

20/02; [2002] VSC 263

SUPREME COURT OF VICTORIA

STEPHENS v MELIS & THE MAGISTRATES' COURT at MOE

Smith J

12, 28 June 2002 — (2002) 131 A Crim R 377

CRIMES FAMILY VIOLENCE – CONSENT ORDER MADE WITHOUT ADMISSION OF ALLEGATIONS IN THE COMPLAINT – NO FINDING OF FACT FIRST MADE TO JUSTIFY THE MAKING OF THE ORDER – CRITERIA SPECIFIED IN S4 OF CRIMES (FAMILY VIOLENCE) ACT – WHETHER MAGISTRATE MUST BE SATISFIED OF ONE OR MORE OF THE FACTS SET OUT IN S4 BEFORE MAKING CONSENT ORDER – CROSS-EXAMINATION OF PLAINTIFF – OBJECTIONS MADE TO QUESTIONS ASKED BY DEFENDANT'S COUNSEL – WHETHER DEFENDANT DENIED A FAIR HEARING: CRIMES (FAMILY VIOLENCE) ACT 1987, SS3A, 4(1), 5, 14.

During cross-examination of the plaintiff on a complaint for an intervention order, counsel asked the plaintiff about her personal sexual history and what happened to one of her boyfriends. Also, she was asked whether she had previously received crimes compensation because of making a similar complaint about a previous boyfriend. The magistrate said that counsel could put to the plaintiff that she was making up the evidence about there being any form of rape in the relationship with the defendant. The magistrate also said that any evidence about any previous compensation claims by the plaintiff was “probably a bit irrelevant”.

Counsel then went on the question the plaintiff about the specific complaint and other matters. During the hearing, the magistrate broached the subject of settlement of the matter. After further discussion, and without being satisfied as to whether one or other of the jurisdictional facts in s4(1) existed, consent orders, without admissions as to the allegations in the complaint, were made by the magistrate. Upon an originating motion by the defendant to quash—

HELD: Order made quashed and remitted to the court for further hearing and determination.

1. In relation to the question of cross-examination, what the magistrate did was to respond to very vague responses by counsel by ruling against a particular question asked while at the same time indicating that more limited questions would be permitted. The magistrate had not done anything to indicate that under no circumstances could counsel pursue the proposed lines of enquiry. The “ball” remained in counsel’s “court”. If counsel had specific matters to put to the witness he could have put them or, in her absence, outlined them to the magistrate. He did neither. In the circumstances, the magistrate did not err in his control of the cross-examination in such a way as to deny the plaintiff a fair hearing.

2. Section 14 of the *Crimes (Family Violence) Act 1987* (‘Act’) enables a court to make any order under the Act with the consent of all the parties to the proceedings. The question is whether the magistrate needed to do no more than satisfy himself merely that a consent was given and that the relevant relationship existed or whether the magistrate also had to be satisfied that one or more of the facts set out in s4 of the Act had been established. If the intention in the Act was to confer a jurisdiction to make intervention orders by consent regardless of s4, one would have expected that to be clearly stated in s14. On the contrary, the language used suggests that that result was not intended. As the consent order is one “under this Act”, it must also be directed to the sort of issues for which the jurisdiction to make orders is conferred. This requires reference back to the matters listed in s4(1) of the Act and suggests that the section assumes that the court will need to be satisfied that one or other of the jurisdictional facts existed before making an order by consent.

SMITH J:**The Proceedings**

1. On 30 October 2001 the Magistrates' Court made consent orders under the *Crimes (Family Violence) Act 1987* (The Act) in proceedings brought against the plaintiff, Nigel Stephens. The orders made were that he be prohibited from;

- (1) assaulting, harassing, molesting, threatening or intimidating the aggrieved family member, Jodie Carstairs,
- (2) approaching, telephoning or contacting the aggrieved family member,
- (3) knowingly being at or within 200 metres of premises situated at 7/21-23 Airlie Bank Road Morwell or any other premises where the aggrieved family member lives or works except in the company of a police officer,

- (4) damaging property owned/jointly owned by the aggrieved family member.
- (5) causing another person to engage in conduct prohibited by this order.
- (6) possessing, carrying or using any firearms.

