CITATION: *Police v RA* [2010] NTMC 061

PARTIES:	POLICE
	v
	RA
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	Domestic and Family Violence Act
FILE NO(s):	21021126, 21020179 & 21020181
DELIVERED ON:	6 October 2010
DELIVERED AT:	Darwin
HEARING DATE(s):	24 September 2010
JUDGMENT OF:	Ms Sue Oliver SM

CATCHWORDS:

COSTS – *Domestic and Family Violence Act*- unreasonable applications

REPRESENTATION:

Counsel:

Applicant:	Ms Watson
Defendant:	Mr Murphy

Solicitors:

Applicant:	Northern Territory Police
Defendant:	Ray Murphy, Barrister and Solicitor

Judgment category classification:	A
Judgment ID number:	[2010] NTMC 061
Number of paragraphs:	48

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

No. 21021126, 21020179, 21020181

[2010] NTMC 061

BETWEEN:

POLICE

Applicants

AND:

RA

Defendant

REASONS FOR DECISION

(Delivered 6 October 2010)

Ms Sue Oliver SM:

1. The defendant in these three matters seeks a costs order against the applicant in respect of each of the matters. Northern Territory police were the applicants for two of the orders, whilst the third is an order made by police under section 41.

The Section 28 Applications

2. On 16 June 2010 applications were made to the Court under section 28 of the *Domestic and Family Violence Act* by Northern Territory police for Domestic Violence Orders for CH and KH respectively as protected persons.

3. CH and KH are respectively the mother and sister of JH. JH had previously been in a de facto relationship with the defendant, RA. Both of these persons therefore are within the definition of family

relationship in section 10 of the Act and in a “domestic relationship” with the defendant within the meaning of section 9(a) and are persons for whom a domestic violence order (“DVO”) may be made.

The Section 41 Application

4. On 18 June 2010 JH made a statement to police in Katherine (although Katherine, based on the contents of the affidavits and statements filed by both parties, is not her ordinary residence) in which she requested a restraining order in respect of herself and the four and half year old daughter. JH gives no reason in her accompanying statutory declaration to explain the circumstances by which she came to seek the assistance of police in Katherine rather than Darwin on that day.

5. A police Domestic Violence Order (“the police DVO”) was made at 15.00 hours on 18 June 2010 naming both JH and the child J as protected persons and imposing full non contact and violence restraints on the defendant with respect to each of them. He was served later that day in Darwin and summoned to appear on 1 July 2010 in Darwin.

The Court Proceedings

6. The section 28 applications for CH and KH had not been served but were brought before the court on the same day as the application (16 June 2010) and the court on that day proceeded to hear the matters *ex parte* and granted interim orders (“the interim DVO’S”) imposing full non contact and violence restraints on the defendant. The matters were then adjourned to 25 June 2010 for confirmation of the interim orders.

7. On 25 June 2010 the defendant appeared by counsel and the matters were listed for a contested hearing in September. On 1 July he likewise appeared by counsel and the Police DVO was listed for hearing with the interim DVO’S.

8. On 1 July the court also adjourned the police DVO for a case management inquiry on 8 September 2010. On that date the interim DVO matters were also brought before the court and Police made application to withdraw all three applications and have the interim orders and the Police DVO revoked. Leave was granted and the respective orders revoked. With respect to the interim orders, the court was informed that both protected persons were moving interstate in October and that the orders were no longer necessary. With respect to the Police DVO the court was informed that there were proceedings before the Family Court.

9. The defendant had filed an extensive affidavit, together with a number of documents on 3 September 2010 in response to allegations made by the three protected persons and setting out additional matters in relation to Family Court proceedings. In summary, he asserts that each of the Domestic Violence Orders were sought to assist JH to obtain a sole custody order for J motivated by a wish by JH to relocate interstate and which she could not do without the consent of the defendant under the terms of a parenting plan agreed by them through a family dispute resolution practitioner of the Family Court of Australia. The defendant, who has a 50% custody arrangement under this plan, had refused that consent.

10. Upon those orders being revoked, the defendant's counsel made application for costs against police.

The Power to Award Costs

11. Section 91 of the *Domestic and Family Violence Act* refers to the power of the Court of Summary Jurisdiction to award costs.

> "If the Court refuses an application to make a DVO or an order varying a DVO, it must not award costs against the applicant unless

it is satisfied the application for the DVO or variation was unreasonable and in bad faith".

