THE MAGISTRATES' CONFERENCE 2020
DOMESTIC AND FAMILY VIOLENCE CASE LAW UPDATE
Judge Kent QC

[1] There have been a number of decisions of the District Court in the last 12 months relating to the *Domestic and Family Violence Protection Act* 2012. Of course, the District Court is generally the final court of appeal for matters of this kind and so these decisions are of particular importance for practitioners and courts dealing with these matters. I will give an overview of some of the cases, but before doing so it is as well to touch on the statutory framework.

[2] The objects in s3 include maximising safety, protection and wellbeing of relevant people and preventing or reducing domestic violence. Safety, protection and wellbeing are paramount; s4; it also contains some guiding principles. Section 8 includes the broad definition of domestic violence, including, for example, unauthorised surveillance. Section 10 defines exposure to domestic violence; there is also reference to emotional, psychological and economic abuse; ss11 – 12. Relevant relationships are defined in ss 13-20, and a procedural overview is in ss21-31. Court proceedings are dealt with in ss136-157. The court is not bound by the rules of evidence, and the balance of probabilities is the relevant standard of proof; s145. Appeals are governed by ss 164-169 and relevantly s 169(2) provides that the decision of the appellate court shall be final. This means that the District Court is the final court of appeal, in relation to the exercise of the jurisdiction under the Act; see *CAO v HAT* [2014] QCA 61 at [27]. Of course, this does not extend to related criminal jurisdiction, for such things as sentences for breaching a protection order, in respect of which the pathway is under s222; however few of these cases seem to go further than the District Court.

[3] In considering the cases, I have organised them under separate categories of the non-making or making of a protection order, and then the cases dealing with sentences, usually for contravention of an order. The appeals are of course of a slightly different legal character.

Refusal to make a protection order

[4] In *AVI v SLA* [2019] QDC 192, an appeal against a Magistrate's refusal to make a protection order in favour of the appellant was unsuccessful. Briefly, the appellant had filed an application for a domestic violence order in the Magistrates Court in February 2018 alleging that the parties' previous relationship had terminated in January 2015 and she and the children had suffered emotionally. It was said that the respondent had been arrested in Zimbabwe for biting her and that other violence had occurred. In between 2015 and 26 December 2017, the respondent had followed her in his car; had some interaction with a woman who did day-care; had contacted her hairdresser; had followed the children and gone to the childrens' school. A temporary protection order was made on 4 April 2018 and the matter came on for trial on 15 November 2018.

[5] In brief, the appellant's narrative was of contact between the parties, in the context of Family Court orders permitting the respondent to have contact with his children at a contact centre.

[6] The respondent denied committing any domestic violence or following or approaching the family in any way. The furthest he had gone was to contact a third party to ask for help in relation to seeing his children (apparently, the pastor of the church, who had given an affidavit to this effect). He had attended the childrens' school, however this was not an example of domestic violence. He was enquiring as to the progress of his sons.

[7] In the Magistrate's decision, the relevant provisions of the Act were examined and reference was made to relevant case law. There was a "relevant relationship". The Magistrate was not satisfied that the respondent had caused trauma and anxiety to the appellant and the children. The Magistrate was not satisfied that the appellant had discharged her onus of establishing that the three alleged incidents of following her occurred. The Magistrate was satisfied that the respondent attended the childrens' school without authority and a child was scared. He was also satisfied that the respondent had contacted the pastor asking for help to see the children. However, these incidents did not amount to domestic violence. Thus it was unnecessary to consider the "necessary or desirable" element and the application was dismissed.

[8] There was an admitted error in the reasoning of the Magistrate where there was reference to applying a standard of beyond reasonable doubt to a finding, however Judge Smith found that this was not material. Apart from reference to statutory provisions, such as s 8 and s 11 of the Act (the meaning of emotional or psychological abuse), his Honour referred to the previous finding by McGill SC DCJ in *GKE v EUT* [2014] QDC 248 at [23], that a person cannot be said to be harassed by a single incident, having regard to a dictionary definition of "harass", further, in that case at [22], "intimidation" refers to a process where a person is made fearful or overawed particularly with a view to influencing their conduct or behaviour; however, this is not a mere question of the aggrieved being upset.

