

CITATION: *Cartwright v Cartwright* [2007] NTMC 040

PARTIES: CARTWRIGHT, ANNETTE

v

CARTWRIGHT, MISCHA

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Domestic Violence Act

FILE NO(s): 20703699 and 20703863

DELIVERED ON: 3rd July 2007

DELIVERED AT: Darwin

HEARING DATE(s): 7th March 2007 remitted 9th May 2007
further submissions 7 June 2007

JUDGMENT OF: Ms Fong Lim RSM

CATCHWORDS:

Adequate reasons – assault - Domestic Violence Act- self defence – continuing behaviour.

Section 4 Domestic Violence Act

Section 185 Justices Act

REPRESENTATION:

Counsel:

Applicant/Respondent: Mr Norrington

Respondent/Applicant: Mr Snell

Solicitors:

Applicant /Respondent: Northern Territory Legal Aid Commission

Respondent/Applicant: Halfpennys

Judgment category classification:

Judgment ID number: [2007] NTMC 040

Number of paragraphs: 27

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

No. 20703699 & 20703863

[2007] NTMC 040

BETWEEN:

CARTWRIGHT, ANNETTE
Applicant/Respondent

AND:

CARTWRIGHT, MISCHA
Respondent/Applicant

REASONS FOR JUDGMENT

(Delivered 3rd July 2007)

Relieving Magistrate Fong Lim:

1. Annette Cartwright (referred to as the Annette) appealed my decision of the 7th of March 2007 to dismiss her application for orders pursuant to the *Domestic Violence Act* against Mischa Cartwright (referred to as the Mischa) on file number 20703699.
2. The appeal was on the following grounds:
 - a. That I fell into error by not giving adequate reasons for decision; and
 - b. Upon the evidence it was not reasonably open to reject the appellant's (Annette's) evidence in circumstances where the Mischa admitted an assault upon the appellant.
3. His Honour Justice Riley agreed with Annette that I failed to give adequate reasons for my decision to allow the Annette to understand why she had failed in her application and allowed the appeal. He did not allow the appeal in relation to the second ground. The matter and the file number 20703863

(even though there was no appeal in that matter) were referred back to me to provide adequate reasons.

4. Within his reasons His Honour suggested that I provide the parties with reasons as to the issue of self defence in the context of the Domestic Violence Act. On the 7th June 2007 I invited the parties to make submissions to me in relation to the application of self defence as such submissions were not made to me at the hearing. I received submissions from the solicitor for Annette on the 21st of June 2007 and the solicitor for Mischa on the 22nd of June 2007.
5. It is important to note that the Annette's application was the subject of a cross application by the Mischa for an order against the Annette under the Domestic Violence Act and both applications were heard together. Both matters were referred to me for further reasons.
6. The evidence of the incident complained of by both parties (the basis for their applications) was produced in the form of affidavits of both parties of evidence in chief and their oral evidence on cross – examination. There was no other evidence produced to the court. At the conclusion of all of the evidence I was not satisfied that I could accept either party's evidence of the incident as more likely on the balance of probabilities which was the basis of my decision to dismiss both applications. While there was some evidence where the parties agreed and that clearly established some facts for the Court the evidence was not enough to establish all of the relevant factors for either party.
7. An applicant for an order pursuant to section 4 of the Domestic Violence Act must prove on the balance of probabilities the following things:
 - (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,

8. It is accepted that the parties were in a domestic relationship they had been sisters - in- law. It is accepted by both parties that there was physical contact between them on the 6th of February 2007 both parties claiming that the other had assaulted her. Annette's evidence is that the Mischa was screaming at her and was pointing her finger aggressively through the car window and Annette had pushed her away and that is when the Mischa came in swinging punches. Mischa's evidence is that it was Annette who struck the first blow by slapping her on the face through the window of her car at which time Mischa then went to hit Annette in self defence.

