

DISTRICT COURT OF QUEENSLAND

CITATION: *GJL v JW* [2023] QDC 36

PARTIES: **GJL**
(appellant)
v
JW
(respondent)

FILE NO: Appeal No 142 of 2022

DIVISION: Civil

PROCEEDING: Appeal

ORIGINATING COURT: Magistrates Court at Cairns

DELIVERED ON: 9 March 2023 *ex tempore*

DELIVERED AT: Cairns

HEARING DATE: 7 March 2023

JUDGE: Fantin DCJ

ORDER: **1. Leave to amend the notice of appeal by removing grounds 2, 3 and 4 is granted.**

2. Appeal allowed.

3. The order made at the Magistrates Court at Cairns on 26 October 2022 granting the respondent's application be set aside.

4. The application be remitted to the Magistrates Court at Cairns for rehearing, before a different Magistrate.

5. No order as to costs of the appeal.

CATCHWORDS: DOMESTIC AND FAMILY VIOLENCE LAW – APPEAL – PROTECTION ORDER – where the Magistrate made a protection order in favour of the respondent – where the appellant submits that the Magistrate failed to give sufficient reasons for the decision to grant the application for a protection order – whether the Magistrate erred in failing to make sufficient findings of fact and in failing to explain how they concluded that the requirements for making a protection order had been established

LEGISLATION: *Appeal Costs Fund Act 1973* (Qld) s 15(2)
Domestic and Family Violence Protection Act 2012 (Qld) s 37(1)(b), s 37(1)(c), s 164

CASES: *FLC v MRT* [2021] QDC 264
GKE v EUT [2014] QDC 248

COUNSEL: M Rawlings for the appellant.
P Haarsma (solicitor) for the respondent.

SOLICITORS: Fisher Dore Lawyers for the appellant.
E&H Law for the respondent.

- [1] On the 26th of October 2022, following a trial, Magistrate Coates made a protection order in favour of the respondent JW and against the appellant GJL. The order contained the mandatory conditions as well as a number of special conditions. They included: that GJL not approach within 100 metres of where the aggrieved lives; that he not contact or attempt to contact her except in certain limited circumstances relating to having contact with their child; that he not follow or approach within 100 metres of the aggrieved except in certain limited circumstances; and that he surrender certain weapons.
- [2] GJL appeals pursuant to s 164 of the *Domestic and Family Violence Protection Act 2012* (Qld) ('the Act') against the making of the protection order.
- [3] The principles with respect to such an appeal are well settled and need not be repeated. The appeal is by way of rehearing on the record and subject to the limitations of an appellate court in that role.
- [4] GJL relied upon two grounds of appeal. Although there were other grounds identified in the notice of appeal, they were not ultimately relied upon at the hearing. Those two grounds may be summarised as follows. First, that the Magistrate erred in law by failing to give adequate reasons for her decision to grant the protection order. Second, that the Magistrate erred in applying the test, in failing to make findings of fact or to give an adequate explanation of her reasoning, for her conclusion that a protection order was necessary or desirable.
- [5] Both parties were legally represented in the Court below and on appeal. At the appeal hearing before me the solicitor for the respondent JW conceded that the appeal should be allowed for the reasons submitted by the appellant GJL, and joined in seeking the relief sought. Both parties sought orders to the effect that the appeal be allowed, the protection order set aside and the application remitted to the Magistrates Court at Cairns for rehearing by a different Magistrate, with no order as to the costs of the appeal.
- [6] I agree, for the following reasons.
- [7] In deciding the appeal the Court is confined to the evidence in the proceedings below. The evidence below consisted of the parties' respective affidavits and oral evidence given by them at the trial.
- [8] It was not in dispute that the relationship was a 'relevant relationship' under the Act. The parties began dating in about September 2019 and the respondent JW left the appellant GJL in June of 2022. It was in dispute, however, whether domestic violence had occurred. The parties had a daughter born in 2021. JW was the sole carer.