[9] Judge Smith was not satisfied that the act in approaching the pastor was an act of domestic violence. The second ground of appeal was that the Magistrate failed to take into account as a material consideration the visit by the respondent to the school as an act of intimidation. Judge Smith found there was no error in the Magistrate's conclusion on this point. The *prima facie* position is, absent any order to the contrary, that a parent is entitled to check on the progress of his children at school. Without more this is not domestic violence; there must be more than mere upset. There had been no evidence led to establish that the event was "intimidating". His Honour noted that although the rules of evidence to not apply to such proceedings, as was noted in *ADH v AHL*[1] the court's decision must derive from relevant, reliable and rationally probative evidence that tends logically to show the existence or non-existence of the facts in issue.[2]

[10] The third ground of appeal was the Magistrate failing to take into account the appellant's claim that the respondent had assaulted her in some way in Zimbabwe. The only reference to this was in the application where the aggrieved had written something in handwriting and the unintelligible word could have been "bit" or "beat", but appears to be crossed out. It was thus unclear whether the allegation was that he had bitten or beaten her. It was said to have occurred in 2012, three years prior to the appellant's first application. There was no evidence given by the appellant at the

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1 [2017] QDC 103 at [46].

2 Paragraph [82].

hearing about this topic. The respondent was cross-examined about it and denied it. His Honour concluded there was insufficiently clear evidence in the application capable of founding any allegation of domestic violence on this point.

[11] Thus, his Honour did not find any of the grounds of appeal had been made out, but in any case, if it had been conducted as a rehearing, the court would have preferred the respondent's evidence for reasons which were particularised.[3] Thus, his Honour concluded that he was not satisfied on the balance of probabilities that any particularised acts as alleged by the appellant had occurred. Thus, the Magistrate's findings were correct. His Honour went on to find that in any case, even if there had been domestic violence along the lines alleged, the consideration of whether an order was necessary or desirable would have arisen and therefore the making of any order was not necessary or desirable taking into account the relevant principles including as analysed in *GKE v EUT* (supra) and in *MDE v MLG*[4].

[12] Thus, this case represents a careful approach to fact finding by the trial Magistrate in the context of the statutory framework and the somewhat curious body of evidence presented at the hearing; and a conventional analysis of the relevant principles on appeal by Judge Smith. Again, it is a reminder of the necessity for careful analysis in the weighing of evidence in such cases.

Making of a Protection Order

[13] In *AJC v Constable Kelli-Ann Gijsberten & Ors* [2019] QDC 195, Judge Lynham considered a case where a protection order had been granted to an aggrieved female and a cross-application by the male partner had been refused. The proceedings took place on 14 June 2018. The appellant appealed the making of both orders.

[14] The appellant had been unrepresented at the hearing, whereas the aggrieved had been represented by counsel. There had been previous directions made by another Magistrate which were the subject of some discussion at the hearing. What Judge Lynham eventually determined was that there were several errors as to procedural fairness in the conduct of the hearings by the Magistrate such that the orders were set aside and the matter remitted to the Magistrates Court to be heard by a different Magistrate.

[15] The unfairness to the unrepresented litigant manifested in several ways. There was a refusal to permit the aggrieved to be cross-examined on a basis which was found to be incorrect. There was a refusal to permit the tender of apparently relevant material by the appellant. There was a failure to make clear to the appellant that he was entitled to give sworn evidence in support of his position, together with a repeated indication that the appellant would not be permitted to give evidence from the bar table.

