CITATION: *[2010] NTMC 022*

PARTIES:	JOHN VAN COMMENEE
	v
	PAUL MANDARINO
TITLE OF COURT:	Summary Jurisdiction
JURISDICTION:	Criminal
FILE NO(s):	20940034
DELIVERED ON:	29.3.10
DELIVERED AT:	Darwin
HEARING DATE(s):	29.1.10 & 19.3.10
JUDGMENT OF:	Mr Daynor Trigg SM

CATCHWORDS:

Justices Act – Personal Violence Orders
"Personal Violence Offence"

REPRESENTATION:

Counsel:

Applicant:	Mr Kudra
Defendant:	Ms McMaster

Solicitors:

Applicant:	
Defendant:	

Judgment category classification: B
Judgment ID number: [2010] NTMC 022
Number of paragraphs: 79

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

No. 20940034

[2010] NTMC 022

BETWEEN:

JOHN VAN COMMENEE
Complainant

AND:

PAUL MANDARINO
Defendant

REASONS FOR DECISION

(Delivered 29 March 2010)

Mr Daynor Trigg SM:

1. This proceeding commenced on 24 November 2009 when the applicant filed an Application for Personal Violence Restraining Order pursuant to *section 82* of the *Justices Act*. In making the Application the applicant relied upon the matters contained in the statutory declaration filed with the Application. This statutory declaration was not tendered in the proceedings. Accordingly, Ms McMaster objected to it forming any part of my considerations.

2. *Part IVA* of the *Justices Act* (which deals with personal violence orders) is silent on evidentiary issues (other that in *section 86(8),* where the court is obliged to take the report of the Director of the Community Justice Centre into account) and accordingly, the normal rules of evidence would apply. The court has no power to inform itself. Accordingly, I agree with Ms McMaster that the statutory declaration

forming part of the Application is not before me. I therefore disregard it.

3. *Section 82* is contained within *Part IVA* of the *Justices Act* which was a new Part that commenced on 1 July 2008. The effect of the changes was to repeal the peace complaint procedures that were of long standing and contained in *section 99* and replace it with a new and fundamentally different regime.

4. Under the repealed *section 99:*

- The proceedings were commenced by Complaint;
- The cost provisions that applied to Complaints (see *Division 5 of Part IV*) therefore applied;
- The court could adjudge a defendant to enter into a recognizance to keep the peace or be of good behaviour towards the complainant;
- The right to relief was activated if it be shown that a breach of the peace had been committed and there might be a repetition (*R v Wright; Ex parte Klar LSJS 8/2/71 @82*).

5. The new *Part IVA* states (in part) as follows:

> **Division 1 Preliminary matters**
>
> **80 Definitions**
>
> In this Part:
>
> defendant, for a personal violence restraining order, means the person against whom the order:
>
> (a) is sought; or
>
> (b) is in force.

personal violence offence means an offence against any of the following provisions of the Criminal Code:

(a) Part V, Division 2;

(b) Part VI, Divisions 3 to 6A;

(c) section 211 or 212;

(d) another provision prescribed by regulation.

personal violence restraining order, see section 82.

protected person, for a personal violence restraining order, means the person for whose protection the order:

(a) is sought; or

(b) is in force.

81 Object of and achievement of Part

(1) The object of this Part is to ensure the safety and protection of persons who experience personal violence outside a domestic relationship as defined in the Domestic and Family Violence Act.

(2) The object of this Part is to be achieved by providing for:

(a) the making of personal violence restraining orders to protect people from certain violence; and

(b) the enforcement of the orders.

Division 2 Applying for and making orders

82 Application for order

Any of the following persons may apply for an order under this Division (a personal violence restraining order) for the protection of a person against another person:

(a) the person whose protection is sought under the order;

(b) an adult acting for the person whose protection is sought under the order;

(c) a police officer.

83 Parties to order

(1) Only 1 person may be named as the protected person or defendant in a personal violence restraining order.

(2) The defendant named in a personal violence restraining order cannot be a child under 15 years old.

84 How application is made

An application for a personal violence restraining order must:

(a) be made in the form approved by the Chief Magistrate; and

(b) be filed in the Court.

85 Notice of hearing of application

As soon as practicable after the application is filed, a clerk must give written notice to the protected person and defendant of the time and place for the hearing of the application.