12. The two circumstances mentioned in section 91 are only some of the outcomes in terms of the orders that a Court might make with respect to DVOs. The withdrawal of an application for a section 28 order from the Court could not be said to be a "refusal" of an application that would enliven the costs power specified in section 91 and it is not argued by the defendant that there has been a refusal to make a DVO.

13. A police DVO is not an application to the Court for a DVO. When police make a DVO the defendant is summoned under its terms to appear in Court to show cause why it should not be confirmed. When a police DVO comes before the Court, section 82 provides that the Court may make one of two orders, either confirming the Police DVO or revoking the Police DVO. If confirmed the DVO becomes a Court DVO. In section 4 the definition of a "Court DVO" includes "a DVO confirmed by the Court under Part 2.10". The question then is whether a revocation of a police DVO amounts to a "refusal" to make a DVO?

14. In my view, in relation to both applications for DVOs under section 28 of the Act and police DVOs that come before the Court for confirmation, the Court cannot be said to have "refused" to make a DVO unless the Court has determined the matter on its merits and has not been satisfied that a "Court DVO" should be made. That, in my view, does not necessarily mean that a refusal only arises following a contested hearing. There may be a refusal for example where the defendant has failed to appear and the Court is not satisfied on the material before it that a police DVO should be confirmed. In such a case the alternate order will be to revoke the order and the revocation in such a case will amount to a "refusal". In this case, the Court was not asked to consider the merits of the police DVO, rather police did not seek its further confirmation and the police DVO was revoked on

that basis. Consequently, I agree with the submission that section 91 does not apply to the police DVO.

15. The Court of Summary Jurisdiction has power to order costs only in circumstances where that power is specifically conferred by legislative provision. Mr Murphy, for the defendant, has urged that I should interpret the Act as conferring a general discretion to order costs and treat section 91 as a provision that provides a limitation on costs orders for two specific instances in which a cost order might be sought, that is, where the Court has refused an application for a DVO or refused an order to vary a DVO.

16. It is difficult to see why the legislature should have confined the making of a costs order to the two specific circumstances mentioned in section 91 when there are other outcomes of proceedings that might be considered to warrant a costs order, especially when such orders are confined in any event to applications made unreasonably and with *mala fides*. For example, where a party has brought an application unreasonably and with *mala fides,* that party may nevertheless defeat an attempt to gain costs by withdrawing the application prior to hearing, even though the other party may have incurred considerable costs to that point in time defending the application. In addition, it is not clear why in the case of the two circumstances specified in section 91 the costs order should be restricted to one against "the applicant", especially when it is the police who often, under the terms of section 28(1), make application, on behalf of a person or persons. Largely speaking, they are reliant on the information on which the application is based being provided to them in good faith. If that information is false and not given in good faith, why should the person on whose behalf the order was sought be immune from a costs order? I note in that regard that a DVO is made not by satisfying the criminal onus of proof beyond a reasonable doubt but on the balance of probabilities, *albeit* at a

heightened standard, and hearsay evidence may be admitted and relied on to achieve that proof.

17. Nevertheless, I do not accept the submission that I should interpret the Act as containing an implied costs discretion in addition to the limited circumstances set out in section 91. In my view, had the legislature intended the Court to be given a broad costs discretion that would have been clearly spelt out and the section 91 circumstances set as a limitation to the otherwise broad power. In my view, there is no power to order costs outside the terms of section 91.

18. The costs application is refused.

Were the DVO Applications and the Police DVO unreasonably brought or made?

19. Although my finding in relation to the costs power means that it is unnecessary to consider the question of whether there were reasonable grounds for police to make application on behalf of KH and CH or to issue a police Domestic Violence Order for the protection of JH & J, these matters have raised questions about the basis upon which applications for Domestic Violence Orders should be sought or made by police and the circumstances in which a Court should hear and make interim orders on an *ex parte* basis. In the circumstances I think that it is appropriate to make some comment on what occurred.

20. A Domestic Violence Order may impose considerable personal restraint on a person including, limiting or preventing his or her contact with a child. A DVO imposing a restraint of that nature can therefore affect and override orders of the Family Court of Australia which provide for contact with children.

