

CITATION: *O'Donnell v JLR & Smith* [2006] NTMC 042

PARTIES: KELLIE O'DONNELL

v

JLR

AND:

KELLIE O'DONNELL

v

DIANNE LOUISE SMITH

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Domestic Violence Act

FILE NO(s): 20528153 and 20528156

DELIVERED ON: 9 May 2006

DELIVERED AT: Darwin

HEARING DATE: 17 March 2006

JUDGMENT OF: VM Luppino SM

CATCHWORDS:

Domestic Violence – Application for Restraining Order - Evidence in support of application too unreliable to satisfy the burden of proof – Applications dismissed.

Domestic Violence Act ss 3(2), 4

REPRESENTATION:

Counsel:

Applicant: Mr Piper
Defendant: Ms Farmer

Solicitors:

Applicant: Pipers
Defendant: Withnalls

Judgment category classification: C
Judgment ID number: [2006] NTMC 042
Number of paragraphs: 42

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

No. 20528153

KELLIE O'DONNELL

Applicant

v

JLR

Defendant

AND

No. 20528156

KELLIE O'DONNELL

Applicant

AND:

DIANNE LOUISE SMITH

Defendant

REASONS FOR DECISION

(Delivered 9 May 2006)

Mr V M LUPPINO SM:

1. These two applications for a restraining order pursuant to the *Domestic Violence Act* ("the Act") had common evidence and common issues and were heard together on 17 March 2006.
2. An order that all evidence in chief be by affidavit was made on a preliminary basis on 25 November 2005 and mostly evidence in chief followed this format. The affidavits tendered in consequence comprised:-
 1. Affidavit of Kellie O'Donnell re the Smith matter sworn 22 November 2005.

2. Affidavit of Kellie O'Donnell re the JLR matter sworn 22 November 2005.
 3. Affidavit of Rodney Smith re the JLR matter sworn 15 December 2005.
 4. Affidavit of Rodney Smith re the Smith matter sworn 15 December 2005.
 5. Affidavit of Dianne Louise Smith sworn 3 March 2006.
 6. Affidavit of JLR sworn 9 March 2006.
 7. Affidavit of Nanette Hunter sworn on 23 January 2006.
3. By way of background, the Applicant is the current defacto partner of Rodney Smith. Rodney Smith is the estranged partner of Dianne Smith and JLR is the daughter of Dianne Smith. The relationships between the parties falls within the definition of "domestic relationship" as that term is defined in section 3(2) of the Act, specifically the combination of subsections 3(2)(a)(i), 3(2)(a)(ii) and 3(2)(c).
 4. The background to both matters centres on an allegation of sexual assault made by JLR against Mr Rodney Smith. These allegations were the subject of criminal charges and Mr Smith was acquitted of those charges in the Supreme Court in September 2005. The Applicant's allegations against JLR, in summary form, are:-
 1. That during the trial JLR mouthed abuse at her. This allegedly occurred outside the steps of the Supreme Court and in the waiting areas in the court foyer. The Applicant alleges that on one such occasion, JLR was in attendance with a group of boys who yelled "*fuck you*" to her and gestured at the Applicant by grabbing their genital area.

2. On one occasion while she was sitting in her car in the Supreme Court car park, that JLR began flicking cigarette butts towards the car from the steps at the front of the Supreme Court. The Applicant alleges that JLR was then in company with her mother Dianne Smith and a worker from the Witness Assistance Service.
3. On another occasion when she parked her car in the Supreme Court car park she claims that JLR and her partner parked their car in such a way so that she was blocked in.
4. She claims to have received approximately four phone calls from JLR which she claims to have identified as being from the defendant by recognition of the JLR's distinctive speaking style and voice. She claims that she learnt this voice and speaking style from the abuse which she claims JLR directed at her when she drives past her home.
5. That from August 2005 on at least twelve occasions, JLR had driven past her home in three different cars with her boyfriend and with other boys and on those occasions abuse had been yelled at her by JLR and the other persons in the cars.
6. In particular the Applicant claims that on Friday 17 November 2005 at approximately 11.00pm she said that she heard JLR say "...*fuck you, we're gonna get you fuckers...*" and like abuse. She claims that this was the last occasion of such an incident.
7. The Applicant also claims that in late October 2005, JLR was in a car parked on the crossover between the road and her property boundary. She claims that JLR threw an object from that car into the front yard. She claims that the car drove away when she came outside but heard JLR yell out "...*that fat fucker is gonna get it one way or another...*". She claims that she searched the yard in an attempt to find the object that was thrown over the fence but found nothing. The Applicant