86 Referral to mediation

(1) Before hearing an application for a personal violence restraining order, the Court must refer the protected person and defendant for mediation under the Community Justice Centre Act.

(2) However, the Court must not make a referral and must proceed to hear the application if it is satisfied it is in the interests of justice to do so, including, for example, because:

(a) there is a history of violence committed against the protected person by the defendant; and

(b) there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful.

(3) A referral stays the proceeding until a report is given to the Court under subsection (6).

(4) The referral is taken to be an application under section 13 of that Act for the provision of mediation services for a dispute between the protected person and defendant.

(5) The Director of the Community Justice Centre must accept the application.

(6) The Director must give the Court a written report on the outcome of the mediation or attempted mediation.

(7) The Court may refer the matter back to the Director with directions about the application.

(8) In deciding the application, the Court must take a report of the Director into account.

87 Deciding application

(1) The Court may make a personal violence restraining order if it is satisfied on the balance of probabilities a personal violence offence has been committed, or is likely to be committed, by the defendant against the protected person.

(2) Otherwise, the Court must dismiss the application.

(3) The Court may decide the application even if the defendant does not appear at the hearing.

88 Matters to be considered by Court

(1) In deciding whether to make a personal violence restraining order, the Court must consider the safety and protection of the protected person and any affected child to be of paramount importance.

(2) In addition, the Court must consider the following:

(a) the defendant's criminal record as defined in the Criminal Records (Spent Convictions) Act;

(b) the defendant's previous conduct whether in relation to the protected person, affected child or someone else;

(c) other matters the Court considers relevant.

(3) In this section:

affected child means a child whose wellbeing is affected or likely to be affected by a personal violence offence.

89 Content of orders

(1) A personal violence restraining order may provide for any of the following:

(a) an order imposing the restraints on the defendant stated in the order as the Court considers are necessary or desirable to prevent the commission of a personal violence offence against the protected person;

(b) the other orders the Court considers are just or desirable to make in the circumstances of the particular case.

(2) In this section:

restraint includes prohibition.

90 Notice of order

As soon as practicable after a personal violence restraining order is made, the Court must give a copy of it to:

(a) the protected person and defendant; and

(b) the Commissioner of Police.

6. One of the anomalies created by this new regime is that the cost provisions (aforementioned) of the Act were not amended, and accordingly there appears to be no right to costs under the Act for matters commenced on Application.

7. Further, it is apparent from the fact that the jurisdiction is only invoked where a “personal violence offence has been committed, or is likely to be committed” (*section 87(1)*) that the legislature has possibly intended to limit matters that may be brought before the court to those that are of a more serious kind. This is apparent from the types of offences that are included within the definition of “personal violence

offence" (in *section 80*). Hence only offences under the *Criminal Code* will suffice (and not, for example offences such as offensive conduct under the *summary Offences Act*). The general type of offences that have been specified include offences against morality (child sex offences etc), threats to kill, rape, assaults, recklessly endangering life, stalking, threats (*section 200* of *Criminal Code*), robbery. All are offences of a serious type.

8. No offences other than those listed in the definition have yet been prescribed. Accordingly, the legislation is, in my view, aimed at protecting persons where serious offending (involving offences under the *Criminal Code* only) has been committed or is likely to be committed. This view is consistent with *section 92(1)* of the *Justices Act* which states that a person who contravenes a personal violence restraining order is subject to a maximum penalty of 400 penalty units (currently some $52,000) or imprisonment for 2 years. Accordingly, severe penalties apply to anyone breaching an order once one is made.

9. By way of contrast, under the previous procedure in *section 99* there was no specific penalty provision in relation to a breach. Rather under *section 99(3)* a person could be imprisoned for up to 6 months if they did not comply with the court's order that they enter into a recognizance. Accordingly, if a person refused to enter the recognizance they could be held in custody for up to 6 months until they did enter into it. But the section was silent as to what the consequences of a breach might be. As far as I am aware the only possible consequence of a breach was the forfeiture of some, or all, of the recognizance.

10. It would seem to follow from these significant changes that it was intended that the courts were no longer to be concerned with disputes

that did not involve actual violence (or serious threats) or the likelihood of actual violence. In my view, the legislative changes have significantly raised the bar when considering the threshold test to making an order.