21. The defendant in these matters alleges that the assistance of police for a DVO was sought by JH in order to increase her chances of gaining an

order from the Family Court of Australia to relocate interstate with their child in circumstances where they previously had a joint parenting arrangement.

22. Affidavit material filed by the defendant, including emails from JH, puts clearly the circumstances in which he came to attend the work place of CH and drive past the home of KH, the actions on which the applications were based. JH had asked him to depart from the usual arrangement by which he picked up the child J from Day Care on Monday afternoons because she was taking her camping over an extended weekend. He was asked to pick the child up on Tuesday. On going to the Child Care Centre around noon, he was told that J had not been there that day. He tried to contact JH by phone. His calls were not answered. He went to her work place and was told she had not been there. He became concerned that there had been an accident. He went to CH's workplace because he did not have her phone number. He told the receptionist of his concerns and asked for CH's mobile number but his request was refused. He began to suspect that JH had left the NT with J. He went to KH's place, drove past and seeing no cars in the driveway did a U turn and drove away.

23. Later that afternoon when he got home he received an email from JH's lawyer that informed him that he would not be allowed by JH to see J as allegations of sexual molestation had been made and an urgent application to the Family Court was being made.

24. None of the supporting statements from JH, CH or KH obtained by police make reference to this allegation though it is apparent on the statutory statement of Police Officer Beverly Hagston filed in relation to this costs application that this allegation was known both to her and to Katherine police. At paragraph 7 of her statement she says:

> "[C] and [K] further stated that [JH] had informed them recently that there had been some sexual allegations made by [J] in relation to her father [R]. They stated that they were under the impression that [R] was not aware of these allegations at this time and that [J] had been informed to leave Darwin with her daughter [J] until the matter had been dealt with. [C] and [K] stated that [R] would know that they were aware of [J's] whereabouts and that is why [R] had attended [C's] work address and [K's] home address."

25. Further Police Officer Hagston states:

> "Both [C] and [K] also stated that they had witnessed [R], in the past, being controlling and violent towards [JH]."

26. Police Officer George Ciolka took C's statement. Nowhere in that statement is there reference to any acts of violence against JH witnessed by C. C speaks only of incidents reported to her by JH. Nowhere in that statement is there any reference to the allegation of sexual misconduct. Officer Hagston says that she has spoken to Officer Ciolka and that no statement was made to him of the things said to Officer Hagston.

27. Police Officer Hagston says that she did not read CH's statement until later in the day after the two applications had been dealt with on an urgent ex parte basis and interim orders made. She says it was then that she realised that C's statement did not contain all the matters that she had been told.

28. However, Office Hagston took KH's statement. Nowhere in her statement does she give an example of any incident of physical violence that she has witnessed or been informed of. She speaks only of the defendant "going off" and "screaming" at some unknown time during his relationship with JH which ended around March 2008. In her statement she refers to JH and J being "in hiding at the moment and mum and I know where they are and R knows that we do." No reason is given for them being in hiding nor is any allegation of domestic

violence made since March 2008. Clearly, Officer Hagston knew why JH and the child were “in hiding” but this has not been included in the statement. All that is contained is a vague reference to “…there have been some issues with [J] and [JH] has been told to go away for her and J’s safety until these issues have been looked at.”

29. In her statutory declaration, Officer Hagston says that she has subsequently checked the Promis system and that a missing person job was filed on 15 June 2010. The existence of that report supports the defendant’s contention that he was essentially duped by a request to take his daughter camping and held genuine concern for her and JH’s safety prompting his visit to CH’s workplace and KH’s home.

30. When the applications were made to the Court on 16 June 2010 they were sought to be heard *ex parte*, the defendant having not been served with them. The presiding magistrate granted that leave and made interim orders on both. However, respectfully in my view, there were no allegations of conduct in either of the statements of CH or KH that were sufficient to amount to domestic violence nor did they disclose any basis for seeking the orders *ex parte*.

31. A DVO may only be made by the Court (or police) if satisfied that there are reasonable grounds for the protected person to fear the commission of domestic violence against the person by the defendant (section 18). Domestic violence is defined in section 5 as being:

> “any of the following conduct committed by a person against someone with whom the person is in a domestic relationship:
>
> (a) conduct causing harm;
>
> Example of harm for paragraph (a)
>
> Sexual or other assault.