claims that at 6.00am on the following day she noticed that her pet dog was bleeding from the nose and mouth and had difficulties breathing. She claims to have taken the dog to the vet who told her that the symptoms indicated that the dog had been baited. There was no evidence from the vet.

5. In summary form, the Applicant's allegations against Dianne Smith are:-

1. She claims that when she was present at the trial that Smith would walk past and make comments such as "*...there's that stupid fucking fat bitch...*", "*...there's that smug looking slut...*" and like comments. She alleges that these comments were made when Smith was in the presence of friends and the Witness Assistance Service worker.
2. The Applicant also claims to have received at least seven phone calls from Smith from about early August 2005. She alleges that Smith sounded extremely intoxicated on each occasion and all the calls were made between 3.00am and 4.00am. She claims that during those calls Smith has said "*...I can't wait(sic) them to throw him in jail. The black bastards will fuck him up the ass...*" and "*...you're gonna lose him. They're going to put him in gaol...*" and "*...fat slut*".
3. The Applicant also claims that Smith and JLR regularly drove past her home between late August 2005 and late September 2005. She says that Smith is always in the car with JLR and it is JLR who yells out abuse such as "*...you fat fucking slut...*" or "*...I'm not finished with you yet...*" and other abusive comments. Interestingly, there was no mention in the affidavit the Applicant swore regarding the JLR matter of Smith's presence in any of the cars during any drive by which I consider to be a notable omission.

6. Rodney Smith swore an affidavit in which he supports several of the Applicant's allegations. He described the events on the occasion where the Applicant alleges that JLR was flicking cigarettes at her in the car. He also states that JLR was then in the presence of other young persons, a worker from the Witness Assistance Service and Smith.
7. He also confirms that he has been present when JLR has driven past "our house" on a number of occasions. He says this has occurred on approximately three occasions. He claims to have seen JLR on these occasions and in particular claims that JLR has stuck up her middle index finger at them and screamed abuse such as "*...you're going down you fat fucker...*".
8. He also claims that on other occasions he has been with the Applicant when the same cars, which he described as a silver Corolla a gold Falcon sedan and a black Falcon, have driven past and the occupants of the cars have yelled out abuse. He claims that on one occasion they threw out a beer bottle in the direction of his car but it missed. There was no mention made of that by the Applicant. He claims that the silver Corolla and the black Falcon are cars owned at different times by JLR's boyfriend.
9. He deposes to having also been present when JLR has rung the house. In particular he says that on one occasion in mid November, sometime after midnight, he heard the phone ring and the Applicant answered it. He was told by the Applicant that the call was from JLR. He said that the Applicant was upset by the call.
10. He also alleges that on other occasions when the phone rings and either he or the Applicant have answered the call, the caller hangs up. He says that these calls happen late at night. The Applicant said nothing of such calls.
11. The last call he refers to is contained in the affidavit he swore for the proceedings against JLR and he says occurred on 14 December 2005. He

says that a person with a young woman's voice said "...*who do you think you are, they're not going to believe anything you say...*". He claims it was JLR's voice and that she sounded intoxicated.

12. In relation to the Applicant's application concerning Dianne Smith, Mr Rodney Smith's affidavit deposes to him having been present when he claims Smith has rung the house. He claims this was an occasion in July 2005 and that the Applicant answered the call. He said that the Applicant told him that she thought it was Smith because the word "black" was pronounced with a New Zealand accent. He claims that the Applicant then told him that Smith had said to her that he was going to be put in gaol with the blackfellas and that he would be "*fucked up the ass*".
13. In her affidavit, JLR largely denies all of the allegations made against her. In particular she deposes:-
 1. That she never knew who the Applicant was until her mother mentioned the Applicant to her during the course of the trial.
 2. That she did not know the Applicant's surname until such time as she had been served with the current application.
 3. That she had never spoken to the Applicant.
 4. That she had never telephoned the Applicant and claims that she does not know the Applicant's telephone number.
 5. That during the trial she was accompanied by Nanette Hunter from the Witness Assistance Service or the prosecutor most of the time.
 6. That she only attended on the first day of the trial and was sent home, and after that her attendance was confined to the days she gave evidence and that she was also there on the day of the summing up.

