

CITATION: *Middleton v McDonagh* [2007] NTMC 038

PARTIES: TRACY-DALE MIDDLETON  
v  
MATTHEW JOHN MCDONAGH

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Court of Summary Jurisdiction

FILE NO(s): 20622853

DELIVERED ON: 28 June 2007

DELIVERED AT: Darwin

HEARING DATE(s): 21 June 2007

JUDGMENT OF: Ms Melanie Little SM

**CATCHWORDS:**

**REPRESENTATION:**

*Counsel:*

Plaintiff: Ms McMaster  
Defendant: Mr Powell

*Solicitors:*

Plaintiff: DPP  
Defendant: NT Legal Aid

Judgment category classification: C  
Judgment ID number: [2007] NTMC 038  
Number of paragraphs: 18

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

No. 20622853

[2007] NTMC 038

BETWEEN:

**TRACY-DALE MIDDLETON**  
Plaintiff

AND:

**MATTHEW JOHN MCDONAGH**  
Defendant

REASONS FOR DECISION

(Delivered 28 June 2007)

Ms MELANIE LITTLE SM:

1. The defendant is charged with failing to comply with a retraining order with respect to an incident on 1 August 2006. The charge is pursuant to section 10 of the *Domestic Violence Act*. The defendant has pleaded not guilty and a hearing was conducted. Prosecution bears the onus of proving each and every element of the offence and if they do not do so the defendant is entitled to be found not guilty. The burden of proof on the prosecution is beyond reasonable doubt. All the evidence in the matter has been taken into account in making this decision. I now summarise the evidence.
2. The first witness was Peter Maley, a solicitor based in Darwin. On 1 August 2006 he was appearing on behalf of his client, Mr Garry Roots. His client was the respondent in an appeal filed by the defendant in this matter. The appeal was from a Court of Summary Jurisdiction decision and was before the Supreme Court. The defendant was unrepresented in the appeal. He had a sling over his arm and had asked the Court not to proceed due to his injury and the medication he had been taking. The witness said that the Judge did

not receive the application well and the defendant abruptly left the Court room. After the case finished Mr Maley left the Courthouse exit and turned right walking towards his office. As he was walking towards his office he saw the defendant holding the sling in his right hand moving it around saying something in a loud voice. He was not sure what was being said. He noticed his client Mr Garry Roots and his client's wife, Mrs Jeanette Roots, twenty to thirty metres away. They were saying something to the defendant. The defendant was looking in their direction. There was an exchange between the parties but he had no idea who had started it. He spoke to his client that day but was not sure exactly when. Mr Maley gave Mr Roots some advice and said it was a matter for the police. Both Garry Roots and Matthew McDonagh had raised voices. He could not recall whether Mr Roots' wife had a raised voice. He could not recall anyone else around.

3. He was then cross-examined. He had prepared written submissions for the Supreme Court and he could not recall making any oral submissions to the Court. The appeal had been going on for some time. He had become aware that the defendant was self represented in the appeal. He could not recall whether he had told his client of that. With respect to his client being at Court on that day, he said he generally encouraged people to attend their court cases and to be involved in their court cases. It was put to him that when they had been in the Court room Garry Roots had said to Matthew McDonagh that he was a 'smart arse'. The witness could not recall that but said that they snipe towards each other generally. Outside the Court he heard an exchange and he had no doubt that both Matthew McDonagh and Garry Roots were involved in that exchange. He had walked out behind them and he was approximately forty metres behind Garry Roots and Matthew McDonagh was approximately twenty metres behind Garry Roots. There was an exchange happening when he arrived. Matthew McDonagh was walking away from Mr Roots. Garry Roots was walking parallel to the carpark area. He agreed there was heavy foliage around the area where he

