CITATION: Suzanne Louise Kendrick v *Emmanouil Rinios* [2004] NTMC 012

PARTIES:	SUZANNE LOUISE KENDRICK
	v
	EMMANOUIL RINIOS
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	
FILE NO(s):	20317487
DELIVERED ON:	27 February 2004
DELIVERED AT:	Darwin
HEARING DATE(s):	30 January 2004
DECISION OF:	Mr Wallace

CATCHWORDS:

Criminal Law - Domestic Violence Act (NT) – breach of restraining order – stated in vague terms – whether vague term a nullity – whether term can be severed.

REPRESENTATION:

Counsel:

Complainant :	J. Duguid
Defendant:	A Woodcock

Solicitors:

Plaintiff:	Solicitor for the DPP
Defendant:	Woodcock Solicitors

Judgment category classification:	A
Judgment ID number:	[2004] NTMC 012
Number of paragraphs:	18

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20317487

BETWEEN:

SUZANNE LOIUSE KENDRICK
Complainant

AND:

EMMANOUIL RINIOS
Defendant

REASONS FOR DECISION

(Delivered 27 February 2004)

Mr Wallace SM:

1. The defendant Emmanouil Rinios ("Mr Rinios"), has been charged with 3 offences contrary to s 10 of the *Domestic Violence Act* ("the Act").

Section 10 (1) reads:

> "1) A person against whom a restraining order is in force who has been served with a copy of the order or the order as varied and who contravenes or fails to comply with the order is, subject to subsection (3), guilty of a regulatory offence."

2. The Complaint made by Suzanne Louise Kendrick, Sergeant of Police, which embodies the charges, has it that twice on 31 July 2003 and once on 31 August 2003 at Darwin, the defendant :

> "being a person against whom a restraining order issued in accordance with the *Domestic Violence Act* was in force, and having been served with a copy of that order, you failed to comply with the terms of that order." [my emphasis]

3. On 30 January 2004 the Defendant pleaded not guilty to these three charges. It was particularised, that the first charge related to the Defendant's meeting Calotina Moussa in Cavenagh St, the second to his meeting her at the Wharf Precinct, and the third to his telephoning her mother.

4. Before any evidence was heard Mr Woodcock, counsel for the Defendant, requested that a preliminary point be argued. Mr Duguid counsel for the Complainant agreed with that course. By consent, for the purposes of the argument, a document was tendered by consent setting out the terms and duration of the restricting order concerned. It laid down that the Defendant must :

> "1. Not approach or remain at any place where Calotina Moussa or members of her family is living, staying or working
>
> 2. Not approach Calotina Moussa or members of her family directly or indirectly
>
> 3. Not contact Calotina Moussa or members of her family directly or indirectly
>
> 4. Not assault or threaten to assault Calotina Moussa or members of her family directly or indirectly
>
> 5. Not damage or threaten to damage property in the possession of Calotina Moussa or members of her family
>
> 6. Not act in an offensive or provocative manner towards Calotina Moussa or members of her family or Mr Peter Passas."

5. It was agreed that the orders were first made ex parte on 23 April 2003, then confirmed by consent on 30 April 2003 to remain in force until 30 April 2004.

6. The preliminary point advanced by Mr Woodcock was that the orders were, in effect, null and void, by reason of uncertainty and ambiguity. His contention was that the phrase "or members of her family" was inherently vague, and that the vagueness invalidated the orders as a whole. Failing that,

he argued that the vagueness of the phrase would necessitate, that phrases being struck out of the orders, and that charge 3 must therefore fail. Failing that, that, it being inherently uncertain whether Calotina Moussa's mother came within the class of "members of her family", charge 3 must fail because of the reasonable doubt inevitable attendant upon that uncertainty.

7. The orders made ex parte on 23 April 2003 must have been made pursuant to the power created in s 6 (2) of the Act. The orders confirmed on April 30 2003 are made pursuant to s 4 (1). The Court's power to restrain a defendant in respect of conduct towards persons other that the original applicant [or "aggrieved person" in the case of an application initiated by the police officer pursuant to s 6 (1)] derives from a combination of the provisions of s 4 (1) (c) and s 4 (1A).

8. Section 4 (1) (c) provides that where the court is satisfied:

> " 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" [my emphasis]

The court may make an order in accordance with subsection (1A), which reads:

> "(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; [my emphasis again].

9. It is interesting to note that the Parliament's concern for others apart from the aggrieved person, is to be located only in s 4 (1) (c), where the defendant's conduct complained of is provocative or offensive behaviour, and not in s 4 (1) (a) or (1) (b), cases where the conduct complained of is, respectively: assault or damage to property; and the threat thereof. It is further interesting to note that Act No 30 of 2001, which has not commenced, will, if it comes into force omit s 4 (1) (c) and substitute for it:

> "(c) that the defendant –
>
> (i) has behaved towards a person in a domestic relationship with the defendant in a manner that has resulted in the person being in reasonable fear of violence or harassment and
>
> (ii) is, unless restrained likely again to behave in the same or similar manner"

10. If commenced, that amendment will leave the power to restrain a defendant in respect of his or her conduct towards such others on the slender and uncertain authority of s 4 (1A) alone.

