02/03; [2003] VSC 43

SUPREME COURT OF VICTORIA

KIRBY v PHELAN

Bongiorno J

6 February 2003

INTERVENTION ORDER – MADE AGAINST DEFENDANT – ALLEGED THREAT TO CAUSE DAMAGE AND LIKELY TO CAUSE DAMAGE – EVIDENCE OF POLICE OFFICER ABOUT CONVERSATION WITH AGGRIEVED FAMILY MEMBER – SUCH MEMBER NOT CALLED AS A WITNESS – EVIDENCE GIVEN BY DEFENDANT – WHETHER EVIDENCE OF POLICE OFFICER ADMISSIBLE – WHETHER PART OF THE *RES GESTAE* – "LIKELY" – MEANING OF – WHETHER DEFENDANT LIKELY TO CAUSE DAMAGE TO PROPERTY – WHETHER ORDER JUSTIFIED IN THE CIRCUMSTANCES: *CRIMES (FAMILY VIOLENCE) ACT* 1987, S4(1)(b).

An application for an intervention order was made by a police officer on behalf of the aggrieved family member (AFM). At the hearing before the magistrate, the police officer gave evidence of a conversation with the AFM some time previously. The AFM did not give evidence. The defendant (who was unrepresented) gave evidence wherein he described certain events on the night in question including his picking up a small axe and walking out the door with it. The magistrate made an intervention order based on a threat to cause damage to property of the AFM and was likely to cause damage. Upon appeal—

HELD: Appeal upheld. Order set aside. Application dismissed.
1. Section 4(1)(b) of the *Crimes (Family Violence) Act* 1987 provides that an intervention order may be made if the person against whom it is made has threatened to cause damage to property of a family member and is likely to cause damage. There are two criteria to be satisfied. Whilst the action in relation to the small axe might have constituted a threat, there was no evidence which could justify the finding of likelihood of damage to property being inflicted.
***Department of Agriculture v Vinnie* [1989] VicRp 73; [1989] VR 836, considered.**

2. Whilst the application was a civil proceeding, the evidence given by the police officer (even though admitted into evidence without objection) was inadmissible hearsay and in the circumstances could not have been relied upon by the magistrate. The officer's evidence was not part of the *res gestae* because the narrative recounted by the officer was no more than a description of a completed event removed in time and place from the occasion on which the officer heard it.

BONGIORNO J:
1. This is an appeal from an order made pursuant to the *Crimes (Family Violence) Act 1987* by the Swan Hill Magistrates' Court on 13 August 2002. An application for such an order had been made by a police officer, Jarrod Phelan, pursuant to s7(1)(a) of the Act on 1 August 2002 in respect of a person, Joyce Kennedy, whom the complainant alleged lived in an intimate relationship with the appellant.

2. At the commencement of the case the magistrate expressed some concern that the aggrieved family member in respect of whom the order was sought, namely Joyce Kennedy, did not want the order to be made. However the Act does not require the aggrieved family member to be actually aggrieved; the definition in s3(1) of the Act merely requires that the aggrieved family member be the family member whose person or property is the subject of the complaint for an order.

3. The matter was conducted by a police prosecutor who called only one witness, Senior Constable Michael Francis Manex. The appellant, an illiterate Aborigine, was unrepresented.

4. Senior Constable Manex gave evidence of a conversation with the aggrieved family member which extended over some three pages of transcript. If that evidence had been admissible it might itself have gone a long way towards establishing a basis for the making of the intervention order which the magistrate made. However, the first question of law raised by this case, namely the admissibility of that evidence, must be answered in the negative. It was the clearest inadmissible hearsay and whilst no objection was taken by the appellant to its admission into evidence, any

possible rule that hearsay admitted in a civil proceeding without objection may be relied upon as evidence (if such rule exists) could not, for obvious reasons, possibly apply to someone in the circumstances of the appellant.

5. The other evidence given by Senior Constable Manex related to his finding firearms and other weapons at the appellant's premises, some of which at least he was not entitled to possess. He also tendered a document containing what was said to be extracts from the appellant's criminal record; an exhibit which the evidence before me discloses was lost by the Magistrates' Court. As the magistrate commented that this evidence did not go, "directly to the issue in any event", it can be assumed that it played no part in persuading him to make the order which he did. In any event, another comment made by the magistrate suggests that the appellant's last conviction for any offence was in 1987.

6. Mr Dennis, who appeared for the respondent, sought to justify the hearsay admitted by the magistrate on the ground that it was, part of the *res gestae*. This submission has no substance whatsoever. The narrative recounted by the police officer was no more than a description of a completed event removed in time and place from the occasion on which the officer heard it. I need say nothing more.

7. The first question of law settled by the Master is therefore answered in the appellant's favour, although of course that of itself does not entitle him to succeed in this appeal. If, absent that evidence, there is any admissible evidence upon which the magistrate could have found in favour of the respondent then his order will stand.

8. Senior Constable Manex's evidence was not the only evidence before the magistrate. In somewhat unusual circumstances the appellant himself gave evidence. It appears from the transcript that he may have been directed by the magistrate to do so. He was given no warning as to possible self incrimination and no attention was paid to the question of the propriety of a magistrate hearing a civil case calling a witness of his own motion. However, as the appellant's evidence was ultimately before the magistrate it must be examined.