[16] There was a further difficulty in that the Magistrate apparently heard the application and cross-application separately, which seems to have been prima facie in conflict with the procedure in s 41C of the Act, which on its face is a mandatory requirement to hear applications and cross-applications together unless there are circumstances requiring them to be separated. Ultimately, however, his Honour was not persuaded that in the circumstances the failure to do so invalidated the decision of the

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3 Paragraph [108].

4 [2015] QDC 151 at [55].

Magistrate.[5] His Honour however concluded that the appellant was not given an adequate opportunity to conduct his case.[6] The narrative in the judgment shows that the Magistrate was dealing with a difficult situation. He had one side represented by counsel and the other side unrepresented, but polite, respectful and clearly doing his best. The case is a reminder that such occasions demand significant patience and forbearance. There are helpful guidelines reproduced at paragraph [59] from the Family Court judgment in *Marriage of F* [2001] 161 FLR 189. The nine guidelines there reproduced are, as his Honour says, helpful in proceedings such as this, as follows:

(i) A judge should ensure as far as is possible that procedural fairness is afforded to all parties whether represented or appearing in person in order to ensure a fair trial.

(ii) A judge should inform the litigant in person of the manner in which the trial is to proceed, the order of calling witnesses and the right which he or she has to cross-examine the witnesses.

(iii) A judge should explain to the litigant in person any procedures relevant to the litigation.

(iv) A judge should generally assist the litigant in person by taking basic information from witnesses called, such as name, address and occupation.

(v) If a change in the normal procedure is requested by the other parties such as the calling of witnesses out of turn the judge may, if he/she considers that there is any serious possibility of such a change causing any injustice to a litigant in person, explain to the unrepresented party the effect and perhaps the undesirability of the interposition of witnesses and his or her right to object to that course.

(vi) A judge may provide general advice to a litigant in person that he or she has the right to object to inadmissible evidence, and to inquire whether he or she so objects. A judge is not obliged to provide advice on each occasion that particular questions or documents arise.

(vii) If a question is asked, or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights.

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5 At [45].

6 Paragraphs [47]-[71].

(viii) A judge should attempt to clarify the substance of the submissions of the litigant in person, especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated: *Neil v Nott* (1994) 68 ALJR 509 at 510.

(ix) Where the interests of justice and the circumstances of the case require it, a judge may:

- draw attention to the law applied by the Court in determining issues before it;
- question witnesses;
- identify applications or submissions which ought to be put to the Court;
- suggest procedural steps that may be taken by a party;
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

[17] His Honour also found that the prohibition from permitting the appellant to cross-examine the aggrieved was also a fundamental error depriving the appellant of a fair hearing. His Honour discussed s 151 of the Act which is not cast in mandatory prohibitive terms. Rather, a discretion arises. His Honour found that the Magistrate had not properly stepped through the process set out by s 151. This was a fundamental error denying the appellant a fair hearing.

[18] For similar reasons, his Honour reached similar conclusions as to the appellant's cross-application. It is noteworthy that counsel for the aggrieved (i.e. the respondent to the cross application) seems to have incorrectly submitted that his client was not obliged to give evidence in the hearing even though she had filed and was relying upon an affidavit in response to the application. Again there was an error in failing to exercise the discretion in s 41C, however this was not in itself fatal. His Honour concluded that the aggrieved was not a "protected witness" for the purposes of s 151, so far as she was a respondent to the appellant's application.

[19] Again, his Honour concluded that the appellant had not been given an adequate opportunity to conduct his case in his own cross-application. One stark example was that it was never explained to the appellant that he was entitled to give evidence in the witness box to prove matters to which objection had been taken, or which he had been precluded by the Magistrate from giving evidence about, either because it was not in his affidavit or it was evidence from the bar table. It was found that the Magistrate failed to comply with his obligation of ensuring the appellant was provided with an adequate explanation, in terms he understood, of the process by which the hearing would be conducted and his rights in terms of giving and objecting to evidence.