7. She agrees that during the trial at Court she may have spoken to some other witnesses but denies seeing any of them grab their genitals while gesturing at the Applicant. She also says that she did not see the Applicant at the Court.
8. She denies that she flicked cigarettes at the Applicant while she sat in her car.
9. She denies mouthing abuse at the Applicant.
10. She admits driving past the Applicant's residence on one occasion following the conclusion of the trial. She says that her mother beeped the cars horn as they drove past.
11. She denies ever being in any other vehicle when the driver has either beeped the horn, shouted abuse or hurled objects directed at the Applicant and specifically denies sticking her middle index finger up at the Applicant or at Rodney Smith.
12. She denies any knowledge of any possible poisoning of the Applicant's dog. She says her boyfriend currently owns a black Ford with tinted windows. She says his previous car was red in colour. She says that her mother drives a white car and she says that she has never owned a car herself.
14. In relation to the affidavit of Rodney Smith she claims that the last time she spoke to him was the day the he allegedly sexually assaulted her and deposes that she has had no contact with him since then save for a text message which she sent him the night the trial ended.
15. Dianne Smith likewise largely denied the allegations made against her in the affidavits. In particular she deposed that:
 1. She did not know who the Applicant was until the trial and then only knew her christian name.

2. That she did not know the Applicant's surname until she was served with the current application.
 3. That she has never spoken to the Applicant.
 4. That she does not know the Applicant's telephone number and denies ever telephoning the Applicant.
 5. That she avoided contact with Rodney Smith and the Applicant during the trial.
 6. That she became aware of the Applicant's address during a bail application and admits that on the Saturday night following the conclusion of the trial she beeped her car horn while driving past the Applicant's home but suggests that there was no-one home at the time.
 7. She denies driving past and beeping her horn on any other occasion.
 8. She denies ever owning or having owned a silver or black car. She said that she had a gold Toyota Camry which she sold in July 2005 and now drives a white car.
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16. Some evidence of an independent nature came in the form of the affidavit and evidence of Nanette Hunter. She is the Witness Assistance Service Co-ordinator at the Office of the Director of Public Prosecutions. She said that she was the Witness Assistance Service officer supporting both Defendants in August 2005 and was the only Witness Assistance Service officer who supported them during the relevant trial.
 17. She said that she advised both JLR and Smith to ensure they were careful to avoid contact with Mr Rodney Smith and any of his supporters. She said that she was aware that the Applicant regularly attended Court during the trial.

18. She said she was in the company of JLR and Smith for the majority of the time that they were present at the Supreme Court trial. She added that at no time while she was present did JLR ever behave inappropriately towards the Applicant. In particular, she denies ever seeing JLR flick cigarettes at any car in the Supreme Court car park.
19. The sections of the Act relevant to the current proceedings are:

3. Interpretation

- (1) Omitted.
- (2) For the purposes of this Act, a person is in a domestic relationship with another person if he or she –
- (a) is or has been a relative of the other person, namely –
- (i) a spouse or de facto partner or a former spouse or de facto partner;
- (ii) a father, mother, grandfather, grandmother, stepfather, stepmother, father-in-law or mother-in-law
- (iii)-(x) Omitted
- of the other person;
- (b) Omitted
- (c) ordinarily or regularly resides or has resided with the other person, or with a relative, as specified in paragraph (a), of the other person;
- (d)-(e) Omitted.