9. The appellant's evidence was inconsequential in as much as he described certain events on the night in question including the aggrieved family member leaving his home. After doing so he continued;

> A: "So I picked up the guitar and walked in the room to put in the guitar case and when I came back out Joyce was gone. So I walks outside and I sung out to Joyce and so she didn't come back then so I went and grabbed another can and I was sitting down having a beer, and then I got up I thought well, she dented my car, which she did, the back door, so I thought well I'll level it up. So I walked up and I was going to smash her back door in."
>
> Q: "Sorry, what was that again. She was gone, you called for her?"
>
> A: "I sung out to her, she didn't answer because she was most probably past the fruit and vegetable joint at the time, it's what over a kilometre away or something, so I decided to walk out the house after I had a beer, that's another beer, then went to walk out the door with the tommy axe because I only use it for kindling, kept it on the freezer in the kitchen next to the sliding door and the back door."
>
> Q: "Why did you have it at all?"
>
> A: "To use for kindling. To cut through it, and that morning I came out to smash Joyce's back door of the car. Silly thing to do I know. Anyways, the next minute the police are in the yard. I didn't even know they were in the yard. I was told that Joycey said that she didn't want the police to come up to the house ".

10. It is only in this passage if at all that any justification for the magistrate's order can be found. Mr Dennis in his submissions put various propositions relating to inferences which could be drawn from other pieces of evidence including a comment by the aggrieved family member to Senior Constable Manex at the time he spoke to her, that she was "scared". None of those submissions can be made out. The inferences suggested amount to no more than speculation.

11. The section of the Act relied upon by the respondent in this case as justifying an order was

s4(1)(b). That section provides that an intervention order may be made if the person against whom it is to be made has threatened to cause damage to property of a family member and is likely to cause damage to property of the family member. There are thus two criteria to be satisfied.

12. Mr Dennis submitted that the appellant's expression of his intention to smash the agreed family member's car door in constituted a threat to cause damage. It may well be that he is correct. The concept of a threat is not without its difficulties. In usual parlance it means something said by one person to another or something done by one person in the presence of another which conveys some notion of an intention to inflict harm of one kind or another. But there may be situations where the term could be appropriately applied to conduct not fitting that description. It may well be that there are circumstances where things done, even alone, could constitute a threat and this may be one of them. However that may be, in my opinion there is no evidence to establish the second limb of the jurisdictional basis for the order; that is to say that the appellant was likely to cause damage to the property of the aggrieved family member.

13. The word "likely" has been examined in a multitude of decisions. No extensive argument was presented by either counsel on it in this case but I was referred to one case by Mr Dennis to which it will be sufficient for me to refer. That is the case of the *Department of Agriculture v Vinnie* [1989] VicRp 73; [1989] VR 836, a decision of the Full Court of this Court on s31(1) of the *Freedom of Information Act* 1982.

14. In that case, the various meanings of the word "likely" are discussed in the judgments of Young CJ and Marks J who referred to the High Court decision of *Boughey v R* [1986] HCA 29; (1986) 161 CLR 10; 65 ALR 609; (1986) 60 ALJR 422; (1986) 20 A Crim R 156. There the High Court was considering the question of culpable homicide under the Tasmanian Criminal Code, which included, as one of the definitions of murder, death by an unlawful act or omission which the offender knew or ought to have known to be "likely" to cause death in the circumstances. Marks J said of *Boughey's* case (at CLR 480):

> "An examination of the reasons for judgment shows that although the word 'likely' is considered to mean 'probable' in the context of the Tasmanian legislation, it was not held to mean 'a greater than 50 per cent chance' or 'more likely than not' (see 161 CLR at 21) but rather a substantial 'real and not remote' chance regardless of whether it is less or more than 50 per cent".

15. His Honour also referred to a passage from Gibbs CJ in the same case to the effect that "likely" in the Tasmanian Criminal Code means 'probable' and not 'possible'. Marks J referred to a number of other cases in which the word "likely" was considered and made the observation, along with many of the judges in the cases to which he referred, that "likely" was one of those words which peculiarly takes its complexion and ultimate meaning from the context in which it is found.

16. In the circumstances of this case it is sufficient to say that no matter how one examines the evidence here, there is no evidence that the appellant was likely to cause damage to property of the aggrieved family member, no matter what colour is given to the word "likely". This is so even if his earlier action in picking up the small axe and walking out the door with it might have constituted a threat within the meaning of that concept in the same section. There had to be some evidence which would justify the finding of likelihood of damage to property being inflicted. Here there was none.

17. It follows that questions contained in paragraphs 3(e), (c) and (g) of the Master's order of 2 October 2002 are answered in favour of the appellant.

18. Undoubtedly the *Crimes (Family Violence) Act* 1987 and legislation like it is a potent weapon in the unending fight against domestic violence; a fight carried on often in very unenviable circumstances by hard working police officers. However that may be, and however useful intervention orders might be, the fact that they may be obtained by what is in form, a civil process and the fact that the grounds for them need be established only on the balance of probabilities does not mean that they can be granted when the grounds for them are not made out on the evidence. They are justified only in those circumstances where the law permits them to be made. In this case, those circumstances did not exist on the case before the magistrate. The order ought not to have been made.

19. There were a number of irregularities in the way in which this case was conducted before the magistrate. Some of them I have referred to. Before concluding I should also refer to the notation on the certified extract of the Register of the Swan Hill Magistrates' Court that suggests that the defendant agreed to the order which was made against him. How that came to be on the Register of the Court is difficult to determine. Certainly a perusal of the transcript would give no justification for such a notation. The making of an intervention order against a person carries with it a number of consequences including civil disabilities. It is important that the proper requirements of such orders be complied with by courts making them.

20. The appeal in this case will be upheld. The order of the Magistrates' Court at Swan Hill of 14 August 2002 will be set aside and in lieu of that order, the application for an intervention order made by Jarrod Phelan against the appellant on 1 August 2002 will be dismissed.

APPEARANCES: For the plaintiff Kirby: Mr S Ginsbourg, counsel. Victorian Aboriginal Legal Service. For the defendant Phelan: Mr BM Dennis, counsel. Victorian Government Solicitor.