[20] The appellant was not afforded procedural fairness in the decision of the Magistrate to conduct the hearing by disallowing the appellant from cross-examining the aggrieved. This was a fundamental error which deprived the appellant of a fair hearing of his application. Both the protection order and the orders as to the cross-application were set aside and the matter sent back for retrial by a separate Magistrate. As outlined above, this is a salutary warning that these cases which are often difficult with unrepresented, sometimes querulous litigants, need careful attention, patience

and caution. There were similar issues in *YTL v Commissioner of Police* [2019] QDC 173 (see your newsletter).

[21] *AMB v TMP & Anor* [2019] QDC 100 was a decision of mine. In that case a Magistrate had made a domestic violence protection order after a contested hearing. The appellant argued about whether domestic violence should have been found and whether the protection order was necessary or desirable. I had the benefit of representation for the appellant and for the second respondent, *Commissioner of Police*. The first respondent, the aggrieved, appeared on her own behalf.

[22] The circumstances were somewhat curious. It was common ground that the relevant relationship had existed between the parties. Although they had apparently been no more than friends, nevertheless the appellant was the father of the child of the first respondent, which brought them within "spousal relationship" as defined in s 15. As discussed in the judgment, the appellate powers of the court provided by s 169 are to be exercised for the correction of error (*Coal & Allied Operations Pty Ltd v AIRC*[7]); such a decision normally involves the exercise of a discretion, so that the principles in *House v R*[8] will need to be addressed. Further, the natural limitations in the exercise of an appellate jurisdiction, having not seen and heard the witnesses, are acknowledged, as set out in *Fox v Percy.*[9]

[23] At the hearing, the Magistrate was satisfied on the balance of probabilities that domestic violence had occurred in the sending of a derogatory and abusive message, and further, emotional abuse along the lines of multiple Facebook messages including derogatory name calling. It was important in this case that the appellant was very critical of the quality of the first respondent's evidence, as was the Magistrate. Indeed, the Magistrate found that she was lying concerning some of the interactions. The circumstances were that where the aggrieved had alleged various insults being used in conversations; she was unaware that the appellant had been recording those interactions and the recordings simply gave the lie to her evidence.

[24] An act of domestic violence of 29 October 2017 was established by a text message which was emotionally abusive in nature; the second category of abusive messages was along similar lines. The Magistrate acknowledged the difficulties with the evidence of the aggrieved. In considering "necessary or desirable", I referred again to the observations of Judge McGill SC in *GKE v EUT* [10]

> "There must be a proper evidentiary basis for concluding that there is such a risk, and the matter does not depend simply upon the mere possibility of such a thing occurring in the future, or the mere fact that the applicant for the order is concerned that such a thing may happen in the future."

[25] There was also reference to *MDE v MLG & Queensland Police Service*[11] where Judge Morzone QC set out the relevant test for the element of necessary or desirable. His Honour set out a three stage process including assessing the risk in the absence of an order; assessing the need to protect the aggrieved from that domestic violence in the absence of an order; and thirdly, considering whether imposing an order is necessary

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7 (2000) 203 CLR 194.
8 (1936) 55 CLR 499 at 505 per Dixon, Evatt and McTiernan JJ.
9 (2003) 214 CLR 118 at 125-126.
10 [2014] QDC 248 at [33].
11 [2015] QDC 151.

or desirable to protect the aggrieved. Finally, if the other preconditions are established.

[26] The Magistrate's analysis relied on uncontentious matters and in the sense that credit worthiness of the first respondent was not central to the analysis and result. The more difficult aspect was whether the events did constitute domestic violence in the form of emotional abuse in the context of the relationship which involved to some extent, mutual exchange of insults. There is no doubt that the aggrieved had spoken to the appellant in abusive terms. Some of the insults made by the appellant were quite serious and the respondents argued that, despite the relationship, they fell at the more serious end of the continuum such as to establish emotional abuse. What I concluded was that the appellate jurisdiction was to be exercised for the correction of error and appellate courts need to respect the advantages enjoyed by the lower court which heard and saw the witnesses. Thus the question was not whether I would have made the same finding as the Magistrate on the material before the court, rather whether there is demonstrable appellable error. I concluded that that there was not. Thus, the appeal was dismissed. This case represents a difficult exercise for the Magistrate at first instance and is an example of a case which was near the borderline.

