunction mentioned in paragraph 68P(1)(a); or
   (b) the person against whom the family violence order is directed (if that person is not the applicant or respondent); or
   (c) the person protected by the family violence order (if that person is not the applicant or respondent).

(3) The court must hear and determine the application and make such declarations as it considers appropriate."

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20 Trial Exhibit 7.

21 *Domestic and Family Violence Protection Act 2012* (Qld) s. 177 (1) (a), s. 177 (2).

22 Published in the Queensland Government Gazette on 24 February 2012 – Vol. 359, GN 51, 24/2/2012, p.404.

The appellant then argues that s.109 of the Constitution (Cth) applies submitting that the temporary protection order and the Family Court order were inconsistent.

[48] Section 109 of the Commonwealth Constitution provides:

> **"Inconsistency of laws**
> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."

[49] The difficulty for the appellant in respect of this submission is that the temporary protection order made on 5 September 2017 contains an exception that the respondent could "make telephone calls, send text messages or emails to the aggrieved for purposes directly related to the parental and contact issues concerning the child/ren but then only as set out in writing between the parties, in compliance with an order of the court or in emergency circumstances."[23]

[50] The exception contained in the temporary protection order appropriately made allowance for compliance with other court orders (including orders pursuant to the *Family Law Act)*, and accordingly there is no inconsistency pursuant to *Family Law Act* (Cth) s.68Q.

[51] The learned magistrate correctly identified that the orders made pursuant to the *Family Law Act* did not apply to the appellant's attempted communication.[24]

[52] This ground of appeal also fails.

6. The Magistrate did not properly consider whether the attempted communication was for "parental responsibility"

[53] The orders made pursuant to the *Family Law Act 1975* (Cth) at paragraph 18 reads:

> "Each party be restrained from communicating with the other party, save and except for the sole purpose of communication regarding parental responsibility and informing each other in the event of an emergency involving the child."[25]

[54] The email which the appellant sent does include a sentence which reads:

> "*My son's cunt of a mother needs to know I have been diagnosed with OCD personality disorder so Cam can be monitored in case he has it*",

whereas the rest of the email appears to be directed at the aggrieved's solicitors, but contains deeply offensive language about the aggrieved, and all of the communication was cc'd to the aggrieved (although not actually received by her).

[55] Clearly the email was not for the "*sole purpose of communication regarding parental responsibility*", given its contents. Accordingly this ground of appeal must fail.

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23 Trial Exhibit 7.
24 Decision p.4.
25 Trial Exhibit 8.

7. The Magistrate did not properly consider that the defendant had acted in a reasonable way given the circumstances

[56] The appellant submits based on the decision of *Zecevic v Director of Public Prosecutions (Vic)* 26 that:

> "It was open to the Magistrate to find on the balance of probabilities that a material condition existed about which [the appellant] acted in a reasonable way given the circumstances".[27]

[57] *Zecevic* relates to the issue of self-defence being left to a jury in a murder trial, and, with respect, has no applicability to the charge on which the appellant was convicted.

[58] This ground of appeal also fails.

Conclusion

[59] The learned magistrate was appropriately satisfied that the elements of the offence of contravening the temporary protection order made on 5 September 2017 had been established on the basis of the admissible evidence. The appellant has failed to make out any of his grounds of appeal. The learned magistrate has not fallen into error in the decision he delivered finding the appellant guilty. Accordingly the appeal should be dismissed.

Order

[60] Appeal dismissed.

[61] I will hear the parties on costs.

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26 (1987) 162 CLR 645.

27 Document #3 – (Outline of Argument of the applicant/appellant, p.5, para 5n).