[9] In her affidavit the respondent JW deposed to nine separate allegations which it appears were relied upon as constituting domestic violence. They were alleged to have occurred over a period from January 2021 to June 2022. They included the following:

1. in January 2021 the appellant would threaten to kill himself and spoke to the respondent about the best place to hide a body;
2. in mid-April 2021 the appellant was said to have abused the respondent in front of her family, which continued after her family left. Her evidence was that she locked herself in the bedroom and the appellant smashed the door open and continued screaming in her face. This was said to have occurred when she was eight and a half months' pregnant;
3. in August 2021 the appellant is said to have picked up the baby and asked the respondent, 'How does it feel to have your child taken away?';
4. on 12 August 2021, the appellant is said to have put his hands around the respondent's neck and started to choke her;
5. also in August 2021, the appellant is said to have told the respondent that it may just be easier to kill his ex-wife and then collected a rifle and described how he would do so, and where he would hide the body;
6. on 10 September 2021 it was said that the appellant threatened to kill himself and was punching and headbutting walls;
7. on 26 March 2022 it was alleged that the parties were having an argument while driving to a storage facility where the appellant stored certain firearms;
8. on 4 June 2022 it was alleged that the respondent returned to the family home and found the appellant with a woman with whom he was having a casual relationship. When the respondent attempted to speak to the woman the appellant grabbed her arms and threw her to the ground, causing an injury to her finger; and
9. finally it was alleged that in June 2022 the respondent received a Facebook message from a person on the appellant's behalf regarding the appellant's proposal for division of property.

[10] On 23 June 2022 a temporary protection order was made against the appellant GJL. The respondent JW deposed to the harassment stopping once that order was granted.

[11] The appellant GJL also provided an affidavit in the proceeding in which he responded to each of the allegations made against him. In short, he denied that he had ever committed acts of domestic violence as defined against the respondent JW. With respect to the specific allegations:

1. he denied ever threatening to kill himself or telling the respondent where the best place to hide bodies was, but explained a conversation he said he had had with her about a matter involving a prisoner who had apparently hidden a body at a particular location;
2. with respect to the second incident, he confirmed there was an argument in mid-April 2021 but denied breaking through the door, or smashing or

breaking anything, or screaming at the respondent. He denied that there was any damage to the house;

3. he further denied picking up the child and making any threat in relation to a child in August 2021;
4. he denied being violent on 12 August 2021;
5. he denied threatening to kill his ex-wife and deposed that his firearms were always stored in a location in a gun safe;
6. he denied the incident alleged on 10 September 2021;
7. with respect to the incident in March 2022, he accepted that the pair were arguing but denied the description given by JW;
8. he deposed to an assault on him by the respondent JW on 1 May 2022 and that after that incident the relationship was over;
9. he referred to making an application for an apprehended violence order following the incident where the respondent JW came to the house and confronted him and the woman who was present;
10. he also referred to, and deposed to, making complaints to New South Wales Police and Queensland Police about the respondent JW;
11. he confirmed that he had asked a colleague to act as an intermediary in communications with JW with respect to property settlement issues; and
12. he also gave evidence relevant to the question of whether an order was necessary or desirable; specifically about his employment history, the fact that he was now living and working in New South Wales, that he had no connection to Cairns and that he had children from an earlier relationship in Townsville, but had no intention of returning to live in Townsville.

[12] Both parties gave evidence at the trial. The respondent JW confirmed the contents of her affidavit. She was cross-examined. She denied assaulting GJL on 1 May 2022. She rejected the allegations made by him. She confirmed that there had been no contact between them during the period from May 2022 to June 2022.

[13] The appellant GJL also gave evidence and was cross-examined. He maintained his denials about the respective allegations.