Sentences for breach

[27] In *SH v Queensland Police Service* [2019] QDC 247, Judge Clare SC heard an appeal from a sentence imposed in the Magistrates Court at Brisbane. The appellant had pleaded guilty to one charge of contravening a domestic violence protection order. He was fined $750 and a conviction was recorded. The appeal was only against the recording of the conviction. The circumstances were somewhat unusual. The appellant had not been alleged to have harmed the aggrieved at any time. Rather he had been said to contravene a police instruction to leave the home and stay away. He had returned to recover his work laptop and there was some yelling apparently.

[28] The appellant was a middle aged man with a minor criminal history which was unrelated. He had favourable references and was a qualified social worker who ran a large not for profit organisation. He had formed a romantic relationship with the aggrieved early in 2016 and in 2017 she started working for him. In January 2019 they moved in together and they lived and worked together for about 10 months. The appellant was passionate about his organisation and its work. The aggrieved on the other hand, apparently exhibited a poor attitude to work and was very difficult to manage. When they began cohabiting, she often stayed out drinking, leaving her young son at home. She was aggressive when criticised.

[29] The appellant was a recovering alcoholic and had regular counselling sessions in respect of that problem. Eventually a protection order was made on 5 July 2018 in the appellant's absence and he was served with it on 28 July. The aggrieved gave her written consent that he could attend the home and the couple continued living together for three months. On 30 October he was directed to leave the home because he was no longer welcome. He left almost immediately, but returned 20 minutes later for his laptop. There was no fresh written consent admitting this. Police were called to the altercation where the appellant was said to be refusing to leave and yelling.

[30] Her Honour found the sentencing Magistrate had made a number of errors in the sentencing process, largely in relation to the facts. The criminal history, emphasised by the Magistrate, had limited relevance, being low level, different in nature and

dated. The Magistrate wrongly observed that the appellant had vilified the aggrieved to his psychologist whereas the psychological report referred to long predated even the making of the protection order. The appellant had given his account of the aggrieved's earlier behaviour in a treatment setting. The prosecutor did not challenge the appellant's version of the aggrieved's behaviour. The only wrongful act specified by the prosecution was the return to the house on 30 October, yet the Magistrate criticised the appellant for "lack of candour in various reports" and his failure to seek assistance as a perpetrator of domestic violence. The psychologist's report actually gave insight into the dynamics of the couple's relationship and was of assistance to the appellant in ways not disputed by the prosecution.

[31] Judge Clare SC found that there was no demonstrated need for rehabilitation as a perpetrator of domestic violence; further there was no reasonable inference open that the appellant had previously committed any domestic violence against the aggrieved. Further, the Magistrate had criticised the appellant for what was perceived to be a diminishing frequency in his appointments with the Biala Substance Abuse Service, however these criticisms were misplaced.

[32] Her Honour concluded that the misunderstanding about the circumstances of the offence and antecedents had the result that the exercise of the sentencing discretion miscarried and had to be reconsidered afresh. In applying the relevant factors set out in s 12 of the *Penalties and Sentences Act* 1992, her Honour concluded that a conviction should not be recorded. Her Honour observed that domestic violence is a matter of great concern; perpetrators should be accountable; disruption to the lives of those aggrieved should be minimised and where the parties had shared a home, a condition excluding a respondent is designed to enable the aggrieved to feel safe, and thus must be enforced. However, recognition of these important principles did not mean that all contraventions were the same. This contravention was low level, isolated, harm was neither intended nor suffered and there were extenuating circumstances. Further, there were favourable antecedents and a plea of guilty with reasonable insight and the appellant accessed services for self-improvement. All of his prospects were otherwise good and the effect upon him was significant; his blue card had been suspended.