The Court also ordered that any firearms, licence, permit or authority be revoked and disqualified the defendant from obtaining another during the course of the order and for a period of 5 years from the date of cessation of the order. The Court ordered that any firearms in the defendant's possession be forfeited to the Crown or disposed of by sale under s5(1A)(b)(II) of the Act. The Court stated that the order would last until 30 October 2002.

The Court recorded that the order was made

"By consent without admission of allegations in complaint The defendant agreed to this Order being made."

2. By an originating motion filed 18 December 2001 the plaintiff sought the following relief or remedy

"(1) That the Intervention Order made by consent without admission of allegations in the complaint, against the Plaintiff by the Magistrates Court of Victoria at Moe on 30 October 2001 be quashed.

(2) That the matter be remitted to the Magistrates Court of Victoria at Moe to be dealt with according to law.

(3) That the plaintiff be allowed to cross-examine the aggrieved family member as to prior complaints of a similar nature made against others."

The originating motion stated the grounds for the relief sought in the following terms:

"(1) The learned Magistrate acted in excess of his jurisdiction in making an Intervention Order against me by consent and without admission from me without first making a finding of fact in accordance of s4 of the *Crimes (Family Violence) Act 1987*.

(2) The learned Magistrate was in error in refusing to allow me to cross-examine the aggrieved family member as to prior complaints of a similar nature made against her earlier boyfriends".

Relevant Provisions of the Act

3. Before considering the issues reference should be made to the relevant sections in the *Crimes (Family Violence) Act 1987*.

"4. Intervention orders

(1) The Court may make an intervention order in respect of a person if satisfied on the balance of probabilities that—

- (a) the person has assaulted a family member or caused damage to property of a family member and is likely to again assault the family member or cause damage to property of the family member; or
- (b) the person has threatened to assault a family member or cause damage to property of a family member and is likely to assault the family member or cause damage to property of the family member; or
- (c) the person has harassed or molested a family member or has behaved in an offensive manner towards a family member and is likely to do so again.

(2) The order may impose any restrictions or prohibitions on the person that appear necessary or desirable in the circumstances to the court.

(3) An intervention order may be made in respect of more than one aggrieved family member if the court is satisfied in accordance with sub-section (1) in respect of each aggrieved family member.

5. Restrictions in order

(1) Without limiting the generality of section 4, an order may do all or any of the following -

- (a) prohibit or restrict approaches by the defendant to the aggrieved family member including prohibiting the defendant from approaching within a specified distance from the aggrieved family member; or
- (b) prohibit or restrict access by the defendant to premises in which the aggrieved family member lives, works or frequents and such an order may be made whether or not the defendant has a

- legal or equitable interest in those premises;
- (c) prohibit or restrict the defendant from being in a locality specified in the order;
- (d) prohibit the defendant from contacting, harassing, threatening or intimidating the aggrieved family member;
- (e) prohibit the defendant from damaging property of the aggrieved family member;
- (f) prohibit the defendant from causing another person to engage in conduct restrained by the court;
- (g) direct the defendant to participate in prescribed counselling;
- (h) revoke any licence, permit or other authority to possess, carry or use firearms.

(1A) If in an order under sub-section (1), a licence, permit or other authority to possess, carry or use firearms is revoked—

- (a) the person in respect of whom the order is made is disqualified from obtaining any such licence, permit or authority during the court of the order and for a period of 5 years from the date of cessation of the order; and
- (b) any firearm in the possession of the person must either be—
 - (i) forfeited to the crown; or
 - (ii) disposed of by sale to a licensed firearms dealer, within the meaning of the *Firearms Act 1996* - as the Court directs.

(1B) If a firearm is disposed of by sale under sub-section (1A)(b)(ii), the proceeds of the sale must be paid to the owner of the firearm.

(2) Before making an order which restricts the defendant's access to any premises, the court must take into account—

- (a) the need to ensure that the aggrieved family member is protected from violence; and
 - (b) the welfare of any children who may be affected by the order; and
 - (c) the accommodation needs of all persons who may be affected by the order—
- and give paramount consideration to the matters in paragraph (a)

(3) Despite anything to the contrary in the *Firearms Act 1996*, an order under sub-section (1)(h) takes effect when it is made and no appeal lies under that Act against an order made under this Act.