9. It is the Annette's submission that self defence is not applicable in the context of the Domestic Violence Act. It is Annette's submission that the Act requires the court to be satisfied that there has been an assault or

provocative behaviour by Mischa towards the Annette but the lack of the requirement for that assault to be “unlawful” means that the defences such as self defence and provocation play no part. Mischa argues that self defence to the assault is available as a complete defence and should I find that Mischa has acted in self defence and therefore find that an order should not be made. Mischa submits that the court should use the definition of assault in the Criminal Code to interpret the provisions of the Domestic Violence Act and in doing so the defence of self defence becomes available to the defendant in an application under section 4.

10. Mischa refers to comments made by Mildren J in Carruthers v Griffis [2000] NTSC 11 where his honour was considering an appeal from this court’s decision to dismiss an application for an order under section 4 of the Domestic Violence Act. One of the grounds of appeal before his honour was that the magistrate in question had misdirected himself on the question of self – defence. It seems that ground was not pressed by the appellant and his honour did not fully consider the issue of whether self defence should be considered in an application for an order under section 4 of the Domestic Violence Act. His Honour considered the evidence in that case and found that there was some evidence to establish self defence but that the rule in Browne v Dunne had not be followed and on that basis allowed the appeal. His Honour did not indicate that it was his view that if self defence was established an order would not be made. His Honour then went on to considered the application of section 27(p) of the Criminal Code Act (NT)1997 and said:

“The learned Magistrate held that the appellant had not proven that the respondent’s conduct was not justified by ss 27(p) of the Criminal Code Act (NT) 1997. That defence was also never raised and in my view, even if it were a proper basis for refusing relief,(emphasis is mine) I consider that it is in the same category as the self defence issue”.

11. His Honour unfortunately did not elaborate on what he meant by the words, “even if it were a proper basis for refusing”. Throughout his comments in on both the issue of self defence and justification His Honour seems to accept that those defences applicable under the Criminal Code had some role to play in the interpretation of the provisions of the Domestic Violence Act.
12. The counsel for Mischa argued that Carruther’s case is an authority for the proposition that if a person accused of assault under the provisions of the Domestic Violence Act can prove self defence or justification then the application must fail. I do not accept that submission. It is clear His Honour did not make that finding but that he did accept that those are matters which could be considered in an application under the Domestic Violence Act should the evidence support it.
13. When interpreting the provisions of an Act the court must have regard to the purpose and object of the Act. The Interpretation Act (NT) reinforces that principle in the Northern Territory in section 62A as follows:

“62A.Regard to be had to purpose or object of Act

In interpreting a provision of an Act, a construction that promotes the purpose or object underlying the Act (whether the purpose or object is expressly stated in the Act or not) is to be preferred to a construction that does not promote the purpose or object.”

14. The object of the Domestic Violence Act is as follows:

“An Act to provide for the making of restraining orders in relation to domestic violence and the registration and enforcement of such orders made in other jurisdictions, and for related purposes”

15. It is an Act primarily for prevention of domestic violence through restraining orders. The only penalty provisions in the act are those which become operative if a restraining order is breached.
16. In relation to assault section 4 of the Domestic Violence Act there is not reference to an unlawful assault. There is no specific reference to an assault

as defined by the Criminal Code. The provision also refers to personal injury, property damage, and threats and provocative behaviour and none of those actions are required to be “unlawful”. Every Act must be read as an entire act and should not be interpreted in reference to the act (except of course act such as the Interpretation Act) unless specifically referred to and unless there is an uncertainty as to what the section means. Guidance can be taken from the Criminal Code in the definition of assault as well as the common law but that does not mean that other provisions of the act should also be considered.

17. Butterworths Australian Legal Dictionary defines assault as

“1. An act that intentionally or recklessly causes another to apprehend immediate and unlawful personal violence: *Knight [1988] 35 A Crim R 314* 2. A general word to include both a threat of and the actual infliction of personal violence: *R v Bacash [1981] VR 923* 3. a form of tort of trespass to the person. It consists of an intentional act or threat directly placing the plaintiff in reasonable apprehension of an imminent physical interference with his or her person or the person of someone under his or her control. Because the essence of assault is the creation of an apprehension of imminent contact in the plaintiff’s mind. It is irrelevant whether or not the defendant has the means to carry out the threat. Words may amount to an assault. Assault is actionable “per se” (without proof of damage): *Barton v Armstrong [1969] 2 NSW 451.*”

