31/88

SUPREME COURT OF VICTORIA

FISHER & ANOR v FISHER

Nathan J

23 March, 22 April 1988 — [1988] VicRp 93; [1988] VR 1028

PRACTICE – APPEARANCE – RIGHT OF AUDIENCE – INTERVENTION ORDER SOUGHT BY LAY PERSON – WHETHER POLICE OFFICER ENTITLED TO APPEAR TO REPRESENT COMPLAINANT: *CRIMES (FAMILY VIOLENCE) ACT* 1987, S7; *LEGAL PROFESSION PRACTICE ACT* 1958, S111; *MAGISTRATES' COURTS ACT* 1971, S45.

1. Section 45 of the *Magistrates' Courts Act* 1971 specifies those persons who have a right of audience in proceedings instituted by information or complaint. Section 7 of the *Crimes (Family Violence) Act* 1987 specifies the classes of persons who may apply for an Intervention Order, notwithstanding the prohibitive terms of s111 of the *Legal Profession Practice Act* 1958.

2. Where a lay person made a complaint for an intervention order and a police officer was allowed to appear to represent the complainant, such officer had no right of audience under any of the above-mentioned Acts, and accordingly, the magistrate was in error in allowing such appearance.

NATHAN J: *[After setting out the facts and referring to some provisions of the relevant Acts, His Honour continued]* ... **[6]** The *Magistrates' Courts Act* s45, spells out those persons who have a right of audience in proceedings which are instituted either by information or complaint. These categories are:

(1) the informant or complainant and defendant personally;
(2) a member of the police force acting on behalf of an informant (in respect of informations but not complaints);
(3) counsel or solicitor;
(4) those other persons specifically empowered by law to appear.

To these classes must be added those who appear, not as of right, but as a result of the presiding Magistrate's exercise of discretion: **[7]** (5) *amicus curiae* (see e.g. *O'Toole v Scott* (1965) AC 939; [1965] 2 All ER 240; [1965] 2 WLR 1160 and *Hubbard Association of Scientologists International v Anderson and Just* [1972] VicRp 37; (1972) VR 340.

Thus, the essential question in this case comes into focus. If the complaint and summons (no matter how called) made by Christine Fisher is really in the nature of an information, and if the actual informant was a police member, Sergeant Aldred might have obtained a right of audience before the Magistrate. If, on the other hand, the complaint and summons are civil proceedings instituted by Miss Fisher herself, Aldred could not appear on her behalf and would probably have been in contravention of the *Legal Profession Practice Act* if he did so unless he was specifically empowered to appear by s7 of the Act. Stating the question thus, I am brought to an examination of the Act. *[His Honour then considered the Parliamentary Debates and relevant provisions of the Act and continued]* ... **[10]** It is thereby patently clear that both Government and Opposition, for once in strenuous agreement, were firmly of the view that Intervention Orders were a civil remedy to be granted by a magistrate on the balance of probabilities and addressed to situations of uncontrolled family violence where one member has perpetrated or threatened acts of aggression upon another.

It is to be noted that similar, albeit much more truncated powers, are also invested in the Family Court of Australia, see *Family Law Act* 1975 (Commonwealth) s114AA. These are also in the nature of civil remedies.

When examining the mischief to which this Act has been addressed, the Government and Opposition were again in strenuous agreement. Both speakers made reference to the Australian Law Reform Commission Report No. 30 and the Women's Policy Co-Ordination Unit (Department of Premier and Cabinet) Victoria Report entitled "Criminal Assault in the Home; Social and Legal

Responses to Domestic Violence". An examination of these Reports indicates the extreme concern of the authors with unreported cases of family violence.

It **[11]** was said that over 90 per cent of cases resulting in injury to a family member were committed by men upon their spouses, de facto or otherwise, and infant children. The reports asserted an extreme reluctance to report these offences to police, because to do so either led to further acts of violence or the removal of the breadwinner and supporter. It was concluded that existing remedies were inadequate to redress these evils, and recommendations along the lines of the Intervention Orders were proposed. Those recommendations have, in turn, found their way into the Act which I am now examining.

Intervention Orders are not, however, novel. In England the *Domestic Violence and Matrimonial Proceedings Act* of 1976 Ch 50 introduced similar relief. (See *Spindlow v Spindlow* (1979) Fam 52 and *Hopper v Hopper* (1979) 1 All ER 181) as does legislation in some other States, e.g. New South Wales, the *Crimes Act* (NSW) 1900 s547AA(2)b, introduced in 1983 Act No.116, South Australia, *Justices Act* (SA) (1921) s99(2), introduced in 1982 Act No.46, and Western Australia, *Justices Act* (WA) s172(2), introduced in 1982 Act No. 125.

I conclude the Act does reflect accurately the claims made for it in Parliament. It introduces a novel but civil remedy in the form of Intervention Orders whilst preserving the existing remedies (albeit inadequate) to cure or prevent acts of family violence; namely the criminal offences of assaults and binding over orders. *[His Honour further considered the nature of Intervention Orders and continued]* ... **[17]** Returning to s7, in my view, the persons enabled to make a complaint under the Act (i.e. police members or any other person authorised in writing) are stated with the degree of clarity and precision, which entitle them to be heard, despite the prohibitive terms of the *Legal Profession Practice Act.* I conclude that the introductory words of ss111 of the latter Act, namely, "except so far as **[18]** otherwise is expressly enacted", applies directly to s7 of this Act. The result is to substantially enlarge the categories of persons who may make a complaint. As I have already indicated, a complainant personally may be heard, but it does not follow that a person appearing on behalf of a complainant has the same right. Section 7 details the classes of persons who may apply for Intervention Orders, other than those persons actually aggrieved, assaulted or threatened with assault. The first expanded category is:

(a) members of the Police Force.