had seen his client. He had a clear view of the defendant and he had to look twice to see his client. He could not recall the content of what was being said between them but they were saying things to each other. He could not recall his client's wife saying anything. Garry Roots had a loud angry tone and so did Matthew McDonagh. He was behind Matthew McDonagh and Matthew McDonagh was looking to the right. Matthew McDonagh and Garry Roots were twenty to thirty metres apart and the distance was opening. Matthew McDonagh was walking away on a diagonal. The witness had not seen Matthew McDonagh take his sling off. He was moving the sling around. It was put to him that Matthew McDonagh may have been stretching his arm and he agreed that was possible. He then said it looked like he was waving the arm about. He drew a plan on the location of the people and that became Exhibit D1. He has been present when he has heard Garry Roots saying inappropriate things to the defendant in the past. In re-examination he agreed that he had also been present in the past when inappropriate things were said by Matthew McDonagh to Garry Roots.

4. Exhibit P2 was the domestic violence order and proof of service. The order is in force up to and including the 3 August 2006. Prosecution submit that the two clauses relevant to the charge are that the defendant must not contact Garry Neil Roots directly or indirectly (clause 2) and that the defendant must not act in an offensive or provocative manner towards Garry Neil Roots (clause 6).
5. The next witness was Garry Roots. In July 2005 he obtained a restraining order against Matthew McDonagh for a period of twelve months. On the 1 August 2006 he was with his wife, Jeanette Roots at the Supreme Court. He and Jeanette are now separated. The witness had his lawyer, Peter Maley with him at Court on that day. There was no discussion between himself and Matthew McDonagh in Court on that day. When Court was finished he left Court. He thought Matthew McDonagh had left Court before he had. He had walked out of the front doors and went down the wheel chair access

ramp with his wife to the car park area. As he was walking towards his car Matthew McDonagh came out from behind them and he heard him saying something. Matthew McDonagh had had his left arm in a sling when he was in Court, telling the Court he had broken ribs and that he was on pain killers. As Matthew McDonagh came out of Court he pulled the sling off his arm, using his left arm, and swung the sling around. Jeanette called out “miraculous recovery hey”. The defendant replied “don’t worry as soon as this DVO is over I’ll kill you both”. He was also swearing and yelling abuse towards the complainant and his wife. They were thirty to forty metres apart when this was occurring. He had heard Matthew McDonagh making a noise when he was taking the sling off but the first words said between them was when Jeanette made the comment. It was only at that moment that the witness knew that the defendant was there. He could not understand what the defendant was saying. They were not facing him. He heard something and then turned around. Then he saw him waving his sling around. After he had heard the comment about waiting until after the domestic violence order was over he yelled out to the defendant “I will see you in Court”. He could not recall what else was said. He could not recall hearing Jeanette say anything else. He saw Peter Maley coming down the ramp and Peter Maley said for them to go to the Police and report the matter. He did do that and he made a statement to the Police.

6. In cross-examination he said he was in the process of going to the car when Matthew McDonagh came from behind him. He had not seen Matthew McDonagh in front of him when he had walked out of the Court room. He had thought that Matthew McDonagh would have left the Court building before him but he must not have done that. It was put to him that he called Matthew McDonagh a ‘smart arse’ when in the Court room and he denied that. He said that he was expecting to give evidence in the court case and he did not know how Court works. Mr Maley had said for him to be at Court. He said he did not know that Matthew McDonagh was acting for himself in