7. Complaints for intervention orders

(1) A complaint for an intervention order may be made by—

- (a) a member of the police force; or
- (b) the aggrieved family member; or
- (c) if the aggrieved family member is a child—
 - (i) a member of the police force; or
 - (ii) a parent of the child or
 - (iii) any other person with the written consent of a parent of the child or with the leave of the court; or
 - (iv) the aggrieved family member with the leave of the court if he or she is or above the age of 14 years; or
- (d) any other person, with the written consent of the aggrieved family member if the aggrieved family member is of or above the age of 17 years; or
- (e) if a guardianship order under the *Guardianship and Administration Act 1986* is in force in respect of the aggrieved family member, by the guardian appointed under that Act, or with the leave of the court, by any other person.

14. Consent orders

The court may make any order under this Act with the consent of all the parties to the proceedings.

14A. Costs

(1) Each party to any proceedings under this Act must bear his or her own costs of those proceedings, unless the court decides that exceptional circumstances warrant otherwise in a particular case.

(2) Despite sub-section (1), if the court is satisfied in a particular case that the making of any application under this Act was vexatious, frivolous or in bad faith, the court may award costs against the applicant."

4. Reference should also be made to s3A of the Act.

"3A. Jurisdiction of Children's Court

(1) If the aggrieved family member or the defendant is under the age of 17 years at the time the complaint or other application is made, the Family division of the Children's Court and the Magistrates' Court each have jurisdiction under this Act with respect to the complaint or other application despite anything to the contrary in section 17 of the *Children and Young Persons Act 1989*.

(2) If a complaint or other application is made under this Act to the Magistrates' Court and the Magistrates' Court considers that, in all the circumstances of the case, the matter should be dealt with by the Children's Court, the magistrates' Court may discontinue the proceeding and order that it be transferred to the Children's Court.

(3) If a complaint or other application is made under this Act to the Children's Court and the Children's Court considers that, in all the circumstances of the case, the matter should be dealt with by the Magistrates' Court, the children's Court may discontinue the proceeding and order that it be transferred to the magistrates' Court.

(4) A court has jurisdiction to revoke, vary or extend in accordance with this Act an order made under this Act by it or any other court.

The hearing of the original proceedings

5. The original proceedings were commenced against Stephens in the Magistrates' Court by a complaint and warrant. The complaint was made by Detective Senior Constable Melis on behalf of Jodie Carstairs who was identified as the "aggrieved family member." The complaint recorded was

"The aggrieved family member (AFM) and the defendant were in a relationship that lasted approximately one month and ceased in late February - early March 2001. The AFM is completely deaf. On the 15th of March, 2001, at approximately 1130 hours, the AFM reported to police that she had been raped on several occasions by the defendant. The AFM has stated in her report that on at least 5 occasions the defendant would ask her for sex and when she declined he would force himself on to her and force sexual intercourse. The AFM also stated that even though she had severed ties with the defendant he attended at her unit on the evening of 14 March 2001 and again asked her for sex. Again the AFM declined and so the defendant has assaulted the AFM with the intention of having sexual intercourse. The AFM is concerned for her safety and does not wish the defendant to attend at her premises or contact her in anyway.

6. Stephens was arrested and released on bail. Subsequently the Complaint was heard over several days in the Magistrates Court. I have been provided with a transcript of the hearing relevant to the two aspects of the present application.

7. As to the making of the consent order, on the adjourned hearing of the matter, on 30 October 2001, the learned Magistrate broached the subject of settlement of the matter with counsel who was then appearing for Stephens and with Senior Constable Bridson, who was appearing for the complainant. It appears that Senior Constable Bridson raised the possibility that Stephens consent to orders without any admissions. Counsel for Stephens expressed concern to the learned Magistrate as to whether an order by consent can be made without admission, expressing the view that before an order could be made the findings of fact required by the Act needed to be made. In particular, counsel expressed the view that the Court's jurisdiction to make an intervention order was founded on the finding of one or more of the findings required in s4 of the Act.

8. The learned Magistrate then indicated that he had discussed the issues with another Magistrate who had expressed the view that it was not necessary to make the findings referred to in s4 when making a consent order under s14 of the Act. He also expressed the view that that was the position he had come to from a number of debates he had had over the years and from his reading of the Act. Counsel then stated that, notwithstanding the power given by s14 of the Act to make consent orders, nonetheless the jurisdiction to make an order was dependent upon compliance with s4. The learned Magistrate expressed the view that it derived from s14.

