

## **ARTE v Nugent & Anor [2020] QDC 268 (23 October 2020) – Queensland District Court**

‘Appeal against grant of protection order’ – ‘Miscarriage of justice’ – ‘No prior history of domestic or family violence’ – ‘Ouster condition’ – ‘Protection order’ – ‘Suicide threat’

Proceedings: Appeal against making of a protection order; whether the protection order was necessary or desirable; whether the Magistrate erred in imposing an ouster condition; whether the Magistrate’s conduct amounted to a miscarriage of justice.

Facts: A protection order was made on 3 February 2020 against the male appellant after a contested hearing, including an ouster condition in relation to his female former partner’s usual place of residence.

The first respondent (the police prosecutor applicant for the order at first instance) opposes the appeal but concedes (1) the Magistrate’s reasons for judgment disclose a *House v The King* (1936) 55 CLR 499 error and (2) it is appropriate for the order to be varied such that the ouster condition is removed.

The second respondent (protected person) is supportive of the appeal and the relief sought. The appellant and protected person were married for 32 years. Prior to 11 October 2019, there had been no previous incidences of domestic violence. The parties were in financial stress after the collapse of a business. On 11 October 2019 the protected person called 000, telling the operator: ‘My husband has gone to the gun cabinet to do a murder suicide...He’s got a gun to kill us.’ The second respondent locked herself in a bathroom. The operator heard the second respondent yell: ‘Get away, get away’. A Police Protection Notice was issued on 11 October 2019, with a condition that the appellant surrender his weapons licence and firearms. An application for a protection order to benefit the protected person was made by the first respondent on 11 October 2019. No ouster condition was sought in the application. On 15 October 2019, the application was adjourned; a temporary protection order was made in the favour of the protected person with the standard conditions.

A protection order was made on 3 February 2020 against the appellant after a contested hearing, including an ouster condition in relation to the protected person’s usual place of residence.

The appellant contended:-

- The appellant’s conduct did not meet the definition of domestic violence - there was no threat of violence; rather the second respondent was intoxicated, stressed and emotional which resulted in her overacting to a bad joke made by the appellant; and
- In the alternative, a protection order is not necessary or desirable (i) appellant and protected person

lived in the same residence during the term of the TPO and no domestic violence had occurred; (ii) prior to 11 October 2019, there had never been any other act of domestic violence in 32 years of the relationship; (iii) the risk of future domestic violence was remote and not sufficient to establish a need for protection.

On 3 February 2020, the Magistrate heard the application and made the order, delivering ex tempore reasons revealing that each limb of section 37(1) was satisfied and it was appropriate to impose an ouster condition. Central to the Magistrate's reasoning were three findings:-

1. the appellant was engaging in victim shaming;
2. the appellant had not taken any steps to address the underlying reasons for the incident on 11 October 2019; and
3. the relationship between the appellant and second respondent involved a power imbalance such that the later would subjugate her wellbeing to that of the former.

#### Grounds of appeal

1. Did the Magistrate err in holding that it was necessary or desirable to protect the second respondent from domestic violence? Error 1
2. Did the Magistrate err in imposing an ouster condition under s.63? Error 2
3. Whether there were irregularities in the conduct of the trial that occasioned a substantial miscarriage of justice? Miscarriage of justice

Held: Order set aside; application remitted to the Magistrate's Court for a new trial before a different Magistrate.

Error 1 – Did the Magistrate err in finding a protection order was necessary or desirable?

Observing Horneman-Wren SC DCJ in *ACP v McAulliffe* [2017] QDC 294, s.37(1)(c) invokes a very wide and general power and is to be construed liberally, having regard to s.37(2) and the s.4 principles of the Act. This required the Magistrate to have regard to the wishes and views of the people who fear or experience domestic violence to the extent appropriate and practicable (s.4(2)(b)) [at 27].

At [29], His Honour reflected on the reasons for judgment and stated that the Magistrate was satisfied s.37(1)(c) was engaged because the second respondent was not adversely affected by alcohol and the 11 October 2019 incident was a very distressing one. His Honour noted the reasons did not disclose if the considerations mandated by section 37(2) were taken into account. His Honour found this to be an error of law and warrants the order being set aside.

His Honour also found the Magistrate's assertion of the existence of the power imbalance and reference to the Duluth model and the power and control wheel had no application to this case and amounted to an error of law.

The first respondent submitted, despite the errors in the reasons for judgment that there was in any event sufficient evidence to find the order was necessary or desirable in the circumstances. His Honour did not agree, finding, at [34], that the evidence going to this very issue is incomplete (see [65] to [85] – no sworn affidavit of the second respondent and there was no application to lead fresh evidence in this appeal).

Therefore, this should be determined in a new trial.

Error 2 – Did the Magistrate err in imposing an ouster condition?

In finding an error had been made by the Magistrate, His Honour noted that an ouster condition had not been sought by the first respondent in the initial application and that the views and wishes of the “aggrieved” had not been sought, as was required by s.64(1).

His Honour considered s.57(1)(a) and s.63 and the mandatory considerations in s.64(1)(a) and (b) regarding whether the aggrieved can safely live in the residence if the ouster is not made and any views or wishes of the aggrieved.

His Honour, at [40], did not accept the Magistrate correctly assessed the risk of future violence occurring and the need for an ouster condition because:

1. The Magistrate's earlier finding in relation to the significant power imbalance, in the absence of evidence (an irrelevant consideration); and
2. The second respondent was not afforded the opportunity to express her wishes by way of sworn evidence (a mandatory consideration).

The exercise of discretion to impose an ouster order miscarried [at 41]. Both errors represent a proper basis for interfering with the exercise of discretion in the manner contemplated by *House v The King* (this was conceded by the first respondent in relation to (1) above).

Miscarriage of Justice

His Honour agreed there were five irregularities in the conduct of the trial at first instance such to establish a substantial miscarriage of justice:-

1. The Magistrate spoke about, and directly to, the appellant in terms that were pejorative, and unnecessary, having regard to the evidence in proper context, (at [46] eg accusing the appellant of “bad manners”, calling him the respondent's “gun-toting husband”);
2. The Magistrate permitted unfair cross-examination of the appellant, (at [47] not allowing the recording to

be replayed at the appellant's request to clarify his understanding of the question and then describing this as being demonstrative of an uncooperative witness);

3. The Magistrate was unnecessarily aggressive towards the appellant's legal representative which adversely impacted upon the proper presentation of the appellant's case, (at [54] accusing the appellant's solicitor of professional discourtesy which was not borne out in the transcript);
4. The Magistrate materially interfered with the conduct of the second respondent's case, ( at [65] by refusing the second respondent leave to file an affidavit on the day of the hearing);
5. An exchange between the solicitor for the first respondent and the Magistrate regarding a domestic violence stakeholders group meeting, taken with the other irregularities, is indicative of a reasonable apprehension of bias on the part of the Magistrate.