[33] This case is a reminder that relevant circumstances must be carefully examined, accurately assessed and borne in mind throughout the sentencing process. It is important for a sentencing court not to become overly inflamed in these difficult cases, and to bear in mind precision and balance in the exercise of the sentencing discretion.

[34] In *CTC v Commissioner of Police* [2019] QDC 250, Judge Jarro heard an appeal against the severity of a sentence for one charge of contravention of a domestic violence order, the question again being the recording of a conviction. The applicant in that case had been sentenced to three months' imprisonment wholly suspended for two years. This was said to be excessive. This was, of course, an appeal brought under s 222 of the *Justices Act*, and thus the relevant ground of appeal is whether the penalty was excessive.

[35] The applicant was 35 years of age at the time of the offence and 36 at the time of sentence. He had a Queensland criminal history with one entry for assault occasioning bodily harm whilst armed and one of deprivation of liberty, dating from

2017 in relation to which he was placed on probation with no conviction recorded. The subject offence occurred two months after the probation order had expired.

[36] The nature of the breach in that case was that the complainant and applicant were married, but not residing together. They have a child together and at the time of the offence, the complainant was 23 weeks pregnant with their second child. There was a domestic violence order in place with various conditions preventing the appellant having contact with the complainant, other than with her consent. On 8 January 2019, police were called to a radiology clinic because the complainant had advised the staff that her husband had assaulted her and injured her lip. He had become enraged after checking the complainant's phone and finding communications with another male. There was an argument and he struck her with the back of his hand in her mouth, causing her lip to bleed. The applicant told police he was merely deflecting the complainant who was apparently trying to strike him. It is unclear whether that version was relied upon or accepted. In any case, as his Honour observed, the applicant conceded he should not have swung his arm at the complainant and he was not acting in any kind of self-defence. He did have written consent from her to drive her to and from the pregnancy scan.

[37] Judge Jarro concluded that the sentence imposed was not manifestly excessive. He referred to the need for general deterrence, despite the mitigating features of the earlier plea of guilty, co-operation with the authorities, limited criminal history, good prospects of rehabilitation, and absence of previous similar history. His Honour found that the sentencing Magistrate had appropriately weighed the counterbalancing factors.

[38] This was, of course, a more serious case than *SH*, and it is not surprising that the result was different. It is apparent from the judgment that the Magistrate in that case had weighed matters carefully and precisely in coming to the correct conclusion.

[39] In *BNH v Queensland Police Service* [2019] QDC 129 Judge Morzone QC considered an appeal pursuant to s 222 of the *Justices Act* 1886 against the severity of sentence for an offence of contravention of domestic violence order which was an aggravated offence. The appellant had pleaded guilty in the Magistrates Court and had been sentenced to two years' imprisonment with parole release after eight months.

[40] The circumstances were that a protection order had been in place for about 11 months.

[41] The parties had been in an on and off relationship for about 10 years. They had three children. The breach occurred on 19 May 2018 and involved somewhat unusual circumstances. The appellant was on parole at the relevant time and as such was required to wear an ankle bracelet for surveillance. The appellant was with the aggrieved and a drunken argument commenced in the course of which he attempted to leave. The aggrieved grabbed the appellant's bag which contained his ankle bracelet charger, thus placing him in danger of having his parole breached. She refused to return it. As a consequence, the appellant assaulted her, punching to her stomach, slapping her chin and biting her on the hand. His parole was suspended on 22 May 2018 and he was returned to custody. He made admissions to police, apologised and pleaded guilty.

