25/11; [2011] VSC 386

SUPREME COURT OF VICTORIA

ELLIS v CAINE

Beach J — 18 August 2011

CRIMINAL LAW – INTERVENTION ORDER MADE UNDER THE *STALKING INTERVENTION ORDERS ACT* 2008 – BREACH OF INTERVENTION ORDER – DEFENDANT CONVICTED OF AN OFFENCE UNDER THE *FAMILY VIOLENCE PROTECTION ACT* 2008 AND SENTENCED TO A TERM OF IMPRISONMENT – WHETHER MAGISTRATE IN ERROR IN FINDING CHARGE PROVED: *STALKING INTERVENTION ORDERS ACT* 2008, S32; *FAMILY VIOLENCE PROTECTION ACT* 2008, S123(2); *CRIMINAL PROCEDURE ACT* 2009 SS8, 272.

E. was convicted of an offence under s123(2) of the *Family Violence Protection Act* 2008 and sentenced to a term of imprisonment suspended for a period of four months. The original order was made under the provisions of the *Stalking Intervention Orders Act* 2008. On appeal—

HELD: Appeal allowed. Conviction set aside. Proceeding remitted for further hearing and determination by the Magistrates' Court as originally constituted.

1. On no basis could it be said that E. committed an offence under s123(2) of the *Family Violence Protection Act*. It was sufficient to say that the evidence given before the Magistrate well justified a conclusion that E. breached the original order made under the *Stalking Intervention Orders Act*. That breach did not constitute an offence under s123(2) of the *Family Violence Protection Act* – rather, it constituted an offence under the equivalent section in the *Stalking Intervention Orders Act*, namely s32 of that Act.

2. There was some doubt as to whether the slip rule had any application in this case. Any application to amend would have to be made in the light of s8 of the *Criminal Procedure Act* 2009. Consistently with the submission that the learned Magistrate in reality made a finding of guilt under the *Stalking Intervention Orders Act*, the respondent wished to have the opportunity to make an application for an amendment. Having regard to the way the case had been conducted to date, the respondent should have that opportunity. However, the question of any amendment to the charge was one to be determined by the Magistrate on proper material, rather than by the Supreme Court.

3. Accordingly, the appeal was allowed and E.'s conviction set aside. Notwithstanding E.'s arguments as to the likely lack of success of any application to amend, the appropriate order was to remit the proceeding for further hearing and determination by the Magistrates' Court as originally constituted.

BEACH J*:*

Introduction

1. On 10 December 2010, Raymond John Ellis, the appellant, was convicted in the Magistrates' Court at Shepparton of an offence under s123(2) of the *Family Violence Protection Act* 2008. Mr Ellis was sentenced to a term of imprisonment of seven days, suspended for a period of four months. The offence under s123(2) of the *Family Violence Protection Act* was contravening a family violence intervention order made under that Act. The relevant order upon which the conviction was based was an order of the Magistrates' Court sitting at Heidelberg and made on 23 March 2010 ("the Heidelberg order").

2. After much debate between the parties, the parties are now agreed that the Heidelberg order was not made pursuant to the *Family Violence Protection Act* – but rather, the Heidelberg order was made pursuant to the provisions of the *Stalking Intervention Orders Act* 2008.[1] I agree with the conclusion that has now been reached by the parties. It is also the conclusion that was reached by the learned Magistrate who convicted the appellant on 10 December 2010. Whilst her Honour's conclusions in respect of this issue were the subject of grounds of appeal in this proceeding, in view of the parties' agreement and my concurring view, it is not necessary to consider these issues further.

3. The issue in this appeal has now reduced to an attack upon the validity of the conviction of the appellant for contravening an order made under the *Family Violence Protection Act*. As no such order was ever made (the Heidelberg order being an order made under the Stalking Intervention Orders Act), the appellant contends that his appeal must be allowed and the conviction set aside.

The respondent's position

4. The respondent was the informant below. It is conceded on his behalf that the appellant could not have been convicted of the offence of contravening an intervention order made pursuant to the *Family Violence Protection Act*. In written submissions made on behalf of the respondent,[2] it is submitted:

> "Although there was no formal application for amendment ... either by the prosecutor or the magistrate to refer to [the] *Stalking Intervention Act* 2008 rather than the *Family Violence Protection Act* 2008, the learned magistrate made it plain from the outset that the breach she was adjudicating on was a breach of an interim intervention order under the *Stalking Intervention Act* 2008. It is submitted that in so finding, the learned magistrate made a finding of guilt under that Act."

5. The respondent submits that the appropriate course would be to remit the proceeding to the Magistrate for further hearing by the Court as originally constituted "for correction of the record of conviction based on the application of the common law slip rule".

The trial below

6. At trial, the prosecution called four witnesses: the applicant for the Heidelberg order (Ms Gentsch), her daughter and two members of the police.

7. During the course of cross-examination of Ms Gentsch, counsel for the appellant established that Ms Gentsch and the appellant were not family members within the meaning of that expression in the *Family Violence Protection Act*.