18. Assault as defined by section 187 of the Criminal Code is

187. Definition

In this Code "assault" means –

(a) the direct or indirect application of force to a person without his consent or with his consent if the consent is obtained by force or by means of menaces of any kind or by fear of harm or by means of false and fraudulent representations as to the nature of the act or by personation; or

(b) the attempted or threatened application of such force where the person attempting or threatening it has an actual or apparent present

ability to effect his purpose and the purpose is evidenced by bodily movement or threatening words,

19. In either the common law or under the *Criminal Code* it is clear an “assault” is characterised as an direct or indirect application or threatened application of force upon a person without their consent. The protection of the defence of self defence or provocation comes into operation when the person who has caused the assault is attempting to avoid either a criminal prosecution or civil suit for damages.
20. An application under the *Domestic Violence Act* for a restraining order is neither a criminal prosecution nor a suit for damages it is an application for protection and it is my view that the consideration of self defence and even provocation will only be relevant in considering all of the circumstances of the assault and whether those circumstances require a restraining order to be issued.
21. It is clear that on that part of the evidence agreed (that is Mischa hit Annette) there was an assault by Mischa on Annette. Whether Mischa hit out in self defence or was provoked is a matter which I found was not established on the balance of probabilities because I could not find either party’s evidence as more likely.
22. If I had found that I preferred the evidence of Annette then I would have accepted that there was an assault upon Annette however the balance of her evidence did not allege continuing provocative behaviour nor was there any evidence of continuing threats of assault it was clear that this was the first and last occasion that the tension between the parties had escalated to violent and unacceptable behaviour (pushing, hitting and bad language). Therefore on Annette’s evidence I could not be satisfied that Mischa’s violent and provocative behaviour would continue therefore there was no need for a restraining order to issue in her favour.

23. If I had found that I preferred the evidence of Mischa then I would have found that there was an assault by Annette on Mischa, slapping her across the face through the window, and the Mischa then reacted in self defence. There was no evidence by Mischa or other instances of violent or provocative behaviour just a suspicion that Annette had been at her house without permission on that night. However even on Mischa's own evidence before this incident the parties has managed to keep things on a civil level by keeping their contact to minimum.
24. It is suggested by Mischa's solicitor that as there is a Family Law order in relation to contact and residency or the Annette's children with Mischa's brother that necessarily requires the parties to have contact then the Court should find that contact will lead to similar behaviour. There is no evidence to support this claim. On that basis I would have dismissed Mischa's application for a restraining order.
25. In summary I could not accept either party's evidence as more likely therefore found that there was no basis for an order to be made. Even if the evidence, which could be agreed upon, proved there had been an assault by Mischa on Annette there was no evidence to support continuing violent or provocative behaviour by either party therefore both applications must fail.
26. Annette also submitted that section 185 of the *Justices Act* allows me to amend my decision if I chose to do so. Section 185 reads:

“185 Amendment of findings of guilt, warrants etc

(1) Any-

(a) finding of guilt or order made by a Court of Summary Jurisdiction :or

(b) warrant of committal, or other warrant or proceeding issued or had by or before any Justice,

May be amended, according to the evidence, by the Justices or Justice by or before whom the finding of guilt, order or warrant was made, issued or had, or by any Court before which it comes on

appeal or otherwise, at any time after it has been signed, and before it has been executed, upon such (if any) terms as costs or otherwise, as to the Justices or Justice or the Court seem fit.”

27. I cannot accept that argument. Section 185 cannot apply to matters where the Court has made an order which has been recorded by the court in its records subsequent to proceeding to a full hearing, and after the matter has gone on appeal otherwise there would be no finality of the proceedings in this court. It is for the court of appeal (in this circumstance the Supreme Court) to amend the order if it thinks fit. The court of appeal in this matter has chosen not to interfere with this court’s order nor has it required the matter to be remitted for a rehearing it has merely required me to give further reasons for my decision.

Dated this 3rd day of July 2007

Tanya Fong Lim
RELIEVING STIPENDIARY MAGISTRATE