(b) damaging property, including the injury or death of an animal;

(c) intimidation;

(d) stalking;

(e) economic abuse;

(f) attempting or threatening to commit conduct mentioned in paragraphs (a) to (e)."

32. Some of this conduct is further defined in subsequent provisions. There were no allegations of any conduct by the defendant towards CH or KH either in the past or present that would meet these definitions. He had not even spoken to either of them. He had attended CH's workplace and driven briefly past KH's place. There was no violence, no threat of violence, no act of intimidation or harassment and a single instance of attendance at a place where a person is or might be is insufficient to amount to "stalking". CH and KH knew precisely why he had looked for them and his actions cannot have been seen objectively to have amounted to domestic violence within the meaning of the Act, let alone to require urgent interim *ex parte* orders.

33. Notwithstanding Officer Hagston's assessment of CH and KH as being genuinely afraid and scared, which I accept as truthful, what is required for an application to be made on behalf of a person by police is an objective view of whether the allegations themselves are sufficient for the person to fear the commission of domestic violence. If they are not, then in my view, police should not bring an application on behalf of a person and should direct them to making an application on their own behalf.

The Police DVO

34. A Police Domestic Violence Order naming JH and J as protected persons was made on 18 June 2010. The order prohibited all contact by the defendant. According to that order, the authorised officer's reason for the decision to make a DVO is that "on or between 3/03 and 3/08 at Darwin the defendant [committed acts of domestic violence]" and was satisfied that "because of urgent circumstances, it is not practicable to obtain a CSJ DVO; and it is necessary to ensure a person's safety; and a CSJ DVO might reasonably have been made had it been practicable to apply for one." These later matters are requirements of the Act for the making of a police DVO (section 41). The conduct relied on according to the reason for decision was over two years old.

35. Attached to the police DVO and filed in Court is a statement of JH taken in Katherine by a police officer. The statement does allege some incidents of violence by the defendant in the period 2003 to 2008. There is an allegation of a threat since separation in these terms:

> "Since we have separated I have been to see R about plans I have to re-locate to South Australia. When I said this he said he would sell his house, and with the money left over he would use it to make sure I was never seen again. I feel threatened by this man with not only my life but that of my child's".

36. JH was less than frank about the proposal to relocate interstate, neglecting to mention the existence of a parenting plan mediated in the Family Court, a copy of which is attached to the defendant's affidavit and which prohibits the parties from taking J to live outside of Darwin without permission of the other parent.

37. There is an allegation that the defendant comes to her house and lets himself in and that he "harasses me and intimidates me". She states at paragraph 24 "I have been running away from Darwin for the week because I am frightened of what he will do if he finds me". There is no mention of the allegation of sexual abuse of the child. Though as will

be seen from what follows, this was a matter that Katherine police were investigating.

38. Police in Katherine had also requested, on 17 June, copies of the statements of CH and KH from Officer Hagston.

39. A defendant is entitled to know the grounds and allegations on which an application is made to the court or on which a police DVO has been based. In both the case of the applications and the police DVO, allegations of sexual misconduct with respect to the child were made. None of the statements or the applications or the police DVO mentions this allegation. It was clearly relevant and in my view likely to have been a factor in all matters that prompted police to act as they did in bringing the applications and making the order. It was not a case in which revealing the allegation would impede a police investigation because JH's lawyer had told A of the allegation on 15 June i.e. 3 days before the police DVO had been made. There is nothing before me that shows whether or not the Katherine police were informed of that action or of the pending proceedings. If they were, then that information is required to be included in the documentation supporting the making of the order.

40. Officer Hagston's statutory declaration notes that in relation to the sexual allegations that "Katherine police have finalised that particular job as there was insufficient evidence to proceed."

41. In my view the grounds for the making of a DVO on the basis of the material **disclosed** in the statutory declaration of JH were weak. The allegations of harassment and intimidation were either not recent or no time frame was given for when they were said to have occurred. No reason is advanced in the material for why she had "[run] away from Darwin". Rather than seeking confirmation of the order, police have

since asked for the police DVO to be revoked and an order granting that application was made on 8 September 2010.