11. However, the compulsory referral to mediation (*section 86(1)*) seems somewhat curious if the court were to be dealing with only serious matters (although the court "must not make a referral....if it is in the interests of justice to do so": see *section 86(1)*), but it appears to be the intention of the legislature to only allow matters to proceed to a hearing if mediation is unsuccessful. This is further evidenced by *section 86(3)* which has the effect of staying the proceedings until a report is given to the court by the Director of the Community Justice Centre. However, the Act is silent as to what the court can do if a party refuses or fails to co-operate or attend mediation, apart from the court having a power to refer a matter back to mediation (*section 86(7)*).

12. However, in deciding the Application "the Court must take a report of the Director into account". Accordingly, it seems to me that, if an applicant fails to attend mediation or co-operate then the court might have power to stay any hearing until the applicant is willing, or decline to grant any relief. And if a defendant fails to co-operate with the mediation process then the court might be able to use this as evidence to support the need for some orders against that defendant. But as these are peripheral matters not argued in this case I have reached no decided view on them.

13. In the second reading speech (delivered on 29/11/07) in relation to *Act 34 of 2007*, where these changes were made, the following was said in relation to these amendments to the *Justices Act*:

> The bill does contain amendments to other pieces of legislation, including the *Justices Act*. Amendments to this act will allow those who experience violence in a relationship but do not live with the perpetrator to seek a new type of civil remedy called a Personal Violence Restraining Order. The primary purpose of this order will be to secure the safety of the victim, with the grounds for the order being a finding on the balance of probabilities that the defendant committed a personal violence offence that caused harm to the victim as defined in the *Criminal Code.*
>
> These provisions replace section 99 of the *Justices Act*, which stakeholders explained during consultation were inadequate to the task and provided limited protection of victims because they were not enforceable by police. This new mechanism will allow the Magistrates Court to refer a matter to compulsory mediation before the court is required to determine an application, unless the matter is of such a significant nature that the court is obliged to hear the matter immediately.
>
> The amendment will also allow police to make an application on behalf of children in circumstances where, for example, they believe a child has been or is being sexually assaulted by a perpetrator who is not in a domestic relationship with that child. Police will be able to act immediately to protect that child while they complete their investigation. In these circumstances, it will be a useful complementary measure to criminal proceedings. (underlining added)

14. I find the reference to "a personal violence offence that caused harm to the victim as defined in the Criminal Code" to be curious. The causing of harm does not appear to be a consideration or pre-requisite to the making of any order. *Part IVA* makes no reference to "harm".

15. Having made these general observations I now turn to consider the evidence in this matter.

16. It was clear from the evidence as a whole that the applicant had some involvement with the "transit centre" site and the various buildings and

businesses operating thereon. It was also clear that the defendant had some involvement with the business of Café Uno, which operated from one of the premises generally on the "transit centre" site. However, there was some uncertainty on the evidence as to what the true position was. Further, witnesses belief as to who owned or operated what was not relevant. Accordingly, at my suggestion, various documents relating to the site were eventually obtained and tendered. These documents disclosed as follows:

- On 22/8/06 a lease commenced until 21/8/11 (with 3 x 5 year rights of renewal) over tenancy 4 of Lot 6587, Town of Darwin – ExP4;

- The lessor named on the lease was Redco (NT) Pty Ltd - ExP4;

- The common seal of the lessor was affixed to the lease, and signed by Douglas Gamble and Tanya Gamble as directors on 22/8/06 – ExP4;

- The lessee named on the lease was Via Appia Pty Ltd as trustee for the Premac Family Trust – ExP4;

- Robyn Bodero signed the lease as the sole director and secretary of the lessee on 18/8/06 – ExP4;

- Robyn Bodero is and was at all material times the sole director, secretary and shareholder of Via Appia Pty Ltd – Ex P6;

- On 18/8/06 Robyn Bodero and the defendant signed a Deed of Guarantee in favour of Redco (NT) Pty Ltd guaranteeing the performance of Via Appia Pty Ltd under the said lease – ExP8;

- On 5/2/07 the lease to Via Appia Pty Ltd was registered on the certificate of title for Lot 6587, Town of Darwin – ExP7;

- GAJ Nominees Pty Ltd was first registered on 1/2/06 – ExP5;

- Gina Gamble has been a director, secretary and sole shareholder of GAJ Nominees Pty Ltd since 1/2/06 – ExP5;

- From about 24 or 25/7/07 the registered owner of Lot 6587, Town of Darwin became GAJ Nominees Pty Ltd – ExP7;

- On 1/5/09 the applicant was appointed a director of GAJ Nominees Pty Ltd – ExP5.