4. Restraining order

- (1) Where, on an application made in accordance with subsection (2), the Court or the Clerk is satisfied, on the balance of probabilities –
- (a) that the defendant –
- (i) has assaulted or caused personal injury to a person in a domestic relationship with the

defendant or damaged property in the possession of that person; and

- (ii) is, unless restrained, likely again to assault or cause personal injury to the person or damage the person's property;
- (b) that the defendant –
- (i) has threatened to assault or cause personal injury to a person in a domestic relationship with the defendant or threatened to damage property in the possession of the person; and
 - (ii) is, unless restrained, likely again to make such a threat or to carry out such a threat;
- (c) 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,

the Court or, subject to subsection (3) and any rule or practice direction under section 20AB, the Clerk, may make an order in accordance with subsection (1A).

- (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; and
 - (b) such other orders as are, in the opinion of the Court or the Clerk, just or desirable to make in the circumstances of the particular case, including, but

not limited to, orders requiring the return of personal property to the defendant or the applicant, or the person on whose behalf the application was made.

20. Before an order can therefore be made it is necessary for an Applicant to prove, on the balance of probabilities:-
 1. That there is some type of conduct on the part of each Defendant which falls within section 4(1);
 2. That each Defendant is a person in a domestic relationship with Applicant as that term is defined in the Act; and
 3. That each Defendant is likely to again behave in the same or a similar manner unless restrained by an order under the Act.
21. As I said earlier, it is undisputed that the parties are in a domestic relationship as that term is defined in the Act. In terms of the third requirement, the Applicant asserts that based on the outcome of the trial and the alleged behaviour of the two defendants and the nature of their comments that the behaviour will continue unless restrained. Were I to accept that the events the Applicant alleges have occurred, there is sufficient evidence from which such an inference could be drawn in my view.
22. In my view the case turns entirely on whether the offending behaviour has occurred. The Applicant bears the onus of proving this on the balance of probabilities. Given the directly opposing versions of the respective protagonists in these matters, the decision in this matter turns on credit findings in respect to the evidence.
23. For the reasons that follow, in my view the Applicant has not satisfied the burden of proof. I consider the evidence of both the Applicant and Mr Smith to be too unreliable to satisfy the burden of proof.

24. Critical to the Applicant's case is her identification of the voices of both JLR and Mrs Smith on the relevant occasions. These occasions were when she claims abuse was hurled at her by occupants of cars driving past her home as well as some telephone calls. She claims to have been able to identify the voices of both defendants from some isolated and restricted incidents when she overheard each of them during the course of the Supreme Court proceedings. The Applicant was quite certain that she had identified those people from her claimed familiarity with their voices. In my view the limited opportunities that she had and the adverse nature of the circumstances of those opportunities makes that evidence unreliable.
25. There is also considerable doubt as to whether the Applicant had the opportunity to overhear the Defendants as claimed, JLR denied the events which the Applicant said gave her three occasions to have heard JLR's voice. JLR says that she was always in company either of the prosecutor or Nanette Hunter from the Witness Assistance Service. Ms Hunter's evidence supports this. Ms Hunter was acting in her professional capacity at the time. Although she was there acting as a support person for JLR and Mrs Smith to a lesser extent, I consider her to be independent nonetheless. She was acting in the course of her employment and she was alert to the need to avoid situations involving the parties. I would expect no less of a victim support person of her experience.
26. Leaving that aside for the present, the circumstances as the Applicant described them were not conducive for setting a satisfactory foundation for later voice recognition. Those circumstances were that it was in the comparatively large foyer of the Supreme Court and that the voice was apparently heard from some distance. None of the conversations overheard were directed specifically at the Applicant and they were for very limited individual periods of time over a significant enough period overall. In other words there are a number of short isolated instances well separated in time. On two of those occasions JLR was apparently talking on a mobile phone

and the third was when JLR was speaking in a group of people. On one of those occasions the Applicant herself was on the phone and consequently her attention would have been focused on her phone call.