Matters to be considered in making a DVO

42. Section 19 sets out matters that are to be considered both by Police and by the Court in deciding whether to make a DVO. The safety and protection of the protected person is to be of paramount importance. However subsection (2) requires, in addition, that the issuing authority must consider the following:

> (a) any family law orders in force in relation to the defendant, or any pending applications for family law orders in relation to the defendant, of which the issuing authority has been informed;
>
> (b) the accommodation needs of the protected person;
>
> (c) the defendant's criminal record as defined in the *Criminal Records (Spent Convictions) Act*;
>
> (d) the defendant's previous conduct whether in relation to the protected person or someone else;
>
> (e) other matters the authority considers relevant.

43. Officer Hagston states that she was not aware of any Family Court proceedings prior to seeing A's affidavit on 3 September 2010. It is beyond belief that CH and KH were unaware at the time they went to police that KH was instituting proceedings in the Family Court and that they knew that JH had set up a story to A about taking the child camping over the weekend to delay the defendant's contact with her. Indeed, Officer Hagston's statutory declaration states that:

> "They stated that they were under the impression that [R] was not aware of these allegations at this time and that [J] **had**

> **been informed** to leave Darwin with her daughter [J] **until the matter had been dealt with**." (emphasis added).

That statement is not only vague, it begs the question who had told her to leave Darwin and in what way was the matter to be dealt with. The alert to pending family law proceedings was obvious and I find it difficult to accept that either Officer Hagston was not told that proceedings were to be brought in the Family Court or alternatively, that in circumstances where the issue was so clearly raised by what she was told, that she failed to make further inquiry.

44. Section 90 of the Act provides specifically for information with respect to family law orders:

> (1) The applicant for a DVO **must inform the issuing authority** of:
>
> > (a) any family law orders the person knows to be in force in relation to the defendant; and
> >
> > (b) any applications for family law orders in relation to the defendant the person knows are pending.
>
> (2) If a police officer is considering making a police DVO:
>
> > (a) the officer **must make reasonable inquiries** about the existence or otherwise of:
> >
> > > (i) any family law orders in force in relation to the defendant; and
> > >
> > > (ii) any pending applications for family law orders in relation to the defendant; and
> >
> > (b) a person must**, if asked to do so by the officer, inform the officer of any such family law orders** or applications.
>
> (3) A decision of an issuing authority is not invalid merely because of the failure of a person to give information under subsection (1) or (2)(b).

45. Neither police in Darwin nor in Katherine appear to have undertaken any real inquiry into pending proceedings or if they did they failed to include it in anything that was put before the Court at the time that urgent interim orders were sought or the police DVO was brought before the Court for confirmation.

46. To summarise, there was nothing on the facts presented in the statements of CH and KH that warranted an urgent ex parte application. Police in Katherine knew of the allegation of sexual misconduct but failed to include it as a reason for making the police DVO, although without doubt it must have been a factor that influenced that decision. Such allegation would in my view provide reasonable ground for making a police DVO but the allegation needed to be in the material served on the defendant and placed before the court. It was an allegation that, coupled with what the Katherine police knew of her wishes to re-locate with the child interstate should have at least alerted them to the need to consider whether family law proceedings were afoot.

47. It is a considerable responsibility and power to bring applications for DVOs for other persons and to make Domestic Violence Orders that have immediate effect on the liberty of another. Objective fact finding and inquiry is required, and attention to the matters that the Act requires to be considered by the issuing authority. I appreciate that for the protection of persons decisions must be made about applications and police DVO's in urgent circumstances. However, in the case of the applications for CH and KH nothing warranted an *ex parte* application. The applications were brought before the court on Wednesday the 16th of June. A was not served with the interim order and summons to court until 4.25pm on 17 June. He could just have easily been served with the actual application at that time with a return date of the following day in the domestic violence list giving him a chance to respond to the

application. In the case of the Police DVO, JH had stated she was "running away from Darwin for the week". Again there seems to have been ample opportunity for an application to be made to the court for a DVO rather than proceed by way of a police DVO that appears to have been served at the same time as the interim orders.

48. The matters exemplify why the Act requires issuing authorities to consider whether family law orders are in force or proceedings pending. The alert to that factor was readily present in my view on the material given to police and further inquiry and consideration of the need to proceed urgently should have been taken. I do not ignore in that observation that the court was also prepared to make interim orders on the applications on an *ex parte* basis and likewise observe that as an issuing authority the court likewise must take care to consider the objective facts before it in considering the making of interim orders.

Dated this 6th day of October 2010.

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Sue Oliver
STIPENDIARY MAGISTRATE