17. I do not know if Redco (NT) Pty Ltd continues to exist as a registered company. It is not suggested that there has been any amendment or assignment of the lease herein (ExP4) to alter the lessor. Accordingly, the standing (if any) of GAJ Nominees Pty Ltd and the applicant in relation to the lease is questionable. However, the standing of the defendant in relation to the lease is also questionable, as he is at best a guarantor in relation to the lease, but is otherwise not a party to it.

18. In his evidence the applicant said that GG Management owned the whole site. On the basis of ExP7 this does not appear to be correct. He went on to say that he is a director of that entity. I do not know if that is correct or not, but in any event that would appear to be irrelevant as that name does not appear on any of the documents tendered in court.

19. The applicant said that Gina Gamble was his mother, but I am unsure of his relationship (if any) with Douglas Gamble or Tanya Gamble.

20. The applicant went on to say that “we” lease Café Uno to the defendant’s partner, Robyn Bodero, it’s her name on the lease. Firstly, it does not appear that the applicant has any legal interest in the lease herein, so that assertion is not correct. Secondly, Café Uno is not leased to Ms Bodero at all, but to a company, so that assertion is also incorrect. Thirdly, Ms Bodero’s name is not on the lease, she has

simply signed the lease as the sole director and shareholder of the lessee, so that assertion is also not correct.

21. Various letters (ExD2) were tendered in the defendant's case relating to the Café Uno lease and these were all on a letterhead that asserted they were from "GG Management a division of Gina Gamble Investments Pty Ltd". Whether this is correct in law or not I have no idea. These letters are all addressed to "Dear Paul and Robyn" and purport to have been signed either by the applicant or Gina Gamble. It would seem that the reference to "Paul" is probably a reference to the defendant.

22. The applicant appears to have little idea of the true legal position as regards Lot 6587 and I give any assertions by him in this regard little weight.

23. Whatever the true legal position it is clear from all the evidence that:

- The applicant lives on part of the transit centre site;
- The applicant operates some businesses (principally Chilli Backpackers and the Youth Shack) which operate on the transit centre site;
- The applicant has run Chilli Backpackers for about 13 years;
- The applicant has run the Youth Shack since 2006;
- The applicant has been involved, purportedly on behalf of the landlord (whoever that might be), with maintenance or other issues that have arisen from time to time on the transit centre site;
- The defendant has been actively involved with the day to day running of Café Uno since about August 2006;

- Since 2006 there have been a number of issues and disputes that have arisen concerning the Café Uno lease;
- These disputes have been mediated in 2007 and 2009;
- In addition, these disputes have gone through consumer affairs in 2008 and 2009;
- In general an agreement has been reached following mediation or consumer affairs involvement, but each party herein asserts that the other has not complied fully with their part of the agreement;
- Lawyers have been involved for both sides in relation to their lease disputes;
- A property manager has specifically been appointed to deal with Café Uno on behalf of the Lessor so as to limit contact between the applicant and the defendant;
- Lawyers are involved for both sides in this matter;
- The applicant has legitimate reasons for needing to attend and move around the transit centre site; and
- The defendant has legitimate reasons for needing to attend Café Uno and move around the transit centre site.

24. Rather than deal with the evidence of each witness in turn (as I usually would), I consider that it is better, in this case, to deal with the evidence in relation to each separate incident complained of. I now do so.

Alleged incident in 2007

25. The applicant gave evidence that in 2007 (when they were doing work on the floors of the Roof Shack that is above Café Uno) he had a call from Café Uno complaining about the level of noise. The applicant attended at Café Uno. He said he went to the back of the café and he spoke to the defendant who told him there was too much noise, told him to stop the noise as it was driving customers away. The applicant told the defendant "no". He said the defendant then grabbed him on the neck (and said he still had a scar, which I could not see and was not invited to inspect) with both hands to the top of his collar; they went to the ground; the defendant pinned him up against a wall; the defendant called him a "piece of shit"; and threatened him (but I was not told what was said, so I am unable to find that any threat was actually made).