27. Furthermore despite the Applicant's insistence to the contrary I did not consider that JLR has a distinctive a voice as she described. I particularly made observation of this during the course of the evidence of JLR in light of the Applicant's claim. There is nothing distinctive or out of the ordinary about her voice.
28. Another concern with the evidence of voice identification is the difference between a persons voice in a conversation in person compared to a conversation in a phone call. Experience tells us that those differences are sufficiently marked as to impede accurate identification of a voice over a telephone especially by person who is not very acquainted with that voice. Similarly, comparing a persons voice overheard from conversations from a short distance in an apparently soft spoken voice would not easily lead to identification of the same voice emanating from a person driving passed in a car and shouting abuse at a greater distance.
29. Similar issues arise in relation to the identification of the voice of Mrs Smith. Similarly the Applicant claims that from some limited opportunities to acquaint herself with the voice of Mrs Smith she is certain that Mrs Smith made some of the calls to her home. The circumstances claimed by the Applicant when she first heard Mrs Smith as a basis for subsequent identification of her voice are questionable. She claims that she overheard her speaking with Ms Hunter in the foyer at the Supreme Court. Given Ms Hunter's role and the fact that she was alert to the need to maintain separation between the persons involved, I think it is unlikely that the Applicant had much of an opportunity to hear the voice of Mrs Smith sufficient for viable later recognition.

30. Albeit that his evidence was very confused on the topic of the particular phone call, one aspect of the evidence of Mr Smith, with whom Mrs Smith shared a thirteen year relationship, puts the Applicant's rigid claim to recognition of the voice of Mrs Smith into context. Mr Rodney Smith was unable to categorically say whether a phone call suspected to have been made by Mrs Smith was actually her. He acknowledged that the caller had a New Zealand accent yet he was unable to say with certainty that the caller was Mrs Smith. Yet it was largely the accent and speaking style which the Applicant relied upon for recognition of Mrs Smith's voice. Again, being mindful of that claim by the Applicant, I specifically noted Mrs Smith's voice and extent of accent during the course of her evidence. As with JLR, I found nothing so distinctive about Mrs Smith's voice as would lead me to conclude that she would be easily identifiable by voice recognition in the circumstances described by the Applicant.
31. There is also much doubt as to whether JLR and Mrs Smith had the Applicant's phone number. I consider it unlikely that they did. The reason for that is that although the Applicant's phone number was listed in the phone book, at the relevant time it was listed under her former address and her former surname. No basis was put up from which I could find or infer that either Defendant knew either. Though not impossible to do so, the steps required to obtain a phone number in those circumstances renders it unlikely that either of the Defendants had the phone number. Moreover Mrs Smith produced telephone records for a number of phone services covering the relevant period. Consistent with the denials of both Defendants that they made the calls as the Applicant alleges, she openly produced those records and although some comment was made about them, there was no cross examination on those documents.
32. As I said I have serious concerns about the Applicant's evidence because of her rigid insistence and her refusal to concede the possibility of error in her part in the recognition of the voices of JLR and Mrs Smith. This is in

circumstances where I believe the possibility of error is in fact high and obvious.

33. Other than the claimed abuse in drive pasts and by telephone, the main incident relied upon by the Applicant is the occasion which occurred at the front steps of the Supreme Court building. This is the incident where the Applicant claims that JLR, in company with a number of her young friends, flicked cigarette butts at her while she was seated in her car. On the same occasion she claims that JLR's friends gestured towards her by grabbing hold of their genitals. This was all said to be at least in the vicinity of both Nanette Hunter and Mrs Smith. Importantly the independent evidence of Nanette Hunter, which I am prepared to accept, is that she was alert to the need to avoid conflict and on the particular occasion was particularly alert and watchful because JLR's friends were rather boisterous. She says that she did not witness the incidents alleged by the Applicant. I think it is telling to note that in her affidavits sworn prior to the affidavit of Ms Hunter, the Applicant describes the position of the persons involved such as to suggest that Ms Hunter would have seen the incidents. In cross examination those details were refined by the Applicant in a way which accommodated the possibility that Ms Hunter's view was obstructed. I am rather suspicious of that as by that time she had access to the affidavit of Ms Hunter. I thought the Applicant was most unconvincing in cross examination on this point.
34. Similarly, she was unconvincing in cross examination in relation to identification of JLR on the occasion of one of the claimed drive pasts. Her evidence was inconsistent. Until that point it seemed clear to me that her identification of JLR on that occasion was by way of voice only. When serious doubts were raised as to that evidence her version changed and the emphasis appeared to swing to visual recognition rather than voice recognition. The Applicant was quick to claim an apparent error, by someone else, in the preparation of her affidavit regarding the omissions in

her affidavit compared to her evidence specifically regarding this issue. Her affidavit made no mention at all of visual recognition.