9. His Worship commented that counsel was concerned about whether or not there was any finding made by the court about any issue of facts. He said he assumed that the defendant conceded that there had existed a relationship which brought him and the affected family member within the Act. He said the next issue was whether an order should be made. He said that an order could either be made by consent or upon finding of the matters of fact listed in s4. He said he was satisfied that the person (the defendant, Stephens) was within the scope and structure of the Act and was of the view that he could make an order with the consent of all the parties without making any findings of fact. He said no concessions had to be made at all. He said he thought that was the structure of the Act. He referred to the fact that the proceedings were civil proceedings and that they would have no consequences except that they would leave the defendant open to a

charge for breach of any order made but that had to be proved beyond reasonable doubt. He said that if the defendant consented to the order, it did not impose any criminal sanction or involve any criminal finding or any finding of facts other than that they come within the structure of the Act because of the relationship. He said this was the view of another magistrate and he thought it was generally accepted. Counsel then sought the opportunity to obtain instructions.

10. Subsequently consent orders, without admissions as to the allegations in the complaint, were sought subject to his Worship determining the geographical limit of those orders.

11. I turn to the other issue raised – whether an error occurred in the learned Magistrate refusing to allow cross-examination of the aggrieved family member as to prior complaints of a similar nature made against earlier boyfriends.

12. The transcript relevant to this issue appears in Exhibit BJM-1 at pages 45 and following.

13. After some cross-examination about the facts, counsel put to Ms Carstairs the following

"Okay. And it would be fair to say that you've had some bad experience in sexual relationships previously, is that right?"

She responded that that was correct. Counsel then commenced the question "Did one of - your previous boyfriends..." but objection was taken on the grounds that her personal sexual history was not relevant. Counsel submitted that the question was not directed to her personal sexual history but what happened to one of her boyfriends. Asked as to the relevance of that, counsel said:

"Well the relevance is this Your Worship that if she has got a - if she has got an unfortunate history in terms of her perception of men, that's a matter that can be explored in my submissions."

The learned Magistrate then said

"You need a better reason ... than that to make it relevant. Have you got a better reason than that?"

Counsel responded "Well, yeah." and then asked if he could put another question. That question was

"Have you previously received compensation because of making a complaint like this about a previous boyfriend?"

Senior Constable Bridson again objected on the grounds of relevance. Counsel responded that it would be allowed in any rape trial on the basis that "it would provide a clear motive for her to make up this account."

The learned Magistrate then asked if counsel was putting to her that "this is made up." Counsel responded "I'm putting to her that she is making up the bit about there being any form of rape in this relationship." His Worship said that he supposed Counsel could put that to her in relation to this case but not other cases. He also indicated that counsel could ask if she had made an application for crimes compensation in relation to this case if he wanted. Counsel responded that the problem was that she didn't need to make such an application at that time. The learned Magistrate said that he could ask in relation to this case what her intentions about compensation were if he wished but he couldn't ask her about previous compensation claims. His Worship said that he thought that was "probably a bit irrelevant." Counsel does not appear to have taken up any of the suggestions of the learned Magistrate but returned to questioning her about the specific complaint and other matters.

The cross-examination issue – submissions

14. In the submissions put for the plaintiff, the second issue was argued first.

15. Counsel for the plaintiff, put that the plaintiff had a right to cross-examine Ms Carstairs on all relevant matters including matters going to credit. Reference was made to a number of authorities including *Wakeley v R*^[1], *Hooper v Gorman*^[2], *R v Taylor and Clarke*^[3], *R v Aldridge*^[4].

16. Counsel submitted that the learned Magistrate had refused to permit cross-examination on the matters referred to above and so denied the plaintiff a fair trial. The cross-examination went to potential motive as to the making of the complaints and to the credit of Ms Carstairs. In referring to her perception, Counsel was raising the issue of whether her interpretation of events had been distorted by her experiences – a matter of credit. The question of complaints against boyfriends, it was said, posed the potential issue of multiple complaints of a similar kind which could give rise to an argument that it was unlikely that the complaint involving the plaintiff was genuine.