26. If the applicant's version is found to be correct on the balance of probabilities then clearly it would be a "personal violence offence" as it would be an unlawful assault under *section 188(1)* of the *Criminal Code*. Assault is defined in *section 187* of the *Criminal Code* to mean:

> (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,
>
> other than the application of force:
>
> (c) when rescuing or resuscitating a person or when giving any medical treatment or first aid reasonably needed by

the person to whom it is given or when restraining a person who needs to be restrained for his own protection or benefit or when attempting to do any such act;

(d) in the course of a sporting activity where the force used is not in contravention of the rules of the game; or

(e) that is used for and is reasonably needed for the common intercourse of life.

27. The applicant said that he then went back to his office and called police and made a statement to them. Apparently no charges were laid over this incident. The applicant said that the police spoke to the defendant and an employee who had allegedly said that the applicant was the aggressor and had attacked the defendant.

28. In relation to this incident (which he said occurred outside the kitchen as he was standing just outside the kitchen door) the defendant said he was telling the applicant about the noise (which at this point in time was quieter than it had been.....and he offered that the machine was "idling") and the applicant was saying the noise was okay, it was bearable. He said the applicant then started to walk away, so he put his hands up and told the applicant that they needed to talk. He said the applicant then pushed him (to get through) with an open right hand against the bench that was behind him and said "get out of my fucking way old man". He said they then grabbed each other. He said the applicant had him by the shoulders of his shirt, and he grabbed the applicant and they wrestled and ended up on the floor. The defendant said that the applicant had him on the floor for a couple of minutes (with the applicant on top) and was yelling "I'm going to kill you" and other things before he let him go.

29. The defendant stated that as a result of this incident he got a big bruise on his back, from where he went back into the bench.

30. The defendant confirmed that he was not charged with any assault. He also said he made no complaint of assault as if he has an argument he'd rather work it out by himself.

31. The defendant's wife, Ms Bodero, also gave evidence in relation to this incident. She said that one of her staff came and told her there was trouble between the applicant and the defendant. She walked out the door and the defendant was dusting himself off. The only other thing she heard was "perhaps shouting" but she could not be more specific. Her evidence did not assist either party. As the wife of the defendant she presumably would have been in a position to corroborate any bruise to the defendant's back, but she was not asked any questions about this.

32. The remaining witness to this event who was called was Ms Haah, who has worked at Café Uno for about 3 years and is an assistant chef. She still works there. She described the level of noise from above and the difficulty of working. She said that the applicant wouldn't listen and went to walk away, and the defendant put up his hands and told him to stop and listen. But the applicant pushed the defendant out of his way, and then the two men were out of her view. She then heard some raised voices and a couple of crashes, and that was it.

33. Ms Haah was not shaken in cross-examination, and there was nothing from her evidence or presentation in court to cause me to reject or disbelieve her evidence. The evidence of Ms Haah generally supports the defendant's evidence and is materially different to the applicant's version.

34. I am unable to prefer the applicant's version to the defendant's version. Hence I am unable to be satisfied on the balance of probabilities that the incident occurred as described by the applicant. I

therefore am unable to find that in this incident in 2007 the defendant committed any “personal violence offence” against the applicant.

Alleged spitting incidents

35. In his evidence the applicant said that over the last 5 years the defendant has “spat in my presence” at least twice. He went on to say that he had a witness for the last occasion. He also said in regard to this general allegation that the defendant has “spat at me”. He went on to explain that the defendant looks at him and then spits on the ground in front of the applicant.

36. The applicant did not specify any particular date or time frame for the two alleged spitting events. Nor did he provide any more detail as to the distance between himself and the defendant at the time.

37. At no stage did the applicant suggest that any spit landed on him or any of his clothing. At no stage did the applicant suggest that he had to take any action to avoid any spit landing on him. At no stage did the applicant suggest that the defendant was within range to spit on him at the time of any such alleged incident. As such it is difficult to see what alleged “personal violence offence” may have been committed even if these allegations were true.

38. In relation to this allegation I heard evidence from Doug Sykes who is the maintenance manager for GG Management. He said that just before Christmas (which I take to mean in 2009, but he did not say) he was standing near the bus shelter talking with the applicant, when the defendant walked up deliberately to where they were standing. He then said that the defendant “went through the actions of spitting” at the applicant (although he also suggested that it was directed at the applicant and him or at the applicant), but no spit came out. He said the defendant was 5 metres away at the time.