[14] The Magistrate gave an immediate, brief, *ex tempore* decision. Her Honour acknowledged that whether domestic violence had occurred was contested in relation to that limb of the test. Under s 37(1)(b) of the Act, her Honour found that domestic violence had occurred. She further found that the respondent JW was ‘...credible, forthright and honest in her application and in her answers to cross-examination’,¹ and was ‘satisfied on all those issues in relation to the evidence both in the affidavit of [JW]’.²

¹ Exhibit 2, 2 [36]-[37].

² Ibid 4 [6]-[7].

[15] With respect to the appellant's evidence, her Honour found that his evidence was 'expansive, elaborated, unconvincing...'.³

[16] With respect to the final limb under s 37(1)(c) of the Act, the Magistrate found that the protection order was necessary and desirable because:

...using the somewhat elaborate new test. Of course, that test is not expansive but it is appropriate, given the fact that as a serving member of the forces that he might regularly attend Townsville, or his family might move elsewhere and he might be in this jurisdiction, Townsville being only a very short four-hour drive from Cairns.⁴

[17] On appeal, the appellant submitted (and the respondent conceded) that the Magistrate erred by failing to give adequate reasons for her decision to grant a protection order. Specifically, in failing to reconcile the competing versions about the event described by the respondent from January 2021 and in failing to identify the actual conduct allegedly committed by the appellant towards the respondent that constituted the domestic violence said to have occurred.

[18] A failure to give adequate reasons, if established, is an appellable error of law. The content and detail of the required reasons will vary not only according to the nature of the jurisdiction but the particular matter the subject of the decision.

[19] I respectfully agree with, and adopt, the observations of Porter QC DCJ in *FLC v MRT*⁵ at paragraph 58, where he summarised the requirements for adequate reasons in the context of an application for a protection order. Acknowledging that Magistrates are usually making such decisions in the context of a busy list, his Honour said that:

Where there are contested facts and the circumstances are such as to make both the identification of acts of domestic violence and the need for an order open to serious question, it is necessary for properly considered reasons to be given. Those reasons must, at a minimum, cover the following matters:

(a) The Court must make findings of fact on the principal contested factual issues with some explanation of the basis for the finding by reference to the evidence;

(b) The Court must identify expressly what acts are found to comprise acts of domestic violence and why;

(c) The Court must explain the basis for concluding that an order is necessary and desirable in the light of the acts found and other relevant circumstances;

(d) The Court must explain why the principal submissions made by the unsuccessful party on these issues have been rejected.⁶

[20] Against a background where there was no concession that any domestic violence had occurred at all and the applicant asserted that there were at least nine separate occasions when acts of domestic violence had occurred, it was necessary for her Honour to find that the respondent had committed domestic violence against the

³ Ibid 3 [34].

⁴ Ibid 3 [40]-[44].

⁵ [2021] QDC 264.

⁶ *FLC v MRT* [2021] QDC 264 [58].

applicant and to identify the acts of domestic violence so found, and explain why those acts comprised acts of domestic violence.