[42] Importantly, the 49 year old appellant had a bad criminal history which included violence and had been imprisoned some 18 times. He had been convicted 16 times for breaching domestic violence orders including nine in the previous five years. So

his criminal history was quite appalling. The error made at sentence was to impose a parole release date. In fact, because parole was breached, a parole eligibility date was appropriate under s 160F of the *Penalties and Sentences Act*. Further, the setting of that date had to be referrable to the appellant's period of imprisonment, thus the total period including that being served for a previous offence was relevant. The total of that time was two years three months, and all presentence custody was relevant; therefore resetting a parole eligibility date at the one third mark required an adjustment to 19 February 2019 from the previous parole release date of 21 May 2019. This case represents perhaps a relatively minor breach, but one committed by someone with an appalling criminal history. It is also a reminder as to the complexities of the parole release provisions.

[43] In *JWD v The Commissioner of Police* [2019] QDC 29, I considered an appeal against sentence. The appellant had pleaded guilty to using a listening device to record a private conversation; stalking; contravention of a domestic violence order and breach of bail conditions. The appeal was slightly out of time due to his solicitor's error and an extension of time was allowed. It was, of course, an appeal pursuant to s 222 of the *Justices Act* 1886 (Qld). The ground of appeal under s 222 is that the sentence imposed was excessive. The background was that the parties had previously been in a relationship. At a time when it seems to have been breaking down the applicant placed a digital recorder in the complainant's vehicle, apparently because he was jealous in relation to a visiting friend. The device was found the same day by the complainant's child. No complaint was made immediately to the police about this.

[44] About three months' later the relationship had ended and the applicant was charged with a serious offence against the complainant in early February and released on bail with non-contact conditions. On 7 February 2018, the domestic violence protection order was made. Subsequently, on the evening of 9 February 2018, the applicant was found on the complainant's rear patio peering through a bedroom window. He had been there for about ten minutes. The behaviour was in breach of the orders mentioned and also amounted to stalking. The applicant was a 47 year old male with a very limited and dated criminal history. He had served 91 days in pre-sentence custody by the time the matter came on for sentence. He had employment available and otherwise positive antecedents. He was sentenced to three years' probation and a conviction was recorded for the stalking. One of the points on the appeal, which was conceded, was that the sentences for the other offences were in breach of the principle against double punishment in the sense that all three of the offences constituted the same physical act of loitering on the back patio. It was also said that recording of the conviction was part of the sentence and was excessive.

[45] My conclusion was that the Magistrate was not in error as to recording of a conviction for the stalking, having applied the relevant factors in s 12 of the *Penalties and Sentences Act* in an appropriate balancing exercise. Further, three years' probation for that serious offence was not in error. Conversely, it was common ground that the probation orders for the contravention of the domestic violence order and breach of bail conditions should be set aside as a double punishment. As to the listening device, I concluded that sentencing discretion did miscarry and, in essence, the sentence imposed was outside the available range as described in *Barbaro v The Queen*.[12] Thus, the sentence for use of the listening device was reduced to two years' probation,

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12 (2014) 253 CLR 58.

with no conviction recorded. The other probation orders were set aside and the applicant was convicted and not further punished.

[46] This case represents a reasonably conventional application of the relevant principles. It is important to bear in mind the possibility that problems of double punishment can arise in such cases where the facts either overlap, or are identical.

[47] In *CBC v Queensland Police Service* [2019] QDC 3, Judge Morzone QC allowed an appeal against sentence for contravention of a domestic and family violence order (aggravated). The facts were that the appellant was a 27 year old aboriginal woman who had previously been sentenced for grievous bodily harm, assault occasioning bodily harm and contravention of a domestic violence order, to a total effective sentence of 3 years' imprisonment with 40 hours community service. She had been released on parole on 28 February 2017. She then formed the relationship with the aggrieved. However, this deteriorated and a protection order was made on 31 October 2018. The appellant's parole had also been suspended. When the police looked for her to serve the relevant warrant, they found her sitting in the carport of the aggrieved's house. This constituted the breach. The Magistrate imposed a one month cumulative sentence with immediate suspension. This was re-opened and a parole eligibility date was made instead. The appellant was arrested and returned to custody.