17. A number of legal arguments were raised by the first defendant on this matter. It seems to me, however, that the first and critical question is the interpretation of what the learned Magistrate did.

Cross examination issue — analysis

18. I have set out above in some detail the exchange that occurred between counsel, the officer representing the complainant and the learned Magistrate. As I read that exchange, it would be overstating the matter to say that his Worship had ruled that no questions directed to the issues sought to be raised could ever be put. What the learned Magistrate did was respond to very vague responses by ruling against a particular question asked while at the same time indicating that more limited questions would be permitted. Counsel, however, did not take up the opportunity to ask more limited questions. There was nothing to stop counsel doing so and having done so then seeking to expand into the line of questioning which had previously been stopped. The relevance of evidence can change as other evidence emerges. In my view it would be incorrect to say that the learned Magistrate had done anything to indicate that under no circumstances could counsel pursue the proposed lines of enquiry.

19. To be more specific, I refer to the objection taken to questions about something one of the previous boyfriends had done. As noted above, Counsel responded vaguely that, if Ms Carstairs had an unfortunate history, "in terms of her perception of men", that was a matter that could be explored. The learned Magistrate said he would need a better reason than that to make it relevant. One option for counsel at that point was to develop the issue by asking questions about her perceptions and putting what if, if anything, the defendant had instructed him about her perceptions. Instead counsel changed direction and asked whether she had previously received compensation. Objection was again taken but not ruled upon. Instead, his Worship asked counsel if he was wanting to put to her that what she was saying was made up. Counsel did not seek to press the original question or seek a ruling but indicated that he was wanting to put to her that she was making up there being any form of rape during the relationship. His Worship indicated that that could be put to her, but it was not. Counsel was also given the opportunity to ask what her intentions were about compensation in the present case. When counsel asked the learned Magistrate about the position on previous compensation claims he said he thought "that's probably a bit irrelevant".

20. His Worship's statements were made in the light of the evidence and issues before him at that time. In my view, "the ball" remained in counsel's "court". If counsel had specific matters to put to the witness he could have put them to Ms Carstairs or, in her absence, outlined them to his Worship. He did neither. Other questions could have been put with a view to obtaining a factual basis to pursue the issues sought to be raised. The final comment from the learned Magistrate was really no more than that, at the time, he thought that questions about previous compensation claims were probably a bit irrelevant. More questions may have laid sufficient ground work for his Worship to be persuaded that they were relevant.

21. In the end result, I am not persuaded that the learned Magistrate erred in his control of the cross-examination at the hearing in such a way as to deny the plaintiff a fair hearing. I turn to the other matter raised – that the orders were made without jurisdiction.

The consent order question – submissions

22. Counsel for the plaintiff submitted that the jurisdiction of the Magistrates' Court is to be found in s4 and that orders can only be made under that section if the Court is satisfied on the balance of probabilities of one of the matters set out in the paragraphs to that provision. Counsel further submitted that consent cannot give jurisdiction although it may authorise the

making of an order within jurisdiction. Counsel also submitted that s14 of the Act cannot confer a jurisdiction to make consent orders and that the power given by that section to make consent orders arises only once the jurisdictional criteria of s4 are satisfied. Only then can the Court act on the consent of the parties as to the form and duration of the order.

23. Counsel submitted that unless the provisions were construed in this way, there was nothing to stop a consent order under s14 being made affecting people who are not family members. Counsel argued that one cannot find a restriction to family members in that section but it is to be found in s4(1). Counsel also argued that, if s14 overrode the provisions in the Act, then a consent order between two adults could be made in the Children's Court. Counsel also submitted that if s14 could operate without any of the findings otherwise required by s4, orders could be made even though none of the facts spelt out in s4 were established or existed. Counsel submitted that s4(1) did not deal with the form of the order but only the jurisdiction to make an intervention order and that s14 went to the content of the order not to jurisdiction. Only in respect of content could the Court act on the consent of the parties.

24. Counsel for the second defendant directly addressed the argument advanced for the plaintiff. He submitted that s4(1) of the Act confers jurisdiction in the sense of authority to decide and power to make intervention orders. It confers jurisdiction on the Court to decide whether any of the conditions for making an intervention order as specified in that sub-section are satisfied and also confers the power to make an intervention order in cases where that question is answered in the affirmative.