- [21] The Magistrate did not do so. There was no identification of which of the nine occasions referred to expressly were found to comprise acts of domestic violence. The Magistrate only expressly referred to one incident from January 2021. There was no attempt to reconcile the competing versions about that event described by each of the parties. While it may be inferred that her Honour accepted the respondent JW's version, by reference to the Magistrate's later findings that 'domestic violence ha[d] occurred',⁷ the Magistrate did not identify the acts said to constitute the domestic violence.
- [22] One might infer that the event from January 2021 was found to be such an act, but the conclusion would necessarily involve a consideration of, and resolution about, issues of credit and reliability. None of that was adequately exposed in her Honour's reasons. The Magistrate did not explain why the appellant GJL's version about that event, or indeed the others, was rejected, save for a broad finding that:
- Today he has given evidence which I found to be expansive, elaborated, unconvincing, and when he said that he was in fear of his life and safety, one would have thought that at the very least he would have included that in his application before the New South Wales jurisdiction.⁸
- [23] The appellant GJL's specific evidence about the January incident, or the eight other incidents, was not assessed, nor were findings specifically made. As a result, it is not clear what incident was accepted or not accepted and what acts during the incident were accepted or not accepted.
- [24] This was a case where there were contested issues of fact which were central to whether any acts had occurred that could be characterised as domestic violence, and if so, whether those acts were of a kind that could sustain the conclusion that the order was necessary or desirable to protect the respondent JW.
- [25] It was necessary for the Magistrate to set out her findings on key facts on material issues and give an adequate explanation on how those findings were reached. Her Honour did not do so. One is left to speculate about what, if any, reasoning process informed the assessment of the evidence. The brief findings her Honour made are conclusory and opaque.
- [26] Her Honour also failed to make adequate findings of fact or give adequate explanations of her reasoning to her conclusion that an order was necessary or desirable. That was in circumstances where a central argument advanced by the appellant's counsel in the Court below was that there had been no contact between the parties since early June 2022 (a fact which was not disputed), which was a period of some four months, that the appellant GJL had lived and worked interstate for some time, that he intended to remain there, that he did not intend to travel to Cairns or to return to living in Townsville and, therefore, an order could not be said to be necessary or desirable.

⁷ Exhibit 2, 3 [39]-[40].

⁸ Exhibit 2, 3 [33]-[36].

- [27] I respectfully agree with the observations of McGill DCJ in *GKE v EUT*⁹ at paragraphs 27, 28 and 30 to 34 inclusive about what must be considered in assessing this issue. The risk of future domestic violence and the need for the respondent JW to be protected from it must be considered in all the circumstances, including past domestic violence.
- [28] The findings of the Magistrate did not engage with the principal submissions put by the unsuccessful party. Any assessment of the risk of future domestic violence between the parties, in the absence of the order, must be based not on speculation or conjecture but on positively proved facts before inferential reasoning could occur. No adequate reasons were given for this issue.
- [29] For all of those reasons, I am satisfied that the Magistrate erred in law and that the appeal should be allowed.
- [30] With respect to the questions of relief, the parties submitted that the appeal should be allowed, the order should be set aside and the matter remitted to the Magistrates Court at Cairns to be heard by a different Magistrate. The basis for seeking a rehearing before a different Magistrate was said to be that the Magistrate made adverse findings of credit with respect to the appellant GJL.
- [31] Ordinarily, that would not prevent the matter being remitted to the same Magistrate for rehearing according to law. A judicial officer is presumed to be able to discharge the necessary task and rehear the matter according to law notwithstanding earlier findings. However, in circumstances where the Magistrate has made adverse findings of credit against the appellant GJL, in my view the preferable course is that the matter be remitted to be heard by a different Magistrate.
- [32] Although it is not strictly necessary for the determination of this issue, I also observe that aspects of the Magistrate's intervention in the trial lacked fairness, appeared to be pre-emptory, and were undesirable. It included repeated interruptions of both legal representatives during the trial, frequently cutting them off before they were able to complete their sentences. That was unhelpful and undesirable.
- [33] The final issue is costs. The order for costs ultimately settled upon and agreed by both parties is that there be no order as to costs. Specifically, there is no application for an indemnity certificate with respect to costs under s 15(2) of the *Appeal Costs Fund Act 1973* (Qld).
- [34] The effect of the orders I intend to make will be that there will be no protection order in place once the orders are made. I specifically raised this issue with the legal representative for the respondent JW, who confirmed that no further order is sought by her at this stage, including on a temporary basis.
- [35] I make an order in terms of the draft as amended, signed by me and placed with the papers.
- [36] The orders are: (1) leave to amend the notice of appeal by removing grounds 2, 3 and 4 is granted; (2) appeal allowed; (3) the order made at the Magistrates Court at

⁹ [2014] QDC 248.

Cairns on 26 October 2022 granting the respondent's application be set aside; (4) the application be remitted to the Magistrates Court at Cairns for rehearing, before a different Magistrate; and (5) no order as to costs of the appeal.