39. Accordingly, even if I accept what Mr Sykes says I am unable to find that any "personal violence offence" had been committed or is likely to be committed. I could not be satisfied on the balance of probabilities that these facts (even if accepted) established any assault. There was no alleged direct or indirect application of force nor any attempted or threatened application of force. The evidence of Mr Sykes suggests that there was a simulated spitting from about 5 metres away, and nothing else. Whilst this may strongly suggest (if the allegation is true) that the defendant has a strong dislike of the applicant it does not go far enough to establish any assault as defined in *section 187* of the *Criminal Code.*

40. Even if the allegations are true, they would do no more than suggest an immature and distasteful action by the defendant. No other basis for a possible "personal violence offence" was suggested by Mr Kudra.

41. In his evidence the defendant denied ever spitting or pretending to spit.

42. I therefore find that it is unnecessary for me to decide whether the defendant has spat or simulated spitting in the presence of the applicant at any time, as taking the allegations at their highest they do not establish that any "personal violence offence" has been committed or is likely to be committed.

Alleged kicking incident in November 2009

43. The applicant said that the defendant walked up to him and kicked him in the shin for no reason, and he had video footage of that. He said that he walked around the corner and saw the defendant. He kept to the left as he walked and the defendant "V lined" him and then kicked him in the shin. He said the defendant then said "come on you

piece of shit" and he replied "grow up, I'm over this", but the defendant kept abusing him.

44. It would appear that this is the incident referred to in the applicant's statutory declaration that set out the facts he relied upon in support of his Application (as set out in full supra). It appears that the "come on" may be the "provoking me to fight" as referred to in the statutory declaration.

45. In relation to this incident the defendant said (after telling the court that he needs a knee replacement for hi right knee, and has two discs out in his back and therefore he walks with a limp) the applicant "come toward me; and I go the other way toward him; John sees me and starts to limp and smile; and when he come close to me I kicked my right foot out to the side at John; and said "fuck off John"; but I did not make any contact; I did not contact with him whatsoever".

46. There is video footage of this incident, and this was played in court and then tendered as ExP2. When ExP2 was played in court I noted on the transcript that I observed a man in a black shirt walk towards a man in a white shirt and kick out (with a sideways action to his right) with his right foot at the person in the white shirt. I noted that I could not see if any contact was made.

47. The applicant gave evidence (which I accept) that the person in the black shirt is the defendant and the person in the white shirt was himself.

48. I have since watched ExP2 on my computer several times to see if there is anything else I can observe from the images. I make the following observations from ExP2:

- The defendant is standing in about the middle of the screen on a footpath;

- The applicant appears at the top of the screen coming around a corner and turning to his right (in the direction where the defendant is standing);
- At about the same time the defendant turns to his left and walks in the direction of the applicant (I was not told where he was going, or why he needed to walk towards the applicant)
- The applicant is walking to his left of the footpath;
- The defendant is walking in about the middle of the footpath;
- I am unable to see that the defendant is walking with any noticeable limp;
- I am unable to see that the applicant is walking with any limp (whether actual or simulated);
- The defendant kicks out with his right foot in a sideways action towards the applicant;
- The defendant's right foot is about 6 to 12 inches off the ground;
- The defendant's right foot moves about 1 to 2 feet to the right;
- I am unable to see if there is any contact made with the applicant;
- The defendant stops not long after the kicking action and appears to turn to face the applicant;
- The applicant generally keeps walking for several paces he pauses and has some words with the defendant (over his right shoulder) before continuing on;
- The applicant continues towards the camera and enters into premises at he bottom of the screen;

- The defendant remains generally in the area at the top of the screen where he stopped shortly after he kicked out.

49. As noted, I am unable to tell whether actual contact was made. The applicant bears the onus of establishing any necessary facts on the balance of probabilities. The applicant says contact was made. The defendant says contact was not made. I have no reason to prefer one version to the other as neither party was shaken in cross-examination. Each version is equally possible. I am therefore not positively swayed towards the applicant's version, and therefore I cannot be satisfied on the balance of probabilities that contact was made.

50. But that is not the end of the matter, as even if there was no contact the actions I observed would still constitute an assault in accordance with part (b) of the definition in *section 187* (as set out supra). On the evidence before me I would also be satisfied that the assault was unlawful, as it was without authorisation, justification or excuse. I therefore find (on the balance of probabilities) that in kicking out his right foot in close proximity to, and in the direction of the applicant, the defendant has committed a "personal violence offence".