25. Counsel further submitted that the power to make orders by consent arose by implication without the need for s14, it being a power required for the effective exercise of its jurisdiction^[5]. Alternatively, counsel submitted that the jurisdiction was exercisable by the court exercising its general powers and jurisdiction which included the power to make consent orders^[6]. Counsel submitted that in those circumstances s14 would be otiose without a jurisdictional effect, it not being needed to remove any doubt as to the existence of the power of the Court to make consent orders. Instead it empowers the Court to make an intervention order with the consent of parties to the proceedings. Counsel submitted that that power is engaged once the requisite consent is shown and that it involves no admission in respect of any of the matters set out in s4(1). To that extent it enlarges the jurisdiction of the court.

26. Counsel for both defendants referred to the case of *Harris v Caladine*^[7] where the High Court considered s79(4) and s80(1)(j) of the *Family Law Act 1975* (Cth). Section 79(4) imposed an obligation on the Court trying property disputes to take account of certain matters before making orders under s79. Section 80 (1)(j) conferred a power to make consent orders "in exercising its powers under this Part" but did not state that the Court must take into account the matters listed in s79(4). The High Court considered whether, in making a consent order, the Family Court was also required to obey the statutory direction in s79(4). The High Court held that it was.

27. Counsel for the second defendant distinguished this case on the basis that s of the Act does not contain any direction as to the matters a court must consider when making any intervention order. He argued that it merely set out the conditions to be satisfied before an order could be made under s4. Counsel submitted that s4 does not state (nor does s14) the matters to be considered when making a consent order under s14. Counsel also compared s4 with s5(2) of the Act, which directs the court to take account of certain matters when making an intervention order restricting the defendant's access to premises. Counsel submitted that that section applied whether an order was made under s4 or s14. Counsel conceded that the approach described by the High Court in *Harris v Caladine* would apply in that situation. Counsel for the second defendant concluded his submission by stating that, because the matter was governed by s14, his Worship did not have to make any findings as to the matter set out in s4

28. Counsel for the first defendant relied upon the above arguments advanced by the second defendant but put forward an alternative argument which involved the application of *Harris v Caladine*. Counsel submitted that, if it be assumed that in making a consent order under s14 the jurisdiction or pre-conditions of s4 are a pre-condition to the exercise of the power under s14, then applying *Harris v Caladine* it was not necessary, where the parties consented, for the court to make an independent inquiry into any of those matters and the court would not need to make

findings and in fact "comparatively little"^[8] would be required to satisfy the court on any of those matters. Brennan J^[9] commented in that case that

"It does not follow that, when a consent order is sought in a s79 application, it is necessary to conduct an inquiry into each of those factors. The Court may be satisfied that a provision is proper by reference not only to the material before the Court relating to the fact as mentioned in s79(4) but by reference to the advice available to the respective parties and the consent which they respectively give to the making of the order. In the majority of cases, once it appears that the parties are conscious of the factors mentioned in pars (a) to (f) and have taken them into account before consenting, the provisions 'with respect to financial matters' proposed for incorporation in the consent order will be seen to be quite 'proper' Nevertheless, when an application for a consent order in a s79(1) matter is made there is a discretion to be exercised with reference to the propriety of the provisions in respect to financial matters. The making of a consent order in s79(1) is not automatic."

29. Dawson J^[10] commented –

"The fact that an order is sought by consent does not relieve a court, or a Registrar, from compliance with the requirements of the section, but it may render compliance much less demanding. Provided that a court, or a Registrar, is adequately informed, where the parties are at arms length and are properly represented little more than consent may be needed to establish that the requirements of the section have been met; see *Jenkins v Livesey* [1984] UKHL 3; [1985] AC 424 at 437,444; (1985) 1 All ER 106; [1985] 2 WLR 47; [1985] Fam Law 310."