The second category is, quite naturally:
(b) family members.

The third category deals with children:
(c) that is a parent may complain on behalf of a child as may a member of the Police Force.

The fourth category is introduced by s7(c)(iii), that is:

– a limitless class of persons who may complain on behalf of the child but only with the written consent of the parent of that child. This invests family friends, neighbours, clergymen, the social worker, or any other person at all, with the ability, subject to the parent's consent, to make a complaint.

The fifth category is extraordinarily wide:

(d) any person whatsoever, but limited to those who have obtained the written consent of an aggrieved family member, may make a complaint.

[19] The following observations in respect of those classes are relevant. Parliament has seen fit to erode the monopoly of legally qualified persons to conduct civil proceedings of this type. This means that should a lay person appear for a complainant and conduct the case negligently, then the person actually aggrieved will not have recourse to the Solicitors' Guarantee Fund in the event of loss. However, the terms of the Act are specific, and the Parliament must be seen to have intended this consequence. It does mean, however, that a person so appearing, including a member of the Police Force, if he or she is the actual complainant, might have to carry the costs of

their own negligence. It will also result in lay persons being opposed by qualified practitioners, and although that position is not unknown under our present system, it could give rise to inequality of representation which might not serve the family members well.

I am satisfied that if a person has the right to make a complaint, they also have the right to appear and be heard at the hearing of that complaint. I reject the argument that even if a police member or lay person may make a complaint, they would then be prohibited under the terms of the *Legal Profession Practice Act* from carrying on the conduct of that complaint before a court.

I conclude that the express statutory power, to make a complaint carries implicitly with it, the entitlement to conduct the proceedings in relation to it. Nothing in the Act derogates from the right of personal appearance. If that appearance by a police member on his own behalf is as a complainant, then, and of course, the **[20]** member has a right to appear. The enlarged category of persons who may make a complaint under this Act is in marked distinction to the common law position which was to give *locus standi* to only those persons entitled to the legal remedy sought. See, for example *Onus v Alcoa* [1981] HCA 50; (1981-82) 149 CLR 27; (1981) 36 ALR 425; (1981) 55 ALJR 631.

But the Parliament intended that family members who may be reluctant to institute proceedings in their own name, have ready access to the courts to prevent threatened or apprehended violence between family members. This objective is accomplished by the enlargement of the classes of persons who may make complaints.

However, s7 does not give any member of the Police Force the right to be heard in respect of a complaint laid by somebody else, even if that person is another police member. The *Magistrates' Courts Act* s45 does not apply to complaints, only to informations. He or she may only appear in respect of those cases where they are themselves the actual complainants, the right is not transferable to another police member.

In the instant case, both the applications for an interim intervention order and the intervention order itself were instituted by Miss Fisher herself as the complainant. Therefore, neither Aldred nor any other member of the Police Force had or has the right to appear on her behalf.

There are compelling reasons why members of the Police Force should not be permitted to appear or be heard on behalf of complainants in civil proceedings, even and perhaps especially so, those concerned with threatened criminal behaviour. I now turn to elaborate them. *[His Honour set out his reasons and continued]* ... **[23]** This Act is referred to as the *Crimes (Family Violence) Act*. It purports to amend the *Crimes Act*. **[24**] Except for the incidental matters to which I have referred, the Act does not amend the *Crimes Act*, at all, but introduces new, necessary and defined procedures to deal with episodes of threatened family violence. To do so, it has established a civil remedy well known to courts exercising equitable jurisdiction, and has set out the civil proceedings by which those injunctive remedies can be obtained. They are not criminal matters, and to call them so does not change the essential characterization of the Act. A duck does not become an emu merely because it is called one.

This Act, which is discrete in its operation from the *Crimes Act* 1958, does not become an amendment to that Act (except for the inconsequential addenda referred to) merely because it is recited as being so. Nothing I have said destroys the efficacy of the Act or the remedies which it creates. It is plainly inappropriately entitled, and this should be remedied, but I must look to the substance of the legislation and not strike it down merely because of its inaccurate title.

Because this judgment is more extensive than is customary, I now summarize my findings:

1. The Act purports to amend the *Crimes Act*. In substance it does not. It introduces civil remedies called Intervention Orders, in the nature of injunctions aimed at restraining family members from continuing or threatening to commit acts of violence.

2. The scope of the restraining orders available is very wide. They should be pronounced with the greatest caution and only after the criteria upon which injunctions are granted have been satisfied and the considerations of s4 sub-s(1) have been taken into account.

3. The *Legal Profession Practice Act* does not prohibit police members or lay persons from making complaints for Intervention Orders.

4. Only those police members and lay persons who actually make the complaints have a right to be heard, or otherwise may appear through legally qualified persons. Police members as such do not have the right of appearance.

5. Police members should only make complaints in exceptional circumstances. Public policy directs that police members should not become parties to civil disputes, even those where criminal behaviour has occurred or been threatened. Finally, I turn to the summons herein which sought review of the decision of the Magistrate on two grounds which largely reiterated each other, and that was that the Magistrate erred in law in determining that s7 permitted Sergeant Aldred to appear to represent Christine Fisher in proceedings in which she was the complainant. I am satisfied that the Magistrate did err in law, and I direct that the complaint be returned to the Magistrate to be conducted in accordance with the terms of these findings.

Solicitors for the applicants: McCracken and McCracken.
Solicitors for the respondent: P G McMullin and Co.