51. In terms of an assault (given that I have not been able to find that any contact was made) it is an assault towards the lowest end of the scale. If I were sentencing the defendant for the assault I consider it to be so minor that I would have considered (subject to there being no aggravating features, such as being committed whilst under restraint, for example by bond or suspended sentence, for offending against the same victim) proceeding under *section 7(a)* of the *Sentencing Act* (by dismissing the charge without recording a conviction).

52. Even if I had found that some contact was made (which I haven't), it would still have been a very minor assault.

Alleged incident on about 3 December 2009

53. The applicant said that the day after this matter was first mentioned in court (which I note from the file was 2/12/09) he was sitting outside at a coffee shop (tenancy T10 of Lot 6587) with a couple of friends (Debbie Turner and Peter Boscato) when he saw the defendant. He said "Paul pulled his sunglasses down and stared at me as he slowly walked past and had a stupid smile on his face".

54. That appears to be the extent of the allegation. I am unable to see how this action could constitute an offence against any of the necessary offences under the *Criminal Code*. Accordingly, I am unable to see how this event (assuming that it happened as alleged) could be a "personal violence offence".

55. Ms Turner gave evidence in relation to this incident also. She said that the defendant stopped and stood there and glared at the applicant for 5 to 10 seconds. This is significantly different to the applicant's version, as he did not suggest the defendant stopped at all, let alone for such a significant time. She went on to say that the defendant started laughing at the applicant. Again this is significantly different to the applicant's version, as he makes no mention of anything like this occurring. She then said that the applicant ignored the defendant and the defendant then walked off.

56. Mr Boscato also gave evidence in relation to this incident. He said he noticed the defendant and said to the applicant "what's this blokes problem" and the applicant told him to "shut up". He said he noticed the defendant staring at the applicant the whole time he was walking past. He said the defendant did not stop (which is contrary to Ms Turner's evidence) but he was not walking fast (and said it took about 12 seconds for the defendant to walk past).

57. The evidence of Mr Boscato is generally consistent with the evidence of the applicant, however, the evidence of Ms Turner is inconsistent with the evidence of the applicant and Mr Boscato. Accordingly, I am unable to accept the evidence of Ms Turner and reject it.

58. Even if I accept that an incident occurred as described by the applicant and Mr Boscato I am unable to find that this incident would constitute a "personal violence offence". Mr Kudra was unable to identify what relevant offence under the *Criminal Code* was allegedly committed.

59. In his evidence the defendant denied staring at the applicant. He said he was walking past and looked to see who was there, saw the applicant, didn't stop and kept walking.

60. I am not satisfied on the balance of probabilities that whatever happened on this occasion it was of sufficient magnitude to trouble a court. I put it out of my mind.

61. Accordingly, at the end of the evidence (which went over 2 days) I am only left with the incident in November 2009 when the defendant kicked his right foot out towards the applicant when they were passing each other on a footpath. In my view, the actions of the defendant were unnecessary, immature and foolish. But were they sufficient such that this court should be sufficiently concerned that it should intervene to ensure the safety and protection of the applicant **from violence** from the defendant (see *section 81(1) and (2)(a)* of the *Justices Act*)? On the evidence can I be satisfied on the balance of probabilities that the applicant needs protection from the defendant, or that the applicant's safety may be at risk if orders are not made?

62. I consider that the court should keep in mind the principle "de minimus non curat lex" in this case. Is the single assault (that I have found to

have occurred) sufficiently non-trifling that this court should intervene and make orders?

63. I consider that the court should also keep to the forefront of it's mind that citizens are generally free to move about in the normal course of life. For a court to impose restraints on a citizen's freedom of movement and actions is, in my view, a serious step to take. That is particularly the case when any such restraint would carry the additional penal sanction that attaches to any breach.

64. I note (ExD5) that GAJ Nominees Pty Ltd (purportedly signed by Gina Gamble and the applicant) have purportedly issued a written "warning to stay off" "the Transit Centre (excluding that part of the Transit Centre known as Area 4 leased to Via Appia Pty Ltd (the premises) and the area from the pedestrian foot path on 69 Mitchell Street adjacent to the premises necessary to gain access to the premises" for a period of 12 months. ExD5 is dated 30 November 2009, and purports to be issued "under *section 8* and in accordance with *section 9* of the *Trespass Act".* Whether this document is valid and/or enforceable does not arise for consideration in this proceeding.