35. In her evidence the Applicant was just as insistent in terms of her claimed visual recognition of JLR and Mrs Smith during the alleged drive pasts. Frankly I thought that any recognition in the circumstances described would be dubious at best yet the Applicant would not concede the possibility of error on her part.
36. The Applicant was also unconvincing when she claimed better recall of the events which occurred at the Supreme Court in September 2005 at the time she gave evidence (17 March 2006) as compared to the time that she swore her affidavit on 22 November 2005. I find it very suspicious that later claimed better recall was in relation to details which have only become relevant consequent of matters deposed to in the affidavit of Nanette Hunter.
37. The apparent discrepancy between the Applicant's affidavit in the current proceedings (sworn 22 November 2005) and an affidavit sworn for the purposes of proceedings involving Mr Smith (sworn 6 December 2005) was also put to the Applicant. The discrepancy related to the number of times she claims that JLR was involved in drive pasts. In the current proceedings she has said twelve but believes it is more than that. In the subsequent affidavit she only refers to the one single occasion. The subsequent affidavit is apparently very clear on this. The Applicant's attempt to explain this as a possible typographical error is ludicrous and reflects poorly on her credibility.
38. There are problems also with the evidence of Mr Smith. Much of his evidence was hearsay based on what he was told by the Applicant. That evidence falls with my rejection of the Applicant's own evidence. Regarding matters upon which Mr Smith gave direct evidence, he claimed specific recall of a relevant telephone call on the 14 December 2005. He was very specific about his recall of the details of that. This the call referred

to in paragraph 30 above where he could not say with any certainty whether the caller, who he said had a New Zealand accent, was Mrs Smith. Certainly he made no suggestion that the caller may have been JLR. There was no mention of that incident in his affidavit concerning the proceedings against Mrs Smith sworn only the next day. His explanation for that omission was that he had been working long hours and was in a hurry to return to work. I consider that unacceptable. More obvious though was the apparent confusion which emerged during cross examination as to whether the caller was JLR or Mrs Smith. His affidavit in relation to the proceedings concerning JLR referred to JLR as having made that phone call. When that inconsistency was put the situation became comical. Although Mr Smith had given a very specific basis for recalling that phone call ie that it was on the day of settlement of the house and the bank had just called about the settlement, as well as specifically recalling that the caller had a New Zealand accent, he then suggested that the caller may have been JLR. Thereafter, whether it was JLR or Mrs Smith became interchangeable as further discrepancies were put to him. When the topic was again raised a little later in cross examination his evidence as to who the caller was changed twice more. In the end he conceded that he could not recall. Confusion between the two in the circumstances described is inexcusable in terms of the reliability of Mr Smith's evidence and unavoidably leads to a rejection of his evidence.

39. For the foregoing reasons I consider the evidence in support of the Applicant to be unreliable. Noting that the Applicant has the burden of proof, with that view of the evidence the burden is not satisfied. On that basis there is no finding of any offending conduct as required by section 4 of the Act and hence there can be no order in those circumstances.
40. I should add that I was not entirely convinced by the evidence of JLR and Mrs Smith. Some aspects of their evidence left me feeling unconvinced that they were telling me the entire truth. In particular the evidence of each of

them on the matter of the incident where JLR is alleged to have flicked the cigarette butt at the Applicant in her car suggests collusion in their evidence. The extent of the emphasis which both put on the manner that the cigarette was flicked is the most obvious sign of this. I thought Mrs Smith was particularly unconvincing when, in refuting that JLR flicked the cigarette butt at the car, claimed to specifically recall how JLR apparently flicked the cigarette butt at that particular time. Nonetheless the burden of proof is on the Applicant. The issues I have with the evidence of the Defendants does not change my view of the evidence relied upon by the Applicant.

41. For the foregoing reasons both applications are dismissed.
42. I will hear the parties as to any ancillary orders.

Dated this 9th day of May 2006.

V M Luppino
STIPENDIARY MAGISTRATE