11. "Another" is expressed in the singular but is in my judgment a singular which includes the plural (*Interpretation Act* s 24 (b)). I can see no reason why orders encompassing "another" need necessarily specify that other by name: "or the present wife of the Applicant" is no worse a description than " Mary Smith"; better, perhaps, if the name is a common one.

12. However, it is obviously the case that a degree of uncertainty exists about the class of a persons denoted by the expression used in the present orders "or members of her family". All of us use the word "family" to convey different meanings at different times ranging from the relatively small nuclear family up to some vast constellation of blood relatives near and remote plus their partners and their blood relatives and so on.

13. In the South Australian case *Starcowski v Police* 2 November 2002 reported only on line ([2000] SASC 350, BC 200006638) it was argued that a domestic violence order was in part a nullity by reason of the vagueness of its wording. The phrase there complained of was "in the vicinity of". Gray J (at paragraph 14) said :

> "In my view, even if this submission were made out, it would not have the effect of rendering those parts of the ex parte order a nullity. Rather, it may render them unenforceable."

14. The South Australian Domestic Violence Act sets up a scheme very like the scheme created under the (NT) Act. There are many differences of detail – compare, for example, s 4 of the South Australian Act, which Gray J sets out at paragraph 7 of his decision in *Starcowski v Police,* with s 4 of the Act. In my opinion difference in details such as that are superficial, and would not give me any reason to diverge from persuasive South Australian authority. But His Honour's use of the word unenforceable brings to mind a separate area of difference, and a more fundamental one.

15. The restraints imposed upon a defendant by a domestic violence order are enforced through provision of s 10 of the Act, reproduced above. Section 10 makes it a criminal offence to breach the order. Police powers to intervene during a breach – by arresting the defendant and removing him or her from the scene, as a rule – depend upon the breach being an offence, as a basis to excite powers in the *Police Administration Act*. Moreover, the offence is explicitly created as a regulatory offence. As such, few of the "defences" deriving from issues of authorisation, justification and excuse are available to any defendant charged with an offence contrary to s 10 of the Act – see s 22 of the Criminal Code. Among the matters of excuse not available is the "defence" created by s 32 of the Criminal Code:

> "A person who does makes or causes an act omission or event under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for it to any greater

extent than if the real state of things had been such as he believed to exist."

16. The only defences to a charge against s 10 are those set out in s 10 (3). Furthermore, although the penalty for a first offence is unremarkable - $ 2000 or 6 months imprisonment - s 10 (2) provides that for a second or subsequent offence, the penalty is to be at least 7 days actual imprisonment. The policy reasons behind s 10 (2) are obvious enough, and, as it happens, I support them, but the important points are that s 10 offences are regulatory, and, if repeated, bring with them mandatory imprisonment.

17. It seems to me intolerable that anyone should be in jeopardy of arrest, then of prosecution attended by such penalties, for breaching an order so vaguely worded as the orders restraining Mr Rinios. For all I know, an industrious genealogist could locate hundreds, if not thousands, of people related in some way to Ms Moussa: every one of them could be "a member of her family". In many instances, their relationship to her – their very existence - would be unknown to Mr Rinios (and Ms Moussa). I am unable to interpret "family" in any single certain narrow sense (Ms Moussa's children, brothers, sisters, parents certainly, but what about uncles, aunts, nieces, nephews first cousins? Or first cousins once removed? Or spouses and partners?). I suspect that what was intended by the term was something like "the members of Ms Moussa's closer family with whom Mr Rinios is already acquainted", but I am not confident of this. That Mr Rinios consented to the orders being confirmed (on 30/4/03) seemingly ought to count for something (although I note that he appeared at court that day accompanied not by a lawyer but by an interpreter), but I cannot see exactly what. In my opinion the vagueness of the term "members of her family" is such that it cannot meaningfully bind Mr Rinios, and the rigours of s 10 – regulatory offence and mandatory sentencing – are sufficient to differentiate the Act from its South Australian equivalent. I regard the words "members of her family" as a nullity of each of the orders.

18. I can see no reason why this approach would invalidate the orders as a whole. In this context I note that the phrase in the charge which I emphasised in paragraph 2 of these Reasons, "issued in accordance with the Domestic Violence Act" would offer a basis for making the submission that Mr Woodcock put forward: that if there is a flaw in the order, the whole order might fall, being not "issued in accordance" etc. However, that phrase does not arise directly out of the statement of the offence in s 10 (1), and I regard it as inessential verbiage in the charge as laid. There can be no argument that the orders, with the null words blue-pencilled, would cause difficulty, uncertainty, embarrassment or prejudice to Mr Rinios. He knew who Calotina Moussa was and he knew what he had agreed to be restrained from doing with respect to her. Charges 1 and 2 may proceed. In respect of charge 3 I find no case to answer on the opening.

Dated this 27th day of February 2004.

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R J WALLACE
STIPENDIARY MAGISTRATE