65. It is clear, from the demeanour of the applicant and the defendant during their evidence and in court generally, that they do not like each other. The defendant was keen to give examples of times there has been trouble with the Café Uno premises and there have been unhappy dealings with the applicant.

66. The defendant told the court of a time when they had further trouble with sewerage erupting into the café. If true, the defendant would have very good reason to be upset. He said he asked the applicant to come and have a look and the applicant said to him "fuck off, that's your fucking problem". The defendant went on to say:

- I'd liked to have killed him but I walked away;
- I was very upset;
- What kind of a man talks like that;
- I felt like get a shovel and hit him on the head.

67. Clearly, by this piece of evidence the defendant indicates that he can be very excitable and prone to think of acting violently in his dealings with the applicant. But apart from when he kicked out at the applicant, there is nothing else to indicate that he is a man of violent disposition.

68. In my view, from a practicable point of view it is desirable that the applicant and the defendant have as little to do with each other as possible. There is ill-feeling from both sides towards the other. It is unlikely at this point in time that either party will act civilly or reasonably towards the other.

69. It is clear that the defendant and Ms Bodero believe that the applicant, and his mother are trying to get them kicked out of their lease of Café Uno. Whether that belief is justified goes beyond the matters I need to decide in this hearing. But that belief, whether true or not, raises yet another reason for ill-feeling between the parties.

70. This matter was not referred to mediation (as required by *section 86(1)*) before it was set for hearing. It appears that the reason for that is that there had already been mediation between the parties under the *Business Tenancies Act.* In the course of evidence I was advised that the parties had gone to mediation twice and Consumer Affairs twice. Clearly, disputes between the parties are of long standing. As I understand it, the previous attempts at mediation had been successful (albeit that the parties didn't necessarily agree that the other side had complied with their side of any agreement reached). Hence, in my

view, mediation should have been undertaken herein before this matter proceeded to hearing.

71. The other reason the matter was not referred to mediation was apparently because the applicant informed the court (as he confirmed in his evidence before me) that he was fearful of the defendant. Given the evidence herein I am unable to find that there is any real basis for such fear. I am not convinced that the applicant's stated fear was genuine.

72. As noted above, the defendant did appear to be somewhat excitable in his manner when he was giving evidence. Further, his actions in kicking out in the direction of the applicant were unnecessary and unacceptable. It was not something that the applicant might have predicted. However, the action (that I saw on ExP2) was not "violent". It was stupid and unnecessary. Even if contact had been made (which I have not found to be the case) no harm or injury was likely to have resulted.

73. Given the ongoing tension between the parties, and the close proximity in which they work, ongoing problems between them are likely. But I am unable to find that it is the defendant who is the one who is likely to initiate or cause such problems. In the September 2007 incident I am unable to find that it was the defendant who was the aggressor, and this was the most serious incident that has occurred. In the November 2009 incident it was the defendant who was the physical aggressor (albeit a minor incident).

74. I am not satisfied that the blame for tensions can be laid solely at the feet of the defendant. The defendant may (and I reach no concluded view on this as it is not a necessary part of my decision) have some valid grievances about the lease and the applicant. Accordingly, I am mindful that these proceedings should not be used as a means of

attempting to terminate the lease to Via Appia Pty Ltd (which should not be the case since the defendant has no involvement with that company).

75. There is no evidence from which I could find that the defendant has gone out of his way to confront the applicant (apart from the one incident in ExP2), or to put himself in areas where the applicant might be.

76. In my view, the court needs to place the seriousness of the "violence offence" on the first scale, and add onto that scale the likelihood of another "violence offence" being repeated. Then on the second scale place the legitimate entitlement of a citizen to unrestrained liberty. It is incumbent on the applicant to satisfy me on the balance of probabilities that the scales are weighted in favour of the first scale.

77. In my view, the applicant has failed to satisfy me that this court should intervene on the facts of this case. The "kicking out" incident was so minor that this court should not make any restraining orders herein. Police were justified in declining to take the matter further.

78. The Application is dismissed.

79. I will hear the parties on any consequential matters.

Dated this 29th day of March 2010.

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Daynor Trigg
STIPENDIARY MAGISTRATE