the appeal. He was advised to be at the appeal and he wanted to be at the appeal. He denied that he attended Court because he knew the defendant would be there. He said that he was not there to 'stir him up' as was suggested. He agreed that the defendant had made a complaint about him approximately four weeks before this. He agreed that he was upset about the allegations being made. He denied this charge was an attempt to get back at the defendant. He agreed that he was aware that the order was about to expire at the time of the alleged breach of the order. He was not able to continue the order as the defendant had kept appealing the case. He denied that he had wanted to 'get' the defendant before the order had expired. He said that he was terrified of the defendant. It was put that the witness had been yelling at the defendant and he said that he said to him "I'll see you in Court". He was not sure what the defendant was saying. He was referred to the statement made to the Police, where he had said that the parties were approximately ten metres apart. He said that the defendant was veering away to the left and he drew a plan of where the parties were. They were walking over to their car and they stopped and looked when Matthew McDonagh was abusing them. He drew a plan of the locations of the people and that became exhibit D3. He had a clear vision between them and the defendant. After the words had been spoken he saw Mr Maley. He agreed that Matthew McDonagh was not walking towards him. Matthew McDonagh had a sling and was swinging it around and that was when Jeanette said "miraculous recovery". He said that Matthew McDonagh was trying to get their attention and it was put to him that that was not right. It was put to him that there was no threat made to kill. The witness denied that. He said Matthew McDonagh was looking directly at them. The witness only said "that I'll see you in Court" – nothing else was said by him. It was put to him that he did not know that Matthew McDonagh was directing words to them in the first instance and he replied "yes I do". It was put to him that he had not been threatened by the defendant and he replied "he did and he knows that he did. He has threatened to kill me many times". He denied that

the complaint was made in a tit for tat response about the report made by the defendant.

7. The next witness was Jeanette Roots. She was married to Garry Roots and is separated now. On the 1 August 2006 she went to the Supreme Court with Garry Roots, relating to an appeal involving to Matthew McDonagh. She went to Court as a witness and also as Garry Roots was her partner to support him. She saw Matthew McDonagh in Court that day. She could not recall any conversations when they were in the Court room as between Garry Roots and Matthew McDonagh. When they left the Courthouse at approximately 11:30am she and Garry Roots were walking towards their car. They had turned to the right as they left the Courthouse. Matthew McDonagh was parallel to them a couple of car bays away. He pulled off his sling and waved it over his head yelling and carrying on. He was looking at them. He said “wait till the DVO’s over and I will kill you both”. He also called the witness a slut. She wanted to get away and can not recall if she said anything to him. She thought that Garry Roots said something but she could not recall what it was. Peter Maley came up to them near the car and said there had been a breach of the DVO and that he had witnessed it. He suggested that it be reported to the Police which they did. She felt sick when the threats were made.
8. In cross-examination she said at the time of the appeal she was not living with Garry Roots but they were still on friendly terms. Garry Roots had been requested by his solicitor to be at Court as far as she knew. She could not recall whether Garry Roots had said to Matthew McDonagh that he was a ‘smart arse’ when they were in Court. She did not think anything was said by Garry Roots in Court to the defendant. She drew a plan of the various locations of the parties and that became exhibit D4. After she had left the Court room doors she turned to the right and down a ramp. They were heading for their car which was parked in a street running off the mall. It was put to her that the defendant had not been talking to her and Mr Roots.

She denied that and said that there was eye contact and there was no one else there. It was put that she had called out 'miraculous recovery hey'. She said she might have done that. She could not recall what Garry Roots said. She thought maybe he had said one thing back to the defendant and they had hurried off. She estimated that she and Garry Roots were approximately eight metres away from the defendant. He was walking parallel to them. It was put to her that Matthew McDonagh had not spoken to them until she had made the "miraculous recovery" comment and she denied that. She had not said anything until after he had said something. She said he definitely threatened to kill them. She denied that they were any further apart than approximately 8 metres when this happened. She admitted that she may well have made the comment about the miraculous recovery as he had been playing games in Court and then he had pulled his sling off. He was waving both arms in the air after he had pulled the sling off. It was put that he had not made the threat to them and she denied that. It was put that he was on the road way walking and she said she was not sure if he was on the road. She did not know which way he went. That was the case for the prosecution and then the defendant gave evidence.