30. Counsel submitted that the consent by the defendant before the learned Magistrate amounted to more than an acceptance of the court's statutory jurisdiction. Counsel also referred to the fact that, in making the consent the defendant did so while refusing to admit the allegations in the complaint but had been silent about whether or not he admitted any of the facts required to be established under s4. Counsel submitted that it did not follow that the defendant had admitted those matters. Rather the situation was one in which the Magistrate was *prima facie* entitled to be satisfied of one or other of the matters listed in s4 but the defendant was not bound in relation to any one particular matter. Counsel referred to *Shirim Pty Ltd v Fesena Pty Ltd*^[11] and *Lord v Dernacourt Investments Pty Ltd*^[12].

Analysis

31. Part 3 of the Act sets out the procedures to be followed. It envisages the filing of a complaint following which the registrar may issue a summons or a warrant.

In the circumstances of the present case, the complaint and warrant was to be served on the aggrieved family member and on the defendant (s11). The complaint must concern an aggrieved family member. The term "aggrieved family member" is defined to mean

"the family member whose person or property is the subject of the complaint for an order."

The concept "family member" is defined also in s3 as being

"in relation to a person means—

(a)...

(ab)...that person who has or has had an intimate personal relationship with that person..."

32. Thus, although perhaps obliquely, the Act, by its procedures and definitions, limits the participants to family members including the one aggrieved. If there is uncertainty about that result it is removed by s4 (see above). It authorises the court to make intervention orders in respect of a person who has committed one of the listed acts against a family member. Indirectly through the procedural provisions, and directly by virtue of s4, an intervention order can only be made under the Act in the context of a relationship which is within the description of a family member relationship.

33. Section 14 brings that analysis to bear to consent orders by its reference to the Court making "any order under this Act." That expression is significant. The provision could have been "The Court may make an intervention order by consent". The expression "under this Act" can only be satisfied if made in respect of complaints made effectively by one family member against another. Section 5 sets out possible restrictions that may be included in the order but is expressed

to do so without limiting the generality of s4. This refers, specifically, to sub-s(2) which empowers the court to impose any restrictions or prohibitions that appear necessary or desirable in the circumstances.

34. Thus, even assuming for the moment, that s14 confers a jurisdiction additional to that conferred by s4, it will not enable orders to be made affecting person who are not within the family relationship as defined in the Act. Section 3A prevents the Children's Court making orders where two adults are involved in the dispute.

35. The issue remains, however, whether s14 confers a jurisdiction to make an intervention order such that the learned Magistrate needed to do no more than satisfy himself merely that a consent was given and that the relationship existed (a finding supported by the implied admission of that fact flowing from the consent to the order) or whether the learned Magistrate had also to be satisfied that one or more of the facts set out in s4 had been established.

36. As noted above, it was argued that s14 is otiose unless it confers a consent order jurisdiction. In my view, this is not so. I can well imagine the drafters being concerned that there could be uncertainty about the Courts' power to make consent orders in an Act entitled "*Crimes (Family Violence) Act*" and where the proposed procedures included powers of entry, search and arrest and involvement of the police in the laying of and presentation of the complaint in court. It is also debatable whether the power to make consent orders without any consideration of the s4 matters is a power necessary for the effective exercise of the jurisdiction. I have no doubt of the convenience of having such a power but it is another matter to demonstrate that it is necessary for the effective exercise of the jurisdiction.

37. In construing s14, it is necessary to bear in mind that where the Magistrates' Court has civil jurisdiction, it can make orders by consent. But in the absence of an express provision permitting it, the parties cannot confer jurisdiction upon the Magistrates' Court by consent or acquiescence^[13]. If the intention in the Act was to confer a jurisdiction to make intervention orders by consent regardless of s4, one would have expected that to be clearly stated in s14. It has not been so stated. On the contrary, the language used suggests that that result was not intended^[14].

38. Section 14 confers a discretion which is to be exercised judicially and the power that is given is to make "any order under this Act" by consent. Under s14 the court is not compelled to make an order by consent of the parties but may do so on relevant considerations. As already noted, the court would need to examine the matter sufficiently to be satisfied that the necessary relationship existed, or had existed. It would also need to consider whether the consent order proposed was one which came within the ambit of the types of orders, including restrictions, envisaged by the Act. But if the order is to be one "under this Act", it must also be directed to the sort of issues for which the jurisdiction to make orders is conferred. This requires reference back to the matters listed in s4(1) and suggests that the section assumes that the Court will need to be satisfied that one or other of the jurisdictional facts existed.