8. Following the conclusion of the prosecution case, counsel for the appellant made a no case submission. The crux of the submission was:

> (a) The Heidelberg order was made pursuant to the provisions of the *Family Violence Protection Act*.
> (b) Ms Gentsch and the appellant were not family members within the meaning of the *Family Violence Protection Act*.
> (c) There is no jurisdiction to make an intervention order under the *Family Violence Protection Act* in respect of people who are not family members.
> (d) By reason of (a) to (c), the Heidelberg order was a nullity.
> (e) There can be no offence in breaching an order that is and was at all times a nullity.

9. The learned Magistrate rejected the appellant's no case submission. Her Honour held that the Heidelberg order was made pursuant to the *Stalking Intervention Orders Act*, notwithstanding an incorrect reference to the *Family Violence Protection Act* contained in a certified extract setting out the terms of the Heidelberg order. As I have said above, that finding is no longer disputed by the appellant.

10. Upon her Honour expressing her view that the Heidelberg order was made under the Stalking Intervention Orders Act, counsel for the appellant then said:

> "Well, Your Honour, the charges can't apply to a stalking order. I don't know if that means there should be an application - - -."

11. It would seem from the context of counsel for the appellant's statement that counsel for the appellant may have been about to foreshadow the need for an amendment to the charge his client was facing. However, no application to amend the charge was made by the prosecutor and no amendment was actually made.

12. Following the Magistrate's rejection of the no case submission, the appellant called one witness and then closed his case. The appellant did not give evidence.

13. Following the conclusion of the evidence, the Magistrate asked for submissions. The prosecutor made a very brief submission about the dictionary meaning of "surveillance".[3]

Counsel for the appellant then made a very short submission concerning the meaning of the word "surveillance" and its application to the case at hand. No submission was made that the appellant could not be guilty of the offence charged in circumstances where no family violence intervention order had been made – the order being relied upon (the Heidelberg order) having been found by her Honour to be an order under the *Stalking Intervention Orders Act*.

14. After providing reasons, her Honour found the charge proved in the following terms:

> "I am satisfied beyond reasonable doubt that on the evening in question Mr Ellis breached the order by he himself keeping Mrs Gentsch and her children under surveillance and the taking of one photograph, and further that he encouraged his wife Mrs Ellis to engage in conduct prohibited by the order. ... I propose to find you guilty as charged, of the (sic) charge 1."

Disposition of this appeal

15. There can be no doubt that the appellant's conviction must be set aside. On no basis could it be said that he committed an offence under s123(2) of the *Family Violence Protection Act*. It is not necessary to set out further the various reasons of the learned Magistrate. It is sufficient to say that the evidence given below well justified a conclusion that the appellant breached the Heidelberg order – an order made under the *Stalking Intervention Orders Act*. However, that breach does not constitute an offence under s123(2) of the *Family Violence Protection Act* – rather, it constitutes an offence under the equivalent section in the *Stalking Intervention Orders Act*, namely s32 of that Act.

16. The respondent relies upon the slip rule. I have some doubt as to whether the slip rule has any application in this case. It seems to me that any application to amend would have to be made in the light of s8 of the *Criminal Procedure Act* 2009. Consistently with his submission that the learned Magistrate in reality made a finding of guilt under the *Stalking Intervention Orders Act*, the respondent wishes to have the opportunity to make an application for an amendment. Having regard to the way the case has been conducted to date, I am of the view that the respondent should have that opportunity. However, the question of any amendment to the charge is one to be determined by the Magistrate on proper material, rather than by this Court.[4]

17. Accordingly, for the reasons given above, the appeal must be allowed and the appellant's conviction set aside. Notwithstanding the appellant's arguments as to the likely lack of success of any application to amend, in my view, the appropriate order[5] is to remit the proceeding for further hearing and determination by the Magistrates' Court as originally constituted. I will hear the parties as to the appropriate form of order and any question of costs.

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[1] Initially, the appellant contended that the Heidelberg order was made pursuant to the *Family Violence Protection Act* and that the Heidelberg order was therefore (and for reasons which do not need to be set out here) a nullity. However, in the appellant's further reply dated 17 August 2011, the appellant notes the parties' present position in the following terms: "The respondent submits, and the appellant concurs, that the [Heidelberg] order was made pursuant to the *Stalking Intervention Orders Act*". See further, paragraph 3.2 of the outline of respondent's submissions dated 12 August 2011.

[2] Dated 1 July 2011.

[3] The Heidelberg order prohibiting, amongst other things, keeping the affected persons referred to in it "under surveillance".

[4] Whilst I have expressed some doubt as to the applicability of the slip rule to the circumstances of this case, nothing in this judgment should be held to prevent the respondent from contending before the Magistrates' Court that the slip rule has application in this case.

[5] Cf s272(9) of the *Criminal Procedure Act* 2009.

APPEARANCES: For the appellant Ellis: Mr TL Bevan, counsel. Tehan George & Co, solicitors. For the respondent Caine: Mr JD McArdle QC, counsel. Solicitor for Public Prosecutions.