9. Matthew McDonagh said he is looking after three children and on 1 August 2006 he was in the Supreme Court. A few days before that he had been attacked and sustained three cracked ribs. He was sore and tender and was given codeine and anti-inflammatory drugs to take. The doctor had suggested that he could wear a sling and he wore the sling to help protect his ribs when he was in Court. He was in the Supreme Court on the 1 August 2006 with respect to an appeal of a decision ordering a restraining order against him. At ten o'clock the Judge heard the case. He was feeling dizzy, sick and in pain. He wanted an adjournment and the Judge said, to use Mr McDonagh's words, "no you do the case". He was not able to show the Judge his medical certificate. He walked out of Court and went down to the office saying he wanted to complain. He was cranky and said he wanted

something done about it. Prior to him leaving the Court room there had been a brief adjournment where the Judge had gone out. At that time Garry Roots had called him a 'smart arse'. He ignored that statement. The Judge had then come back and then the question of the adjournment was ventilated. He then walked out of Court. The witness drew a plan of the locations of the persons and that became exhibit D5. He was downstairs a good fifteen minutes and then he went out of the Courthouse. He went from the bushes to an area in front of a car. He was cranky, pissed off and was swearing. He was swearing about the Judge not looking at his medical certificate. As he was walking along he took his arm out of the sling. He was stretching his arm out and he had the sling in the other arm. He heard some words including the word 'recovery'. He was walking away and he turned as he called out "Fuck off you dogs" and then saw who it was. They were thirty to forty metres away. He did not see Peter Maley at all. He did not see the complainant Mr Roots or Mrs Roots until he had heard someone call out. He had kept walking. He had heard the voice and then said "shut up you dog". He turned and saw who they were and thought "oh shit". He had heard Mr Roots say 'I will see in Court and your set up' and words to that effect. He said that was the end of the incident.

10. In cross-examination he said he was upset that the Judge did not look at his medical certificate. He believed the Judge dismissed his case. He was with security officers at the front counter area when he was saying he wanted to make a complaint against the Judge. He had taken quite a bit of medication after the assault and on the morning of Court had taken six codeine. They had a strange effect on him. After Garry Roots made the smart arse comment in court he just turned away. He denied waving the sling around. He had moved his left arm around in circles and he demonstrated this with his arm stretched out. He heard someone yell out as he was moving his arm around. He said the words "fucking dogs" but he was not sure who he was speaking to. He did not know that they were there

before that. The drugs made him feel strange but he was still in pain. He denied he directly yelled at Garry Roots. When he realised who the people were he walked away. He denied that he said that he would kill them. He denied he said she was a slut. As he was walking away Garry Roots was yelling at him saying “I will see you in Court”. That was the close of the defence case and then submissions were made.

11. I find it proven beyond a reasonable doubt that as at the 1 August 2006 the defendant was a person against whom a restraining order issued in accordance with the *Domestic Violence Act* was in force. Exhibit P2 sets out that the order was in force to the 3 August 2006. I find it proven beyond reasonable doubt the defendant was served with a copy of that order. Once again reference is made to exhibit P2.
12. The issues to be resolved requires the credit of the witnesses to be assessed. I found the witness Peter Maley to be a careful and credible witness. In particular he took great care not to reconstruct any of the events that he witnessed. His evidence can be accepted as reliable.
13. Garry Roots attitude to answering the questions was less than impressive. His attitude towards questioning and in particular cross-examination was one of “why should I answer this question”? He failed to appreciate the need to answer questions in a responsive manner and continued to talk about matters which were not directly relevant to the Court proceedings. He would often answer in a flippant way and made many inappropriate remarks. This was perhaps most notably demonstrated when he called the defendant Mr Manson. Much of this evidence was not summarised in the summary but as stated all matters are taken into account and this evidence does effect the witnesses’ credibility. He had a flippant attitude to Court proceedings at times. His attention was on the defendant rather than the people who questioned him. I formed the view that he sought to minimise his role in the incident. Nonetheless I did form the view that this witness was nervous and

alarmed to be in the presence of the defendant in a small Court room setting. It is certainly possible that the attitude exhibited in the witness box by this witness was in part due to his fear of the defendant. But I did not conclude it was entirely due to his fear of the defendant and I find the witness' evidence can not be accepted in its entirety as reliable. In particular the evidence of the exchange said to have occurred outside the court house.