39. I am conscious of the importance in practice for the consent order procedure to operate speedily and efficiently. I suggest that the above construction enables s14 to be given appropriate operation and still permits a practical, though slightly more complex, approach to be taken to applications for intervention orders under the Act.

40. Because of the variety of matters listed in s4, the above approach need not impose an onerous burden on Magistrates and parties when dealing with consent orders. Magistrates would need to be satisfied that the consent is an informed consent and to direct their minds, albeit briefly, to the complaint and to the extent to which the consent provided the necessary admissions of the relevant relationship and of jurisdiction on the basis that it involved an admission of one or other of the jurisdictional facts referred to in s4. As to the latter, as long as the consent is an informed one, it may not be necessary to identify the particular jurisdictional fact admitted by the consent. The informed consent to the order could be accepted as admitting jurisdiction and that the orders sought were appropriate "under the Act" in the circumstances of the case. Detailed reasons would not be required. Obviously, greater care would be required with unrepresented parties. As to represented parties, I refer to the remarks of Dawson J quoted above^[15].

41. In cases like the present, where the defendant wishes to consent to an order but maintain a denial of the matters alleged in the complaint itself, it would be open to Magistrates to make a consent order if satisfied, for example, that one or other of the facts referred to in s4, but not alleged in the complaint, could be treated as admitted by the consent.

42. It follows that I have come to a different conclusion from that of the learned Magistrate in dealing with the matter in that the view expressed by him was that the Act required no more than that the relevant individuals be or have been in the relevant relationship and that they consented to the proposed orders. The order made below should be quashed.

Disposition of the matter

43. I have given consideration as to the proper course to follow in light of the above conclusions. My tentative view is that the matter should be returned to the Magistrates' Court for further hearing and determination according to law. I will, however, invite further submission on the issue and on the appropriate orders.

[1] [1990] HCA 23; (1990) 93 ALR 79; (1990) 64 ALJR 321.

[2] [1976] 2 NSWLR 431.

[3] [1892] VicLawRp 96; [1892] 18 VLR 497.

[4] [1990] 20 NSWLR 737; (1990) 51 A Crim R 281.

[5] *Grassby v R* [1989] HCA 45; (1989) 168 CLR 1; 87 ALR 618; (1989) 63 ALJR 630; (1989) 41 A Crim R 183, Dawson J at CLR 16, 17; *Connelly v Director of Public Prosecutions* [1964] AC 1254; [1964] 2 All ER 401; (1964) 48 Cr App R 183; [1964] 2 WLR 1145, Lord Morris at AC 1301; *John Fairfax & Sons Ltd v Police Tribunal (NSW)* (1986) 5 NSWLR 465, McHugh JA at 476; *Palmer v Clarke* (1989) 19 NSWLR 158, Kirby P at 167.

[6] *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways (NSW)* [1935] HCA 77; 54 CLR 470; [1936] ALR 105, Dixon J at CLR 502-503.

[7] [1991] HCA 9; (1991) 172 CLR 84; [1991] FLC 92-217; 99 ALR 193; (1991) 65 ALJR 280; 14 Fam LR 593.

[8] *Harris v Caladine*, at 96, per Mason CJ & Deane J.

[9] at 103.

[10] at 124.

[11] [2000] NSWSC 878; 35 ACSR 221.

[12] unreported SC (NSW) (14 March 1994) BC9402299, McLellan CJ in Equity.

[13] *Walden v Minister for Works* (1915) 18 WALR 16 at 19; *Mason v Ryan* [1884] VicLawRp 115; (1884) 10 VLR (L) 335; 6 ALT 152.

[14] Compare s10A *Domestic Violence Act* 1986 (ACT) considered in *R v Novak* [1999] ACTSC 74. It provides "The Court may, with the consent of the parties to the proceedings, make any order under this Act without proof or admission that the respondent has engaged in conduct that constitutes domestic violence".

[15] Footnote 10 above.

APPEARANCES: For the Plaintiff Stephens: Mr G Nash QC and Mr J Lavery, counsel. Chester Metcalfe & Co., solicitors. For the Defendant Melis: Ms P Tate, counsel. Victorian Government Solicitor. For the Defendant Magistrates' Court: Mr S McLeish, counsel. Victorian Government Solicitor.