[48] It emerged that the appellant had attended the home to collect her belongings and she had not made any move towards the aggrieved who remained inside the house. His Honour concluded that the nature and extent of the offending in context fell within the lower end of such type of offending and more in the sentencing range of a good behaviour bond. Thus, it was concluded that the Magistrate's sentence was excessive, particularly considering the degree of the time in pre-sentence custody, and the result was that the defendant was convicted, but not further punished.

[49] The guidance that can be taken from this case is to carefully assess the facts in any sentencing procedure. It emerged on further enquiry that the facts were less serious than had apparently originally been appreciated by the Magistrate, although it was observed by his Honour that the Magistrate was not assisted by any precise submissions as to the facts.

[50] In *Jones v DBA* [2019] QDC 149, Judge Sheridan considered a situation where a protection order had been made in the context of a temporary protection order being in place following an ex-parte application, and the appellant, having been found to have breached that order, was then made subject to a five year protection order pursuant to s 37 of the Act, the power to do so being said to have originated in s 42 which has application where a court convicts a person of a domestic violence offence and confers a jurisdiction to make a protection order if satisfied that, under s 37, a protection order could be made against the offender. Importantly, ss (4) provides the caveat that the offender must be given a reasonable opportunity to present evidence and prepare and make submissions about the making or variation of the order. What was found was that the learned Magistrate did not purport to act under s 42(2) of the Act and there is no indication that any consideration was given by the learned Magistrate to elements of s 37. For example, there was no finding as to necessary or desirable. Judge Sheridan applied the rules of statutory interpretation including as set out in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue*[13] and the

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13 (2009) 239 CLR 27 at [47].

requirement in s 14A of the *Acts Interpretation Act* 1954 (Qld) as to a purposive approach.[14]

[51] The issue was that although there was a power in s 42(3) to vary an order which was already in force, her Honour concluded that this power did not give the court the power to change a temporary protection order into a protection order. This was so, particularly where the power to make a permanent order is constrained by, for example, the various considerations in s 37, which had not been addressed. Her Honour referred to *R v Tonkin ex-parte Federated Ships Painters and Dockers Union of Australia*[15] which addressed a similar distinction between the setting aside of an award and the varying of the terms of an award. The court held that implicitly a power to vary did not involve the setting aside of an award or substituting a new award. Her Honour also considered the meaning of the word "vary" with reference to other helpful authorities.

[52] I would respectfully suggest that her Honour's analysis is clearly correct, and this case represents a reminder that the relevant powers provided in the Act must be carefully considered before action is taken. There are various safeguards for procedural fairness and these must be borne in mind.

Choking

[53] Finally, although not a pure Domestic Violence point, in that the legislation is not primarily engaged, I have been directed to the recent decision of Judge Coker in *R v AJB* (2019) QDC 169 as to the meaning of "choking" in relation to the offence of choking in a domestic setting, Code s315A. His Honour concluded that there must be a cessation of the ability to draw breath, not simply a restriction[16], although presumably a short term stopping would be enough. I am not aware of a Crown reference on the point. If there is a mere restriction, then Assault Occasioning Bodily Harm, carrying the same maximum, could be charged instead. It remains to be seen if this approach becomes the settled law, but for now it seems an appropriate guide in such cases. His Honour carefully analysed the point[17]. I note that we still don't know if the synonyms "suffocation and strangulation" in the section are intended to connote a different result.

Conclusion

[54] The cases remind us of a number of precautions to be followed in this jurisdiction:

- remember the statutory framework;
- remember procedural fairness, particularly with an unrepresented litigant;
- weigh the evidence as carefully, dispassionately and precisely as possible and reach necessary relevant conclusions;
- and always bear in mind the guiding principles in s4; safety, protection and wellbeing are paramount.

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14 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 at [44].
15 (1954) 92 CLR 526.
16 At [22] and [44]
17 In fact, since delivery of this paper, in a separate case, the Court of Appeal has concluded that "choked" means "to hinder or stop the breathing of a person"; *R v HBZ* [2020] QCA 73 at [59]