14. The witness Jeanette Roots was much more responsive in the answering of questions and much calmer in Court than her husband. Nevertheless she adopted a suspicious attitude to much of the questioning and would answer in a manner which suggested she was trying to ascertain why the question was being asked, answering in a pre-emptive way. This attitude became more evident as cross-examination proceeded. She conceded she may have made the provocative statement to the defendant but could not recall making it. I consider she was trying to minimise the role played in the incident by herself and her husband. This had a negative impact on her creditability as a witness.
15. The defendant exhibited an excitable and short tempered demeanour throughout his evidence. He would jump up and down in the witness box and spoke in a loud and bombastic manner. He freely used coarse language in his evidence and it was not hard to imagine that when upset and angry, his presence would be alarming. He had agreed that he was angry and upset as he was at the front of the Courthouse, contributing his anger to the failure to be given the opportunity of presenting his medical certificate to the Court. I did form the view that his narrative was the 'warts and all' version and that he was not seeking to minimise his role.
16. This case demonstrates the extreme difficulty of ongoing Court proceedings where there are full non-contact orders involving the persons before the Court. In the appeal in the Supreme Court both parties were fully entitled to be at the Court and this means that the no contact order (as was considered

appropriate by the Court who made the order) is tested to the extreme. Due to the lay out and size of the court room parties are placed in a situation of being in close contact. They must arrive and leave the courthouse. This charge arose as the parties were leaving court. Court cases are, of themselves, very stressful events. These defended proceedings themselves once again place the parties in close proximity including outside the Court foyer area and there was a suggestion there had been some 'facing off' of each other outside the Courthouse.

17. I make the following findings of fact, based upon the evidence and the findings as to credit. I am satisfied that the defendant was talking to himself outside the Courthouse and was directing his anger and agitation towards his failure to be able to present the medical certificate to the Court. I am satisfied that he did not have an injury to his arm but had used the sling to help protect his rib area following the incident a few days earlier. For that reason I am satisfied that, having had the sling on for some time, he had decided to take the sling off and stretch out his arm. I am satisfied he was moving his arms around. I find that he was not waving his arms directly towards the complainant. At this point in time Mr Maley came out of the Courthouse and heard an exchange of words between the parties. He can not now recall what was said in that exchange. I find the exchange was extremely brief. I find it proven beyond reasonable doubt that it was the complainant's wife who first made a remark towards the direction of the defendant. She said 'miraculous recovery hey', a provocative remark in the context of the history of the relationship between the parties. At that stage the defendant was not aware that the complainant and his wife were in the vicinity. The defendant had been talking out loud to himself and when he heard the remark swore at the person who made the remark. It was a females voice who had made the remark. The order the defendant had related to a male. The remark made by the defendant was not directed towards the complainant. As is transpired the complainant was in the vicinity. I can not

be satisfied on the evidence before me that there was a threat made to kill the complainant and his wife. Had I been satisfied that such a remark had been made I would have found that to be acting in a provocative manner towards the complainant. Nevertheless I am not satisfied that the remark was made. The complainant continually referred to generalised statements as to what had been happening in the past and was not an impressive witness as to precisely what was said in the exchange. Mr Maley's evidence was that he heard the complainant saying words to the defendant in an aggressive manner. The complainant did not give evidence in accordance with this evidence. I find that the complainant was seeking to minimise his involvement and I am not persuaded by his evidence as to the tenor of the exchange. I am not satisfied beyond reasonable doubt that when the defendant swore and directed words towards the voice he had heard that he was aware who it was. It was only after he turned around that he saw who the persons were. I am satisfied that the defendant was walking diagonally away from the complainant when he was talking to himself. I do not accept that they ever were as close as the witness Jeanette Roots stated they were and find that they were approximately thirty to forty metres apart and the distance was increasing, as the defendant was walking away and the remarks said.

18. As stated the onus of proof lies with the prosecution to prove their case beyond reasonable doubt. I find they have not proven their case beyond reasonable doubt and find the defendant not guilty as charged.

Dated this 28<sup>th</sup> day of June 2007.

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**Melanie Little**  
STIPENDIARY MAGISTRATE